KIMBERLY D. TAYLOR, AN INDIVIDUAL, APPELLANT, *v.* KEITH BRILL, M.D., FACOG, FACS, AN INDIVIDUAL; AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 83847

KEITH BRILL, M.D., FACOG, FACS, AN INDIVIDUAL; AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY, APPELLANTS, *v.* KIMBERLY D. TAYLOR, AN INDIVIDUAL, RESPONDENT.

No. 84492

KEITH BRILL, M.D., FACOG, FACS, AN INDIVIDUAL; AND WOMEN'S HEALTH ASSOCIATES OF SOUTHERN NEVADA-MARTIN PLLC, A NEVADA PROFESSIONAL LIMITED LIABILITY COMPANY, APPELLANTS, *v.* KIMBERLY D. TAYLOR, AN INDIVIDUAL, RESPONDENT.

No. 84881

December 21, 2023 539 P.3d 1188

Appeals from a judgment following a jury verdict in a medical malpractice action, a post-judgment order granting in part and denying in part a motion to retax and settle costs, and a post-judgment order denying attorney fees. Eighth Judicial District Court, Clark County; Monica Trujillo, Judge,[1] and Joseph T. Bonaventure, Sr. Judge.

Reversed and remanded.

Breeden & Associates, PLLC, and *Adam J. Breeden*, Las Vegas, for Kimberly D. Taylor.

McBride Hall and *Heather S. Hall* and *Robert C. McBride*, Las Vegas, for Keith Brill, M.D., FACOG, FACS, and Women's Health Associates of Southern Nevada-Martin PLLC.

Before the Supreme Court, STIGLICH, C.J., and HERNDON and PARRAGUIRRE, JJ.

OPINION

By the Court, HERNDON, J.:

In these appeals, we consider whether defendants to a medical malpractice action may defend by arguing, or otherwise present

[1]While Judge Carli Lynn Kierny signed the final judgment, the district court case was assigned to, and the trial was presided over by, Judge Monica Trujillo.

evidence concerning, the plaintiff's informed consent or assumption of the risk when the plaintiff does not raise a claim based on lack of informed consent. We conclude that assumption-of-the-risk evidence may be relevant in certain instances where a plaintiff's consent to the procedure is challenged. But neither the defense itself nor evidence of informed consent is proper in a medical malpractice action, like this one, where the plaintiff's consent is uncontested. Thus, the district court erred in allowing such arguments and evidence at trial here.

We also consider whether a plaintiff must use expert testimony to show that the billing amounts of the medical damages they seek are reasonable and customary. While an appropriate expert can testify as to the reasonableness of the amount of damages, we hold that expert testimony is not required when other evidence demonstrates reasonableness. The district court abused its discretion by prohibiting such evidence. Based on these errors, and others discussed herein, we reverse the district court's judgment and remand this matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

Kimberly Taylor, the plaintiff in the lawsuit below, had a hysteroscopy performed by the defendant, Dr. Keith Brill. Dr. Brill perforated Taylor's uterus and bowel during the procedure. Taylor reported escalating pain after the surgery and was twice transported to an emergency room via ambulance. On the second trip, the attending doctor concluded her symptoms were consistent with an uncontrolled bowel perforation and performed an emergency surgery to remove any contamination and to correct what turned out to be a three-centimeter perforation.

Taylor then filed a medical malpractice action against Dr. Brill and the Women's Health Associates of Southern Nevada-Martin PLLC, amongst others. Taylor alleged that Dr. Brill had breached the standard of care by piercing her uterine wall and small intestine during surgery. Taylor also alleged Dr. Brill continued surgery after observing her uterine perforation, failed to evaluate and diagnose her intestine perforation, failed to inform the post-anesthesia care unit of the uterine perforation and instruct the post-anesthesia team to observe her for specific concerns requiring further examination, and failed to apprise her of these complications. The matter proceeded to a jury trial. Before trial, Taylor sought to exclude any references to known risks or complications, as well as hospital documents regarding her informed consent and educating her on the risks of the procedure to be performed. The district court ultimately ruled that Dr. Brill could introduce evidence of Taylor's knowledge of the risks and complications associated with the procedure but not her informed consent form. At the conclusion of trial, the jury

unanimously found in favor of Dr. Brill and denied all of Taylor's claims. Taylor appeals from the final judgment in Docket No. 83847. Dr. Brill and Women's Health Associates appeal from certain post-judgment orders in consolidated Docket Nos. 84492 and 84881.

DISCUSSION

We first address Taylor's challenge to the district court's admission of evidence regarding her knowledge of the risks associated with the procedure Dr. Brill performed. We then address Taylor's other evidentiary challenges, including to the district court's decisions to prohibit her from presenting nonexpert evidence in support of her damages claim and to allow evidence of insurance write-downs. Finally, we address Taylor's remaining challenge concerning the rejection of a portion of Taylor's proposed closing argument.

Evidentiary decisions

We review a district court's decision to admit or exclude evidence for an abuse of discretion and will not disturb such a decision "absent a showing of palpable abuse." *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 764-65, 312 P.3d 503, 507 (2013). But when an evidentiary ruling rests on a question of law, we review it de novo. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012).

Informed consent and assumption of the risk

Taylor first challenges the district court's decision to admit evidence of her knowledge of the risks and potential complications of her surgery through witness testimony, Taylor's hospital discharge instructions, and associated paperwork. Taylor asserts that such evidence is irrelevant in this case because she did not allege that she was not informed of the risks associated with her procedure or that Dr. Brill failed to obtain her consent. Dr. Brill contends that the evidence is relevant because the complication she experienced was a known risk of the procedure and the evidence demonstrated that such a complication could occur in the absence of negligence.

Only relevant evidence is admissible. NRS 48.025; *see also Desert Cab Inc. v. Marino*, 108 Nev. 32, 35, 823 P.2d 898, 899 (1992). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. But relevant evidence is "not admissible if its probative value is substantially outweighed by the danger of unfair prejudice, of confusion of the issues or of misleading the jury." NRS 48.035(1).

To succeed in a professional negligence action, a plaintiff must prove that, in rendering services, a health care provider failed "to use the reasonable care, skill or knowledge ordinarily used under

similar circumstances by similarly trained and experienced providers of health care." NRS 41A.015. The plaintiff must establish three things: "(1) that the doctor's conduct departed from the accepted standard of medical care or practice; (2) that the doctor's conduct was both the actual and proximate cause of the plaintiff's injury; and (3) that the plaintiff suffered damages." *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996).

We have not previously considered whether evidence of informed consent is relevant, or if an assumption-of-the-risk defense is proper, in a professional negligence action. Generally, the first two elements of such an action—deviation from the standard of care and medical causation—are shown by evidence consisting of "expert medical testimony, material from recognized medical texts or treatises or the regulations of the licensed medical facility wherein the alleged negligence occurred." NRS 41A.100(1). An assumption-of-the-risk defense, on the other hand, requires proof of "(1) voluntary exposure to danger, and (2) actual knowledge of the risk assumed." *Sierra Pac. Power Co. v. Anderson*, 77 Nev. 68, 71, 358 P.2d 892, 894 (1961) (quoting *Papagni v. Purdue*, 74 Nev. 32, 35, 321 P.2d 252, 253 (1958)). As the defense "is founded on the theory of consent," a party may seek to present evidence of a plaintiff's informed consent to support it.[2] *Id.* We conclude that such evidence and argument is irrelevant to demonstrating that a medical provider conformed to the accepted standard of care or to refute medical causation when defending against a medical malpractice claim. *See* NRS 41A.100(1). Indeed, informed consent evidence "does not make it more or less probable that the physician was negligent in . . . performing [the surgery] in the post-consent timeframe" and is therefore inadmissible to determine whether a medical professional breached the standard of care. *Brady v. Urbas*, 111 A.3d 1155, 1162 (Pa. 2015); *see also* NRS 48.025(2) (deeming irrelevant evidence inadmissible).

Even if a plaintiff gave informed consent, that would not "vitiate [a medical provider's] duty to provide treatment according to the ordinary standard of care" because "assent to treatment does not amount to consent to negligence, regardless of the enumerated risks and complications of which the patient was made aware." *Brady*, 111 A.3d at 1162. Other jurisdictions are in accord. *See, e.g.*, *Hayes v. Camel*, 927 A.2d 880, 889-90 (Conn. 2007) ("[E]vidence of informed consent, such as consent forms, is both irrelevant and unduly prejudicial in medical malpractice cases without claims of lack of informed consent."); *Baird v. Owczarek*, 93 A.3d 1222, 1233 (Del. 2014) (concluding that once the plaintiff dismissed their

[2]Dr. Brill argues he did not present such a defense, but his answer to the complaint includes the affirmative defense that Taylor "assumed the risks of the procedures, if any, performed."

informed consent claim, any signed consent forms "became irrelevant, because assumption of the risk is not a valid defense to a claim of medical negligence, and because [such evidence] is neither material [n]or probative of whether [the doctor] met the standard [of] care" (citation omitted)); *Wilson v. P.B. Patel, M.D., P.C.*, 517 S.W.3d 520, 525 (Mo. 2017) (concluding that such evidence would mislead the jury that the plaintiff consented to injury); *Waller v. Aggarwal*, 688 N.E.2d 274, 275-76 (Ohio App. Ct. 1996) (recognizing that informed consent evidence is generally irrelevant because it does "not grant consent for the procedure to be performed negligently [or] waive appellant's right to recourse in the event the procedure was performed negligently" and that it has the potential to confuse the jury); *Wright v. Kaye*, 593 S.E.2d 307, 317 (Va. 2004) (holding that when a plaintiff does not place consent in issue, "evidence of information conveyed to [the plaintiff] concerning the risks of surgery in obtaining her consent is neither relevant nor material to the issue of the standard of care . . . [or] upon the issue of causation").

Despite the foregoing, certain evidence that may support an assumption-of-the-risk defense, such as evidence of the known risks and complications of a particular procedure, may help inform a jury as it evaluates whether there has been a breach of the accepted standard of care. *See Mitchell v. Shikora*, 209 A.3d 307, 318 (Pa. 2019) ("[R]isks and complications evidence may assist the jury in determining whether the harm suffered was more or less likely to be the result of negligence."). Other courts have distinguished between inadmissible informed consent evidence—such as consent forms or communications between a physician and patient regarding the purpose, nature, and risks of procedures—and admissible evidence of the risks and complications of surgery. *See id.* at 316-18. However, evidence of a procedure's risks must still fall within the ambit of NRS 41A.100(1). And courts must analyze on a case-by-case basis whether the evidence should still be excluded because its potential to confuse the jury substantially outweighs its probative value. *See* NRS 48.035(1).

Since expert witness testimony may establish the standard of care and breach, the testimony regarding risks and complications of the procedure by Taylor's and Dr. Brill's retained experts was admissible. *See* NRS 41A.100(1). However, lay witness testimony and hospital literature are generally not suitable for this purpose, making the testimony by Taylor and Dr. Brill, as well as portions of Taylor's discharge instructions and associated paperwork about this same subject, inadmissible. *Id.* Accordingly, the district court abused its discretion by allowing evidence of Taylor's knowledge of the procedure's risks and consequences and evidence probative of Taylor's informed consent. And we are not convinced that the

limiting instruction given to the jury cured the prejudice resulting from this error.

Special damages

Taylor sought special damages as remuneration for the medical services she underwent following her injury from the surgery performed by Dr. Brill. To be entitled to special damages, Taylor had to demonstrate that the amounts she was billed were reasonable and necessary. *See Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 266, 396 P.3d 783, 788 (2017). The necessity of the medical services Taylor received after Dr. Brill's allegedly negligent surgery was not contested in the trial court. Taylor's retained expert, Dr. Berke, clearly testified that the medical services Taylor received were reasonable and necessary and were caused by the perforations that arose from Dr. Brill's surgical procedure. The district court excluded the bulk of the evidence Taylor sought to admit in support of her special damages claim—including medical bills, testimony from health care industry witnesses about those bills, and testimony from Taylor herself, who had worked in the medical billing industry with both physicians and hospitals for over two decades. The district court relied, in large part, on its finding that testimony about the reasonable and customary nature of medical charges was beyond the knowledge of a layperson and required an expert. Since Taylor proffered no expert to testify that the charges for the medical services she received were usual, customary, or reasonable, the district court excluded them. In doing so, the district court relied on *Curti v. Franceschi*, which held that an award for medical services was supported by substantial evidence where the attending doctor testified as to the amount that the patient was charged, that he believed such charges were reasonable, and that he had no usual and customary fee. 60 Nev. 422, 428, 111 P.2d 53, 56 (1941). But that case does not stand for the proposition that evidence of the reasonableness of the damages sought can *only* be proven by an expert witness or physician. Here, Taylor presented three witnesses—the CFO of the charging hospital, a health care billing representative, and a health care customer service billing manager—all of whom would have testified regarding the charges for the medical treatment provided to Taylor. Taylor also sought to testify herself on the issue based in part on her experience working in the medical billing industry for over two decades. This information was relevant and therefore admissible. NRS 48.015; NRS 48.025. The district court thus abused its discretion in excluding this evidence, *see Yeghiazarian*, 129 Nev. at 764-65, 312 P.3d at 507, which affected Taylor's substantial rights, as it prevented her from proving a prima facia case for damages, *see Brown v. Capanna*, 105 Nev. 665, 672, 782 P.2d 1299, 1304 (1989) (holding that an appellant's substantial

rights were affected by the exclusion of testimony that would have helped prove their prima facie case).

Insurance write-downs

Although the district court excluded the vast majority of medical billing evidence related to Taylor's proposed special damages, it did admit evidence related to two lower-cost items of medical billing. Taylor challenges the district court's decision to permit Dr. Brill to present evidence of insurance write-downs in defending against this aspect of her damages claim. The district court based its decision on its interpretation of NRS 42.021(1); therefore, the issue presented is one of law that we review de novo. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014) (recognizing that statutory interpretation questions are issues of law); *Davis*, 128 Nev. at 311, 278 P.3d at 508.

NRS 42.021(1) abrogated the common law collateral source doctrine by creating an exception for evidence of collateral source payments in medical malpractice actions:

> In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may introduce evidence of any amount payable as a benefit to the plaintiff as a result of the injury or death pursuant to . . . any contract or agreement of any group, organization, partnership or corporation to provide, pay for or reimburse the cost of medical, hospital, dental or other health care services.

NRS 42.021(1); *see also McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 936, 408 P.3d 149, 154-55 (2017) (discussing the change from common law). However, if evidence is introduced pursuant to subsection (1), the source of the collateral benefits cannot "[r]ecover any amount against the plaintiff . . . or . . . [b]e subrogated to the rights of the plaintiff against a defendant." NRS 42.021(2). This statute was thus intended to prevent a situation where a jury would reduce a plaintiff's award based on collateral source evidence, but the collateral source would still seek reimbursement from the award. *Harper v. Copperpoint Mut. Ins. Holding Co.*, 138 Nev. 300, 306, 509 P.3d 55, 60 (2022) (citing *McCrosky*, 133 Nev. at 936, 408 P.3d at 155).

Construing this statute narrowly, we conclude that the district court erred in finding that the statute permitted the admission of insurance write-downs. *See Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158-59, 347 P.3d 1038, 1040 (2015) ("Statutes that operate in derogation of the common law should be strictly construed . . . ."). NRS 42.021(1) contemplates evidence only of actual benefits paid to the plaintiff by collateral

sources, and insurance write-downs do not create any payable benefit to the plaintiff. Insurance write-downs are therefore inadmissible under NRS 42.021(1).

Closing arguments

Lastly, Taylor asserts that the district court improperly limited her closing arguments. We review de novo whether an attorney's comments would constitute misconduct. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009); *see also Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008).

Taylor sought to make a closing argument "that the jury with its verdict should 'send a message' to Defendants that safety is important, that [Dr. Brill] must answer for the injury he caused to his patient, and that he cannot be careless toward his patient, etc." In denying this request, the district court stated that Taylor "shall not be permitted to use the phrase 'send a message[ ]' . . . in closing argument." But Taylor's argument was not inappropriate because it was based on the evidence in the case, rather than "implor[ing] the jury to disregard the evidence." *Capanna v. Orth*, 134 Nev. 888, 890-91, 432 P.3d 726, 731 (2018). Asking the jury to send a message is not prohibited "so long as the attorney is not asking the jury to ignore the evidence." *Id.* (quoting *Pizarro-Ortega*, 133 Nev. at 269, 396 P.3d at 790). The district court therefore erred in limiting Taylor's closing argument in this manner.

CONCLUSION

Informed consent evidence is inadmissible, and an assumption-of-the-risk defense is improper, in professional negligence suits when the plaintiff does not challenge consent, as it serves only to confuse and mislead the jury. Additionally, expert or physician testimony is not required to demonstrate the reasonableness of the billing amount of special damages. And evidence of insurance write-downs does not fall within the type of evidence NRS 42.021(1) makes admissible. The errors made below regarding these issues, along with the improper limiting of Taylor's closing argument, warrant reversing the judgment in Docket No. 83847 and remanding for further proceedings in line with this opinion, including a new trial.[3]

Because we reverse the underlying judgment, we necessarily reverse the order granting in part and denying in part Taylor's motion to retax and settle costs in Docket No. 84492 and the order denying Dr. Brill's request for attorney fees in Docket No. 84881.

[3]We have considered Taylor's remaining arguments, including her assertions that the district court erred in limiting her voir dire, in not admitting into evidence a demonstrative medical device, in not allowing proposed impeachment of a defense expert, in the settling of jury instructions, and in allowing misconduct by defense counsel in closing argument, and we find no errors.

See Frederic & Barbara Rosenberg Living Tr. v. MacDonald Highlands Realty, LLC, 134 Nev. 570, 579-80, 427 P.3d 104, 112 (2018) (recognizing the necessity of reversing a fees and costs order when the substantive judgment was being reversed).

Stiglich, C.J., and Parraguirre, J., concur.

IN THE MATTER OF THE GUARDIANSHIP OF THE PERSON AND ESTATE OF KATHLEEN JUNE JONES, PROTECTED PERSON.

KATHLEEN JUNE JONES, APPELLANT, *v.* ROBYN FRIEDMAN; DONNA SIMMONS; AND ELIZABETH BRICKFIELD, GUARDIAN AD LITEM FOR KATHLEEN JUNE JONES, RESPONDENTS.

No. 84655

December 21, 2023 539 P.3d 1178

Appeal from district court order granting guardian ad litem fees. Eighth Judicial District Court, Family Division, Clark County; Linda Marquis, Judge.

Affirmed.

Legal Aid Center of Southern Nevada, Inc., and *Scott Cardenas* and *Elizabeth Mikesell*, Las Vegas, for Appellant.

Dawson & Lordahl, PLLC, and *Elizabeth Brickfield*, Las Vegas, for Respondent Elizabeth Brickfield.

Michaelson Law and *John P. Michaelson*, *Ammon E. Francom*, and *Peter R. Pratt*, Henderson, for Respondents Robyn Friedman and Donna Simmons.

Julia S. Gold, Chairperson, *Dara J. Goldsmith*, Amicus Curiae Chairperson, *Michael W. Keane*, and *Amanda Netuschil*, Reno, for Amicus Curiae State Bar of Nevada, Probate and Trust Law Section.

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

OPINION

By the Court, HERNDON, J.:

Roughly 18 months after respondents petitioned for guardianship over their mother, triggering the contentious litigation that followed,[1] the district court appointed a guardian ad litem (GAL) to aid it in determining the protected person's best interests. The GAL, an attorney, soon thereafter filed a notice of intent to seek the fees and costs to be incurred at her standard hourly rate. After submitting a report, the GAL sought fees at her stated rate. The court awarded her those fees over the protected person's objection. At issue in this appeal are three arguments against the fee award: (1) the GAL has

[1]*See Matter of Guardianship of Jones*, 138 Nev. 51, 507 P.3d 598 (Ct. App. 2022), for background information on the guardianship proceedings.

no right to fees when the district court order appointing her did not specify the rate, as required by the Nevada Statewide Rules for Guardianship (NSRG); (2) the court improperly appointed an attorney as the GAL under NRS 159.0455 and NSRG Rule 8; and (3) the rate of compensation to which the GAL is entitled should be that of a fiduciary, not an attorney.

We conclude that the protected person waived any argument pertaining to the form of the district court's order by failing to raise the issue below. Even so, we note that, within days of the GAL's appointment, the protected person was notified that the GAL would seek fees at her requested rate of compensation, and the district court's failure to specify the rate in the order thus did not prejudice the protected person. We further conclude that the district court erred in interpreting NRS 159.0455(3) as requiring the court to appoint an attorney where there is no court-approved volunteer program. However, this error was harmless because the district court expressly appointed an experienced attorney as the GAL due to the complexity of this matter. Lastly, we conclude that the record contains substantial evidence supporting the GAL's fee request. The district court did not abuse its discretion in awarding the GAL the full amount of her requested fees.

FACTS AND PROCEDURAL HISTORY

Upon petition, respondents Robyn Friedman and Donna Simmons became temporary guardians over their mother, appellant Kathleen June Jones (June); their temporary guardianship was followed by their sister Kimberly's appointment as guardian. During Kimberly's term as guardian, there were over 400 documents filed in the case, 25 hearings held, and at least 3 investigations conducted into the circumstances underlying the guardianship proceedings.

A major issue between the parties concerned Robyn's and Donna's ability to obtain communication, visits, and vacation time with June. The district court scheduled an evidentiary hearing on the issue and appointed respondent Elizabeth Brickfield, an attorney, as GAL for June. In particular, the court directed Brickfield to address the issue in the following manner:

> Schedule[ ] opportunities for Protected Person to elect to speak with and/or visit in person with her adult daughters and [address] whether the Guardian has an obligation to facilitate, prompt, encourage, plan, schedule, and/or create an environment that promotes an opportunity for continued communication between Protected Person and her adult daughters based upon the current level of care and needs of the Protected Person.

The court later asked Brickfield to assist with another issue—that of relocating June to California. It noted that each of the issues for

which it sought the GAL's help were interrelated and complex. As to compensation, the order stated, "[t]he guardian ad litem may request fees from the guardianship estate or a third party" and any request must comply with NRS 159.344.

Five days after the order was filed, Brickfield filed a notice of appearance and a notice of intent to seek attorney fees and costs from the guardianship estate pursuant to NRS 159.344(3). Brickfield's notice indicated that her hourly rate was $400 and listed various support staff billing at rates ranging from $75 to $350 per hour. In response, June filed a notice of objection, arguing that the GAL was not entitled to her attorney rate of $400 per hour because the issues did not require legal services or legal expertise. June proposed that the GAL should charge within the national average range, which June represented to be $22 to $48 per hour. Kimberly joined June's opposition. Brickfield filed a declaration in response to the notice of objection, describing her extensive experience and qualifications and asserting that the rate was comparable to that charged by other attorneys with similar qualifications in Clark County for services as counsel and as a GAL.

About 6 weeks later, Brickfield filed her report to the court. The report outlined Brickfield's work on the case:

> (i) reviewed the pleadings relevant to the issues of visitation and communication and the Physician's Certificate and accompanying report; (ii) met with Ms. Jones by telephone on 2/24/21 and in person on 3/25/21; Ms. Jones was accompanied by LACSN counsel; (iii) met individually with Ms. Jones' five children by separate telephone or Zoom conferences; the children who are represented by counsel were accompanied by counsel. Each meeting with a child lasted approximately one hour; the two meetings with Ms. Jones totaled one hour; and (iv) separate telephone conversations with the respective children's counsel.

Brickfield also provided her conclusions and made recommendations in June's best interests.

Brickfield thereafter filed a petition seeking approval of her GAL fees and costs, requesting a total of $5713.50. Brickfield requested $5400 in fees for herself for 13.5 hours of work, $310 in fees for 2 hours of work by a paralegal, and $3.50 in costs for filing fees. June objected, agreeing that Brickfield was entitled to compensation but arguing that a GAL should be paid at a lower GAL rate rather than an attorney rate. She added that Brickfield misrepresented how she benefited her and that, in fact, she gained no benefit from Brickfield's appointment. She added that she should not have to pay for a GAL to whom she objected. The district court entered a written order awarding Brickfield her requested $5713.50 in fees and costs.

June appealed,[2] and the Probate and Trust Section of the Nevada State Bar was permitted to file an amicus curiae brief.

DISCUSSION

Any error in the district court's order appointing the GAL is waived

June argues the district court lacked authority to award the GAL fees because it did not specify the GAL's rate in its appointment order. NSRG 8(I) requires the district court to "state the hourly rate to be charged by the guardian ad litem" in the appointment order. June contends that Brickfield cannot receive payment because her rate was not specified in the appointment order. She adds that the district court also did not amend its appointment order to comply with NSRG 8(I) after receiving Brickfield's notice of intent to seek fees. Respondents assert that June waived her argument that the order appointing the GAL does not conform with NSRG 8(I) because June failed to raise it below.[3] Respondents also argue that any error in failing to state the GAL's exact rate was not prejudicial.

Generally, "[a] point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). This general rule applies even to issues that are subject to review de novo. *Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

The record below supports that June waived any argument that the district court order did not satisfy the formalities under NSRG 8(I). June did not raise any such issues with the district court's order in her objection to Brickfield's notice for fees, nor did she raise any such issues in her opposition to Brickfield's petition for fees. Finally, June did not raise any issues with the GAL's appointment order at

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[2]Respondents assert that we lack jurisdiction over this appeal because the order awarding guardian ad litem fees and costs was entered amidst ongoing guardianship proceedings and thus does not constitute a special order after final judgment appealable under NRAP 3A(b)(8) and because it is not appealable under any other provision of that rule. We conclude that the order is independently appealable under NRS 159.375(5) (allowing appeals from orders in guardianship proceedings "authorizing the payment of a debt, claim, devise, guardian's fees or attorney's fees"). Moreover, despite respondents' request, we decline to issue sanctions for June's counsel filing this appeal, as this appeal ostensibly was filed to protect her interests and presents previously unanswered questions of law pertaining to attorney GALs. NSRG 9.

[3]Respondents further suggest that the issue was waived when June failed to appeal from the order appointing the GAL. However, that order was not appealable. *See Brown v. MHC Stagecoach, LLC*, 129 Nev. 343, 345, 301 P.3d 850, 851 (2013) ("[W]e may only consider appeals authorized by statute or court rule."); NRAP 3A(b) (providing appellate jurisdiction over final judgments and other specified orders).

the hearing on the motion for fees. Thus, June waived any arguments to the form of the appointment order.

Even if the issue had been properly raised, June fails to demonstrate any prejudice warranting reversal. *See* NRCP 61 (providing that reversal is not warranted where the error is harmless). The order specifically required the GAL to comply with NRS 159.344, indicating to the parties the GAL was allowed to seek fees, and further expressly permitted the GAL to "request fees from the guardianship estate or a third party." Shortly after the order was entered and on the same day she filed her notice of appearance, Brickfield filed her notice of intent to seek fees. *See* NSRG 8(I). June noticed her objection, but the court did not alter the noticed compensation rate. Thus, while June correctly notes that the district court should have stated the GAL's permissible hourly rate in its order of appointment, the error was harmless in this instance and did not divest the court of authority to later award fees.

The district court erred in concluding that it must appoint an attorney to serve as a GAL, but the error was harmless

In addressing June's objections to Brickfield's motion for fees, the district court concluded that it could appoint a nonattorney as GAL only if a court-approved volunteer advocate program was established under NRS 159.0455. June argues that the court erred in so concluding. Respondents argue that, even if the court could have appointed a nonattorney outside of a volunteer advocate program, no other person who had the appropriate training and experience to serve as the GAL was suggested to the court, noting that Brickfield was uniquely qualified to address the issues present in such a complex case.

The district court's interpretation and construction of a statute presents a question of law that is reviewed de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). Likewise, the district court's legal conclusions regarding court rules are reviewed de novo. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). When interpreting a statute that is clear on its face, the language of a statute should be given its plain meaning. *Zohar*, 130 Nev. at 737, 334 P.3d at 405.

A GAL may be appointed by the court to represent a protected person if the court determines that the protected person will benefit from the appointment and the GAL's services will be beneficial in determining the protected person's best interests. NRS 159.0455(1). Under NRS 159.0455(3), "[i]f a court-approved volunteer advocate program for guardians ad litem has been established in a judicial district, a court may appoint a person who is not an attorney to represent a protected person or proposed protected person as a guardian ad litem." On the other hand, NSRG 8, which governs

GALs appointed pursuant to NRS 159.0455, specifies in subsection H that "[a] guardian ad litem may be a trained volunteer from a court-approved advocate program, an attorney, or any other person that the court finds has appropriate training and experience."

June argues that NRS 159.0455 and NSRG 8(H) contradict each other on the topic of who a court may appoint as GAL. But there is no conflict: NSRG 8(H) creates a complete list of people who could be eligible to serve as a GAL ("a trained volunteer from a court-approved advocate program, an attorney, or any other person that the court finds has appropriate training and experience"). Meanwhile, the statute clarifies that the court may appoint a nonattorney "[i]f a court-approved volunteer advocate program for guardians ad litem has been established in a judicial district." NRS 159.0455(3). But the statute does not create a necessary condition for the appointment of a nonattorney. So the district court erred in interpreting NRS 159.0455(3) as requiring the appointment of an attorney where there is no court-approved volunteer program.

A third option under NSRG 8(H) exists and does not conflict with NRS 159.0455(3). NSRG 8(H) provides three types of individuals that the district court can appoint as a GAL: an attorney, a volunteer from a volunteer advocate program, and "any other person that the court finds has appropriate training and experience." While the district court analyzed the first two options, it did not address the third option, which included *any* person trained and experienced as a GAL. Thus, it erred to the extent it concluded that it had to appoint an attorney because no trained volunteer was available.

This error, however, was harmless, as the district court alternatively stated that an attorney GAL was specifically appointed due to the complex nature of the case, the visitation issues' impact on June, and the parties' continuing inability to communicate effectively. *See* NRCP 61; *Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1007, 194 P.3d 1214, 1220 (2008) (explaining that to be reversible error, the moving party must demonstrate that a substantial right was prejudiced and "that, but for the error, a different result might have been reached"). There is no evidence in the record that the district court was aware of any nonattorney with the appropriate training and experience to be considered for the appointment. Nor does the record reflect that any such persons were proposed to the district court for consideration. So, while NSRG 8(H) provides three options, the facts of the instant case indicate that the third option was not available to the district court. The district court reviewed Brickfield's extensive qualifications, including her experience, legal abilities, and knowledge in the guardianship field. Because June cannot demonstrate that the district court could have appointed a nonattorney to deal with the complex legal issues relating to June's guardianship and relocation, we conclude that the district court's

error could not have affected the outcome of the GAL proceedings. Its error was thus harmless.

The district court did not abuse its discretion in awarding the GAL's fees

June contends that the district court should not have awarded Brickfield fees at her attorney rate because a GAL performs fiduciary services, as opposed to legal services.[4] June argues that NRS 159.0455 and NSRG 8 make clear that a GAL, as "an officer of the court," is a fiduciary and is restricted from "offer[ing] legal advice to the protected person." NRS 159.0455; NSRG 8(C) (noting that "[a] guardian ad litem is an officer of the court"); NSRG 8(N) (distinguishing the role of an attorney from the role of the GAL); *see also* NRS 159.344 (concerning the payment of attorney fees and costs in a guardianship). June alleges that the district court's finding that the customary fiduciary rate for a GAL in Clark County is $400 per hour or more has no evidentiary basis and that, based on the market rate, a reasonable fee ranges between $22 to $48 per hour.

Respondents argue that the district court's fee order is supported by substantial evidence and that Brickfield's fees as a GAL were appropriately paid at an amount commensurate with her attorney rate. Respondents contend that there is no market rate requirement and that the district court satisfied the requirements codified in NRS 159.344.

But the statute requires a court to determine the nature of the services performed in awarding compensation: it distinguishes between "services that require an attorney[,]" which may be compensated at an attorney rate, and "fiduciary services," which may be compensated at a fiduciary rate. NRS 159.344(5)(g). We now determine that, while GALs in Nevada act in the same manner as a fiduciary and do not provide "attorney" work, the record nonetheless contains substantial evidence supporting the district court's award of Brickfield's requested fees.

GALs are fiduciaries

A fiduciary relationship is one "between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation[ship]." Restatement (Second) of Torts § 874 cmt. a (Am. Law Inst. 2008); *see also Matter of Frei Irrevocable Tr. Dated Oct. 29, 1996*, 133 Nev. 50, 58, 390 P.3d 646, 653 (2017) (same).

As noted, the district court may appoint a GAL to benefit the protected person and assist in determining the protected person's best

[4]June does not provide any arguments specific to the $3.50 in costs or the paralegal's $310 in fees. Thus, June appears to only dispute the $5400 in fees awarded to Brickfield.

interests. NRS 159.0455(1)(a). A GAL "is an officer of the court and is not a party to the case." NRS 159.0455(4); *see also In re Christina B.*, 23 Cal. Rptr. 2d 918, 926 (Ct. App. 1993) (clarifying that a GAL is a party's representative whose purpose is to protect the person, creating a role that is "more than an attorney's but less than a party's"); *Shainwald v. Shainwald*, 395 S.E.2d 441, 444 (S.C. Ct. App. 1990) (collecting cases and explaining that "[a] guardian ad litem is a representative of the court"). The GAL's duties are limited to those set forth in the district court's order. NRS 159.0455(2). GALs are also prohibited from offering legal advice to the protected person. NRS 159.0455(4).

We conclude that the relationship between GALs and protected persons is fiduciary in nature. The scope of duties GALs are ordered to perform is directed by the court for the benefit of the protected person. NSRG 8. While amicus contends that GALs are *only* "officers of the court" pursuant to NRS 159.0455(4), nothing prevents an officer of the court from also being a fiduciary. GALs are required to "zealously advocate for the best interest of the protected person . . . in a manner that will enable the court to determine the action that will be the least restrictive and in the best interest of the protected person or proposed protected person." NSRG 8(B). This duty fits squarely with the definition of a fiduciary. Likewise, GALs are to "advocate for the best interest of the protected person . . . based on admissible evidence available" and "conduct independent investigation and assessment of the facts to carry out the directives of the appointing order and may submit recommendations to the court that are based on admissible evidence." NSRG 8(G).

Here, every aspect of the GAL's relationship with June is to act for her benefit and with her best interests in mind under the direction of the district court. Other states have recognized the same where the GAL is court-appointed and acting as a branch of the judiciary.[5] This, however, does not mean that the GAL cannot perform services

[5]*See, e.g.*, *Garrick v. Weaver*, 888 F.2d 687, 693 (10th Cir. 1989) (concluding that the GAL is a type of fiduciary); *Golin v. Allenby*, 118 Cal. Rptr. 3d 762, 787 (Ct. App. 2010) (observing that a GAL's powers are "subject to both the fiduciary duties owed to the incompetent person and . . . the requirement that court approval be obtained for certain acts"); *People ex rel. M.M.*, 726 P.2d 1108, 1119-20 (Colo. 1986) (noting the propriety of appointing a GAL as a fiduciary representative for the protected person); *Collins ex rel. Collins v. Tabet*, 806 P.2d 40, 49 (N.M. 1991) (recognizing that GALs "occup[y] a position of the highest trust suggest[ing] that he or she is a fiduciary"); *Byrd v. Woodruff*, 891 S.W.2d 689, 706 (Tex. App. 1994) (holding that "a guardian ad litem's court-appointed role to act as the representative of a minor's interest is sufficient to establish a fiduciary relationship"); *see also* 1 Pa. Cons. Stat. § 1991 (2008) (defining GAL as a fiduciary); *cf. Fleming v. Asbill*, 483 S.E.2d 751, 753-54 (S.C. 1997) (holding that the relationship between a GAL and the court is not an employer-employee relationship, creating no agency relationship between the court and the GAL).

that require an attorney. For example, advocacy before a court is the quintessential task of an attorney and a purpose of the GAL. *See* NRS 159.0455(4)(a) & (b) (requiring a GAL to advocate for the protected person's best interests in a manner that enables the court to act in those interests). We now take this opportunity to clarify how the GAL's actions in a guardianship proceeding bear on the type of fees they may seek.

In *Hull v. United States*, the Tenth Circuit considered whether compensation for a GAL was taxable as costs or as attorney fees. 971 F.2d 1499 (10th Cir. 1992). That court held that the GAL's role determines whether its expenses are taxed as costs or attorney fees. *Id.* at 1510. It then remanded the case to district court to determine what portions of the guardian ad litem's work should be taxed as costs and what portions should be paid as attorney fees based on the nature of the GAL's work; specifically, based on whether the GAL performed tasks "as an officer of the court," or whether they performed "legal services as an attorney." *Id.* On appeal after remand, the court upheld the award of guardian ad litem fees as costs, finding undisputed evidence that the GAL rendered services solely as an officer of the court while a separately retained attorney rendered attorney services. *Hull ex rel. Hull v. United States*, 53 F.3d 1125, 1128-29 (10th Cir. 1995). We now adopt this distinguishing factor because it clarifies that the *type* of work performed by the GAL dictates the propriety of the GAL's fees. GALs are not presumptively entitled to "attorney fees" because they do not act as attorneys on behalf of the protected person. However, if they perform the type of services also performed by attorneys and have commensurate experience as an attorney, GALs may be compensated at an attorney rate for their work. This conclusion accords with NSRG 8(J), which requires courts to analyze the work completed by the GAL and their particular expertise and experience. We hold that courts, when determining fees for a GAL, should evaluate (1) the experience and qualifications of the GAL, (2) the nature and complexity of the work asked of the GAL, (3) the work actually performed, (4) the result of the GAL's work, and (5) any other factors the court finds to be relevant in a particular case.[6] We adopt these factors, which are similar to the factors guiding inquiries into attorney fees in guardianship proceedings, because they bear on the propriety of the GAL's rate, the success (or lack thereof) of the GAL, and the nature of the GAL's work.

[6]We also clarify that while a GAL seeking compensation must meet the requirements of NRS 159.344, as per NSRG 8(J), the factors listed in NRS 159.344(5) apply only to attorney fees, not GAL fees. That is, GALs must meet the written notice and petition requirements laid out in the statute, but courts evaluating their compensation should consider the factors enumerated above, not the factors enumerated in NRS 159.344(5).

The award of Brickfield's fees at a rate of $400 per hour is reasonable

When a fee award depends on the interpretation of a statute or court rule, the district court's decision is reviewed de novo. *Logan v. Abe*, 131 Nev. 260, 264, 350 P.3d 1139, 1141 (2015). An award of costs is reviewed for an abuse of discretion. *Id.* at 267, 350 P.3d at 1144.

This court has not determined the standard of review for an award of fees to a GAL as a fiduciary. We now determine that the appropriate standard of review is abuse of discretion. *See Robbins v. Ginese*, 638 N.E.2d 627, 629 (Ohio Ct. App. 1994) (concluding that the district court did not abuse its discretion by awarding the GAL its attorney rate). An abuse of discretion "occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001).

The parties agree that the district court discussed each enumerated factor in NRS 159.344(5) when evaluating Brickfield's fee request. While we now clarify that NRS 159.344(5) is not appropriately applied to GAL fees but rather only to attorney fees, June's only argument is that the fiduciary rate is not equivalent to the attorney rate. However, based on the factors enumerated above, we conclude that the district court did not abuse its discretion in awarding Brickfield $400 per hour, as the court noted the importance of the GAL's report and its determination regarding the visitation petition. *See Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 350, 455 P.2d 31, 33-34 (1969) (stating that the trier of fact understands the value of the services the best). June's analysis fails to consider that Brickfield's experience as an attorney was important to this case, though she was acting as a fiduciary. The district court was not required to rely on June's suggested $22 to $48 per hour range, as she merely surveyed three websites without any indication as to delineating factors like each GAL's experience, qualifications, or work performed. June also ignores the difficulty of the visitation petition and the legal knowledge required to serve her best interests. Meanwhile, the district court reviewed Brickfield's experience, her qualifications, the services she provided for June, the invoices submitted, and the benefits June received. The district court also repeatedly noted the complexity of the visitation petition and the need for someone with extensive guardianship experience. As it noted, Brickfield operated in the sensitive area of determining how June's family members could communicate with or visit her, a determination that required legal experience and skill. Brickfield also aided in the court's determination to remove Kimberly as June's guardian and its appointment of June's next guardian.

Thus, the district court did not abuse its discretion by finding that Brickfield's requested fees were appropriate compensation for her

work as a fiduciary in this case. While Brickfield's fees are more appropriately termed as a fiduciary fee rather than an attorney fee, the district court did not abuse its discretion in awarding the full amount requested.

CONCLUSION

Although the district court erred by failing to include Brickfield's rate in the order of appointment, June waived this argument by failing to raise it below. Likewise, the district court's error in concluding an attorney must be appointed where a volunteer is not available from a GAL program, without acknowledging the third option under NSRG 8(H), was harmless. Finally, while Brickfield is a fiduciary entitled to fiduciary fees, the district court did not abuse its discretion in awarding her fees in an amount commensurate with her attorney rate because the award was supported by the GAL's experience, specialized knowledge, and ability to understand the intricacies of this particular case's complex legal issues. Accordingly, we affirm the district court's order awarding the GAL fees.

Lee and Parraguirre, JJ., concur.

GINA ENGELSON, as Special Administrator of the ESTATE OF LENORE MEYER, Deceased, Appellant, *v.* DIGNITY HEALTH, a Foreign Nonprofit Corporation, dba ST. ROSE DOMINICAN HOSPITAL-SIENA CAMPUS; GRAPE HOLDINGS LLC, a Foreign Limited Liability Company, dba SAGE CREEK POST-ACUTE, Respondents.

No. 84978-COA

December 28, 2023 542 P.3d 430

Appeal from a district court order granting motions to dismiss in a professional negligence action. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Reversed and remanded.

Burris & Thomas, LLC, and *Steven M. Burris* and *Gary Myers*, Las Vegas, for Appellant.

Hall Prangle & Schoonveld, LLC, and *Kenneth M. Webster* and *Tyson J. Dobbs*, Las Vegas, for Respondent Dignity Health.

Hutchison & Steffen, PLLC, and *David J. Mortensen* and *Candace C. Herling*, Las Vegas, for Respondent Grape Holdings LLC.

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

OPINION

By the Court, Westbrook, J.:

Complaints for professional negligence must be timely filed within the applicable statute of limitations period, NRS 41A.097(2), and must be supported by an affidavit of merit, NRS 41A.071. When a party suffers an injury or wrongful death caused by professional negligence, NRS 41A.097(2) provides that the statute of limitations begins to run from the date the plaintiff discovers or should have discovered their legal injury. In the underlying proceeding, the district court dismissed an estate's survivorship claims after finding "irrefutable" evidence that the estate and its special administrator knew or should have known about the relevant legal injury more than a year before filing the complaint.[1]

[1]For an injury or wrongful death that is alleged to have occurred on or after October 1, 2002, but before October 1, 2023, a plaintiff must file their professional negligence claim within one year after the plaintiff discovers or should have discovered the legal injury. NRS 41A.097(2). Recent amendments to NRS 41A.097 extended the statute of limitations for professional negligence claims to two years after the plaintiff discovers or should have discovered the injury,

When appellant moved for reconsideration on grounds that the complaint was timely when the claims were construed as wrongful death claims, the district court denied reconsideration on the basis that her complaint failed to state a claim for wrongful death. The district court also found her affidavit of merit was insufficient to support a wrongful death claim because it did not establish that professional negligence *caused* the wrongful death.

We conclude that the district court erred when it dismissed appellant's complaint as time-barred. In doing so, we take this opportunity to clarify that an affidavit of merit need not opine as to the element of causation to support a professional negligence-based wrongful death claim under NRS 41A.071. Therefore, we reverse and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Eighty-five-year-old Lenore Meyer was admitted to St. Rose Dominican Hospital-Siena Campus (St. Rose-Siena) in late June 2020. During her stay at St. Rose-Siena, Meyer received treatment for a urinary tract infection, blocked bowels, and a possible Clostridium difficile (C-diff) infection.

On or about July 28, 2020, Meyer transferred to a skilled nursing facility, Sage Creek Post-Acute (Sage Creek), to receive post-treatment rehabilitation. Upon her admission, Sage Creek documented that Meyer had a stage 3 decubitis ulcer, or bedsore, in her sacral region.

Because of COVID-19 pandemic protocols, Meyer's family was unable to visit her at Sage Creek. However, during this time, Meyer apparently called members of her family to report that she was receiving horrible treatment, which included failing to assist her when she needed to go to the bathroom and leaving her to lie in bed in her own feces. Meyer's family reportedly made numerous phone calls to voice their concerns to the charge nurse and nurse manager. Meyer remained at Sage Creek for approximately two weeks before returning to St. Rose-Siena with a recurrence of C-diff and possible sepsis.

When Meyer was readmitted to St. Rose-Siena on August 12, the hospital documented that Meyer's sacral bedsore was now "huge," "down to the bone," unstageable, and infected. Meyer remained at St. Rose-Siena for almost a month, until the hospital discharged her on September 4. However, just days later, on September 8, Meyer returned to the hospital due to weakness and altered mental status. At that point, an infectious disease specialist diagnosed Meyer with sepsis, colitis, and pneumonia, and again noted the infected

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but only for claims arising on or after October 1, 2023. *See* NRS 41A.097(2)-(3) (2023). As the claims in this case arose before October 1, 2023, these amendments do not affect our analysis.

sacral bedsore. On September 10, St. Rose-Siena discharged Meyer to home hospice, where she died four days later.

Exactly one year after Meyer's death, on September 14, 2021, Meyer's daughter Gina Engelson—as special administrator of Meyer's estate—filed a professional negligence complaint against St. Rose-Siena and Sage Creek.[2] Engelson alleged that the nursing care provided by St. Rose-Siena and Sage Creek fell below the standard of care in more than a dozen ways, which included negligence in "[f]ail[ing] to timely and adequately treat skin lesions in order to prevent a preexisting ulcer from getting worse." Engelson alleged that as a "direct and proximate result" of negligence by St. Rose-Siena and Sage Creek, Meyer was "caused to suffer serious bodily injury, including worsened pressure ulcer wounds, infection and great pain of mind and body, loss of a chance of a better outcome, and contributed to her death." Engelson further alleged that, under Nevada law, Meyer's claims and causes of action "survive[d] her death and [could] be prosecuted by the administrator of [her] [e]state." Engelson also alleged that St. Rose-Siena and Sage Creek were "vicariously responsible under the doctrine of respondeat superior . . . for the injuries and death" of Meyer.

Two exhibits were attached to Engelson's complaint: a "Declaration of Expert" made under penalty of perjury by Debbie Marsh, R.N., which served as an "affidavit of merit,"[3] and an electronic disc containing the medical records and other documentation relied on by Marsh. In her affidavit of merit, Marsh explained that she was familiar with the standard of care for nursing at both hospitals and skilled nursing facilities. She identified specific nurses at St. Rose-Siena and Sage Creek who she believed breached the standard of care in their treatment of Meyer during the summer of 2020. And she identified specific acts of negligence at St. Rose-Siena and Sage Creek that she believed fell below the standard of nursing care. As to St. Rose-Siena, Marsh opined that the hospital negligently allowed Meyer's stage 3 pressure ulcer to develop while failing to document its existence. As to Sage Creek, Marsh opined that its nurses did not meet the standard of care for the prevention, clinical staging, and management of Meyer's pressure-induced soft tissue injuries, which required pressure redistribution, improving skin perfusion, minimizing excess moisture, and turning Meyer every two hours.

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[2]Engelson's complaint also alleged negligent hiring, training, supervision, and retention, as well as corporate negligence, and further requested punitive damages.

[3]For purposes of this disposition, we will refer to the Marsh declaration as an "affidavit of merit" or "affidavit." As the Nevada Supreme Court recognized in *Baxter v. Dignity Health*, the affidavit of merit required by NRS 41A.071 "can take the form of either a 'sworn affidavit or an unsworn declaration made under penalty of perjury.'" 131 Nev. 759, 762, 357 P.3d 927, 929 (2015) (quoting *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 922 (2010)).

Although Marsh asserted that the acts of negligence by St. Rose-Siena and Sage Creek "denied Mrs. Meyer a better outcome," she did not offer any opinion that these acts of professional negligence caused Meyer's death.

St. Rose-Siena and Sage Creek moved to dismiss Engelson's complaint pursuant to NRS 41A.097(2) on the basis that it was filed more than one year after Engelson and/or Meyer discovered or should have discovered the legal injury, which they characterized as Meyer's negligently caused bedsore.[4] To establish that Engelson's complaint was time-barred, St. Rose-Siena and Sage Creek relied on factual statements from Marsh's affidavit of merit, where Marsh summarized the information that she had received from Engelson's attorneys based on their interviews with unnamed members of Meyer's family.

Relying primarily on Marsh's affidavit of merit, St. Rose-Siena argued that, as of July 28, 2020, Engelson and Meyer were on inquiry notice of the Meyer estate's negligence claims against the hospital because *that* was the date that the stage 3 sacral ulcer was first documented in Meyer's medical records at Sage Creek. Likewise, Sage Creek relied on the Marsh affidavit to argue that Engelson and/or Meyer were on inquiry notice of the estate's potential negligence claims on or before Meyer's discharge from Sage Creek because, after Sage Creek documented the bedsore, Meyer had spoken by phone with her family regarding the allegedly substandard care she was receiving while at Sage Creek.

The district court agreed, finding that Engelson's complaint and the accompanying affidavit of merit established "irrefutable evidence that Plaintiff was aware of her injury on or around August 11, 2020 at the latest."[5] Because Engelson's complaint was filed more than a year after that date, the court entered an order dismissing Engelson's complaint as time-barred.

Thereafter, Engelson moved for reconsideration, arguing for the first time that, because her complaint alleged wrongful death claims, it was timely filed within one year of her discovery of *that* legal injury: Meyer's wrongful death. In addition, Engelson reargued that Sage Creek was not a "[p]rovider of health care" as defined in

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[4]In its motion to dismiss, Sage Creek conceded that Marsh's affidavit "appear[ed] to support" her allegations of professional negligence for purposes of NRS 41A.071(1).

[5]When Engelson asked the district court how it determined the accrual date of August 11, 2020, the court explained it was "[b]ased on the statements made by [St. Rose-Siena's counsel] that there was bedsore and treatment of the same through August 11th of 2020." St. Rose-Siena's counsel then noted "just for the record, that [this] is from the Affidavit of Debbie Marsh that says the family was aware that the bedsore was down to the bone and notified that was the case prior to the transfer back to St. Rose on August 12th." The district court then advised Engelson that its determination of the accrual date was "based on your own Affidavit."

NRS 41A.017 and, therefore, the one-year statute of limitations did not apply to Sage Creek. The district court rejected both arguments.

In its order denying reconsideration, the district court concluded that Engelson's complaint failed to state a wrongful death claim and that her affidavit of merit did not satisfy the requirements of NRS 41A.071 because it did not support the allegation that professional negligence *caused* Meyer's death. Additionally, the district court concluded that, regardless of whether Sage Creek was, itself, a "provider of health care" as defined in NRS 41A.017, Engelson's claims against Sage Creek were inextricably linked to the underlying alleged professional negligence of its nurses, and therefore, her claims were subject to the requirements of NRS Chapter 41A. Engelson appeals.

ANALYSIS

St. Rose-Siena's and Sage Creek's motions to dismiss were not converted to motions for summary judgment

St. Rose-Siena and Sage Creek both acknowledge that they sought dismissal under NRCP 12(b)(5) on statute of limitations grounds and that the district court granted the relief requested. Yet, they assert that this court must treat their motions to dismiss as motions for summary judgment because the parties' briefing was supported by "evidence outside the complaint." Specifically, St. Rose-Siena and Sage Creek contend that the district court considered documents that were contained on an electronic disc that was attached as an exhibit to Marsh's affidavit of merit and incorporated by reference therein, copies of Governor Sisolak's emergency directives regarding the COVID-19 pandemic, and unpublished orders from other cases ostensibly cited for their persuasive authority. We disagree that the district court's consideration of these documents converted St. Rose-Siena's and Sage Creek's motions to dismiss into motions for summary judgment.

Pursuant to NRCP 12(b)(5), a defendant can move to dismiss a plaintiff's complaint for "failure to state a claim upon which relief can be granted." And a court can dismiss a complaint under NRCP 12(b)(5) "if the action is barred by the statute of limitations." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998) (citing NRCP 12(b)(5)). When ruling on a motion to dismiss, a court generally "may not consider matters outside the pleading being attacked." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993); *see* NRCP 12(d). However, a court may properly consider "matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling" on such a motion. *Breliant*, 109 Nev. at 847, 858 P.2d at 1261. Implicitly, the court may also consider legal authorities that, by definition, are not "evidence," when reviewing a motion to dismiss. *See id.*

A court's consideration of such matters will not convert a motion to dismiss into a motion for summary judgment. *See Baxter*, 131 Nev. at 764, 357 P.3d at 930 (stating that "[w]hile presentation of matters *outside* the pleadings will convert [a] motion to dismiss to a motion for summary judgment . . . such conversion is *not* triggered by a court's 'consideration of matters incorporated by reference or integral to the claim,'" including an affidavit or declaration of merit (quoting 5B Charles Alan Wright & Arthur Miller, *Federal Practice & Procedure: Civil* § 1357, at 376 (3d ed. 2004))).

In this case, the district court did not consider evidence outside of the complaint that would convert the motions to ones for summary judgment. Marsh's affidavit of merit was attached as an exhibit to Engelson's complaint. Further, that affidavit incorporated by reference all of the documents that Marsh reviewed, and copies of those documents were contained on an electronic disc that was, itself, attached as an exhibit to Marsh's affidavit. As a result, all of those documents effectively became part of the complaint, and the district court could properly consider them in connection with St. Rose-Siena's and Sage Creek's motions to dismiss without converting them into motions for summary judgment. *See* NRCP 10(c) ("A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."); *see also Baxter*, 131 Nev. at 764, 357 P.3d at 930.

To the extent the parties also attached unpublished orders and copies of the Governor's emergency directives regarding the COVID-19 pandemic as exhibits to their briefing below, the district court's consideration of such materials likewise did not convert the motions to dismiss into motions for summary judgment because those materials constitute legal authority, not evidence. *See Breliant*, 109 Nev. at 847, 858 P.2d at 1261; *see also Lucky Lucy D LLC v. LGS Casino LLC*, 139 Nev. 240, 244, 534 P.3d 689, 692 (2023) (recognizing that the "Governor's Emergency Directives . . . carried with them the force of law for the duration of the state of emergency").

Therefore, we review the district court's order under the "rigorous, de novo standard of review" applicable to an order granting a motion to dismiss for failure to state a claim. *Montanez v. Sparks Fam. Hosp., Inc.*, 137 Nev. 742, 743, 499 P.3d 1189, 1191 (2021) (quoting *Slade v. Caesars Entm't Corp.*, 132 Nev. 374, 379, 373 P.3d 74, 78 (2016)). A district court may dismiss a complaint for failure to state a claim only "if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). When evaluating such a dismissal, "this court will recognize all factual allegations in [the plaintiff's] complaint as true and draw all inferences in [the plaintiff's] favor." *Id.*

The district court erred by granting the motions to dismiss on statute of limitations grounds

Engelson argues that the district court erred when it initially granted St. Rose-Siena's and Sage Creek's motions to dismiss. Engelson contends that her complaint was timely filed within the one-year statute of limitations for professional negligence actions then required by NRS 41A.097(2). Sage Creek disagrees, arguing that the district court properly dismissed Engelson's complaint because the estate was on inquiry notice of its professional negligence claims more than one year before Engelson filed the complaint.[6]

NRS 41A.097(2) requires claims for professional negligence occurring on or after October 1, 2002, and before October 1, 2023, to be filed "within one year of the injury's discovery and three years of the injury date," whichever occurs first. *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 361, 325 P.3d 1276, 1277 (2014). In *Massey v. Litton*, the Nevada Supreme Court explained that the limitation period for the "discovery" of an injury begins to run when the 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." 99 Nev. 723, 728, 669 P.2d 248, 252 (1983). For purposes of the discovery rule, the "injury" in question is the legal injury, which means *both* the "physical damage" *and* the "[professional] negligence causing the damage." *Id.* at 726, 669 P.2d at 250-51. In the proceedings below, the parties appeared to agree that the "physical damage" at issue was Meyer's bedsore; however, they disagreed about *when* the plaintiff was on inquiry notice that professional negligence may have caused that bedsore.

We note that the one-year statute of limitations is expressly tied to the *plaintiff's* discovery of the injury constituting professional negligence. *See* NRS 41A.097(2) (describing the applicable statute of limitations for the discovery of an injury as "1 year after *the plaintiff* discovers or through the use of reasonable diligence should have discovered the injury" (emphasis added)). In cases like this one, where a decedent's estate is the named plaintiff, Nevada law indicates that the discovery rule is triggered when the estate or its representative are on inquiry notice of the legal injury. *See, e.g.*, *Kushnir v. Eighth Judicial Dist. Court*, 137 Nev. 409, 411-14, 495 P.3d 137, 140-42 (Ct. App. 2021) (determining that a professional negligence claim accrued on the date that the named plaintiffs—the estate and its administrator—acquired the decedent's medical records); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, No. 82250, 2021 WL 4860728, at *2 (Nev. Oct. 18, 2021) (Order Granting Petition) (concluding that professional negligence

[6]St. Rose-Siena does not address this argument in its answering brief, focusing instead on the district court's subsequent ruling on Engelson's motion for reconsideration.

claims accrued when the special administrator of the decedent's estate filed a complaint with the State Board of Nursing).

As the special administrator of Meyer's estate asserting survivorship claims pursuant to NRS 41.100, Engelson "stands in the shoes of the decedent and is subject to all defenses that might have been asserted against the decedent," including any applicable statutes of limitations. *Schwartz v. Wasserburger*, 117 Nev. 703, 708, 30 P.3d 1114, 1117 (2001). Although Engelson filed her lawsuit exactly one year after Meyer's death, the district court had to determine whether Engelson or Meyer "discovered" the legal injury prior to Meyer's death, because if so, the estate's claims would be time-barred. *See, e.g.*, *White v. Johns-Manville Corp.*, 693 P.2d 687, 697 (Wash. 1985) (applying the discovery rule to survivorship actions and concluding that the statute of limitations "commences at the earliest time at which the decedent or his personal representatives knew or should have known" of the legal injury).

Here, the district court dismissed Engelson's complaint after concluding, as a matter of law, that "Plaintiff was aware of her injury on or around August 11, 2020 at the latest" and that the complaint was untimely filed more than one year after this accrual date, on September 14, 2021. However, the accrual date for the one-year discovery period in NRS 41A.097(2) "ordinarily presents a question of fact to be decided by the jury," and "[o]nly when evidence *irrefutably demonstrates* this accrual date may a district court make such a determination as a matter of law." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 251, 277 P.3d 458, 462 (2012) (emphasis added). Moreover, "[a]t this stage of proceedings [the] court must determine whether there is any set of facts that, if true, would entitle [the plaintiff] to relief and not whether there is a set of facts that would not provide [the plaintiff] with relief." *Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 644, 403 P.3d 1280, 1286 (2017).

To date, Nevada's appellate courts have found irrefutable evidence of the accrual date under only limited circumstances. For instance, in *Winn*, the Nevada Supreme Court determined as a matter of law that a plaintiff "discovered" his daughter's injury, including the cause of that injury, on the date that he first received his daughter's medical records. 128 Nev. at 253, 277 P.3d at 463. "At [that] point, [the plaintiff] had not only hired an attorney to pursue a medical malpractice action, but he also had access to [a relevant] postoperative report" that placed him on inquiry notice that his daughter's injury was caused by professional negligence. *Id*. Likewise, in *Kushnir*, this court concluded, as a matter of law, that an estate's professional negligence claim on behalf of a decedent accrued on the date that the estate acquired the decedent's medical records, as that was the date its medical expert had all the information necessary to discover the medical malpractice and prepare an expert affidavit. 137 Nev. at 411-14, 495 P.3d at 140-42.

Relatedly, in *Estate of Curtis v. Socaoco*, the Nevada Supreme Court concluded that the personal representative of a decedent's estate was on inquiry notice of the estate's claims against certain health care providers on the date that she was "explicitly informed" by medical professionals that those providers "should have immediately sent [the decedent] to the hospital" after erroneously injecting her with morphine. No. 79116, 2020 WL 5837916, at *2 (Nev. Sept. 30, 2020) (Order of Affirmance). When the decedent died a few days later, the personal representative "knew or should have known that *someone's* negligence in treating the morphine overdose might have caused [her] death." *Id.* (emphasis in original).

Finally, in *Valley Health System*, the Nevada Supreme Court looked to the date that the special administrator of the decedent's estate filed a complaint with the State Board of Nursing to determine the accrual date for the professional negligence claims. 2021 WL 4860728, at *2. Because the complaint alleged that the decedent's health care providers "did not appropriately monitor her, abandoning her care and causing her death," the court concluded that the special administrator "had enough information to allege a prima facie claim for professional negligence" on the date he filed that complaint. *Id.*

Here, the district court did not have irrefutable evidence that Engelson or Meyer were in possession of Meyer's medical records at any time prior to her death. *Cf. Winn*, 128 Nev. at 253, 277 P.3d at 463; *Kushnir*, 137 Nev. at 411-14, 495 P.3d at 140-42. Likewise, the district court was not presented with evidence that any medical professionals "explicitly informed" Engelson or Meyer that the care Meyer was receiving may have either caused her bedsore or caused it to worsen. *Cf. Socaoco*, 2020 WL 5837916, at *2. And the district court was not presented with evidence that Engelson or Meyer filed an administrative complaint against Meyer's health care providers at any point prior to Meyer's death. *Cf. Valley Health Sys.*, 2021 WL 4860728, at *2.

Although the district court found that Engelson's "complaint and the accompanying [affidavit of merit] established irrefutable evidence" of the accrual date, the court drew improper inferences against both Engelson and Meyer to reach that conclusion. Engelson's complaint does not contain *any* allegations indicating that Engelson or Meyer knew or should have known that professional negligence might have either caused Meyer's bedsore or caused it to worsen at any point prior to Meyer's death. Likewise, Marsh's affidavit of merit does not irrefutably demonstrate that Engelson or Meyer were on inquiry notice of their professional negligence claims while Meyer was still alive. Though the affidavit describes how Meyer's bedsore worsened during her stay at Sage Creek—as documented in her medical records—it does not state that Meyer or her family were aware that her bedsore had worsened due to

professional negligence. Additionally, while the affidavit states that Meyer placed phone calls to family members to complain about her treatment at the facility, there is no indication that those complaints had anything to do with Meyer's bedsore.

On appeal, Sage Creek asks this court to find irrefutable evidence of the accrual date in the "memorandum to expert" that was prepared by Engelson's attorneys and attached to Marsh's affidavit. But this memorandum does not irrefutably demonstrate that Engelson's complaint is time-barred either. The memorandum states that Meyer "was told by a nurse at St. Rose-Siena named Anna that there was a bedsore from St. Rose-Siena, but when she was transferred to Sage Creek, it was only the size of a dime and was closing up." Even if Meyer knew she had a bedsore that was healing when she first arrived at Sage Creek, the memorandum does not establish that Meyer knew her bedsore *worsened* during her stay at the facility due to the treatment and care she was receiving. And even though the memorandum states that when Meyer was subsequently transferred to St. Rose-Siena, the bedsore was "huge," "down to the bone," and "stage 4," the memorandum does *not* state that Meyer or Engelson were actually informed by the hospital staff that her condition had in fact worsened and, more specifically, was the result of professional negligence.

While the affidavit of merit and the memorandum to expert both generally referenced phone calls that Meyer had with unnamed "family members" during her two-week stay at Sage Creek, neither document states that Meyer discussed her bedsore during any of these calls. Instead, the documents reflect that Meyer complained to her family about the *treatment* she was receiving at Sage Creek and that she told her family about a few specific instances of that mistreatment. The documents further state that "the family" tried to call the head nurse and manager to get help for Meyer, which was not given. To conclude, based on the vague references in these documents that, as of August 11, 2020, Engelson and Meyer knew or should have known that professional negligence by St. Rose-Siena and Sage Creek may have caused Meyer's bedsore or caused the bedsore to worsen, the district court had to draw inferences against them, which it was not permitted to do when ruling on a motion to dismiss.[7]

It is important to remember that the professional negligence alleged in this case occurred during the summer of 2020, when much of this State was subject to COVID-19 pandemic restrictions and when Meyer's family was not even permitted to see her

[7]Sage Creek also relies on language in the memorandum to expert which states that the family has "recordings" of phone calls with Meyer during her stay at the facility. But again, there is no indication these recordings referenced Meyer's bedsore or showed that Meyer or Engelson were aware that a professional negligence claim against Sage Creek may exist.

in person to witness the wound that is at the heart of this litigation. Although Meyer's medical records from the summer of 2020 contain documentation regarding her bedsore, it is unclear when Engelson first received copies of those medical records.[8] Absent "irrefutable evidence" that Meyer or Engelson were aware of the contents of Meyer's medical records by August 11, 2020, we cannot say that they were on inquiry notice of the professional negligence claims as of that date.

Thus, because the evidence before the district court did not "irrefutably demonstrate" that Meyer or Engelson discovered Meyer's legal injury as of August 11, 2020, *see Winn*, 128 Nev. at 251, 277 P.3d at 462, the district court erred in determining as a matter of law that the complaint was time-barred.

This court may address the district court's rulings on the merits of Engelson's motion for reconsideration

After the district court dismissed her complaint on statute of limitations grounds, Engelson moved for reconsideration on the basis that her complaint stated a wrongful death claim that was timely filed within one year of Meyer's death. This was an argument that Engelson had not raised in response to the previously filed motions to dismiss. In her motion for reconsideration, Engelson also reargued a point that she had previously raised in opposition to Sage Creek's motion to dismiss—namely, that Sage Creek was not a "[p]rovider of health care" as defined in NRS 41A.017 and, therefore, the one-year statute of limitations did not apply to Sage Creek.

The district court could have declined to consider both arguments, and it would have been within the court's discretion to do so. *See* EDCR 2.24(a) ("No motion once heard and disposed of may be renewed in the same cause, nor may the same matters therein embraced be reheard, *unless by leave of the court* . . . ." (emphasis added)). Instead, the court rejected both arguments on their merits

[8]We refuse, at this time, to adopt Engelson's contention that the true accrual date was April 15, 2021—the day Engelson's attorney received a copy of Meyer's medical records from Sage Creek. Although Engelson relies on a Custodian of Records Affidavit indicating that Meyer's medical records were reproduced on that date, the affidavit does not irrefutably demonstrate that this was the *actual* accrual date when Engelson first discovered the injury. Rather, this evidence merely establishes that Engelson discovered Meyer's injury *no later than* April 15, 2021. *See Winn*, 128 Nev. at 253, 277 P.3d at 463 (holding that the date the plaintiff received medical records irrefutably demonstrated the latest date on which he was placed on inquiry notice of a potential cause of action). Discovery may reveal that Meyer's family obtained the necessary information or medical records from Sage Creek or St. Rose-Siena *prior* to their reproduction to Engelson's attorney on April 15, 2021. And, because the accrual date is generally a question of fact, it would be premature for us to decide this issue on appeal. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance.").

in a written order that was issued before Engelson filed her notice of appeal. Where, as here, the district court's "reconsideration order and motion are properly part of the record on appeal from the final judgment, and . . . the district court elected to entertain the motion on its merits, then we may consider the arguments asserted in the reconsideration motion in deciding an appeal from the final judgment."[9] *Arnold v. Kip*, 123 Nev. 410, 417, 168 P.3d 1050, 1054 (2007).

This court generally reviews the denial of a motion for reconsideration for abuse of discretion. *See Saticoy Bay, LLC, Series 34 Innisbrook v. Thornburg Mortg. Sec. Tr. 2007-3*, 138 Nev. 335, 343, 510 P.3d 139, 146 (2022). "An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016). And "deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Additionally, we review questions of law, including questions of statutory interpretation, de novo. *Soro v. Eighth Judicial Dist. Court*, 133 Nev. 882, 885, 411 P.3d 358, 361 (Ct. App. 2017); *Pub. Agency Comp. Tr. (PACT) v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011).

As detailed below, we conclude that the district court erred by determining that Engelson failed to adequately plead and support a wrongful death claim on behalf of the estate based on professional negligence. And, because the one-year statute of limitations for a wrongful death claim based on professional negligence begins to run when "the plaintiff discovers or reasonably should have discovered the legal injury, i.e., both the fact of death and the negligent cause thereof," *see Pope v. Gray*, 104 Nev. 358, 362, 760 P.2d 763, 765 (1988), we conclude that the district court erred in determining that Engelson's complaint—filed exactly one year after Meyer's death—was untimely. Consequently, to the extent it based its denial of reconsideration on those erroneous determinations, the district court abused its discretion. Nevertheless, the district court correctly found that Engelson's professional negligence claims against Sage Creek were subject to the requirements of NRS Chapter 41A.

Engelson's complaint adequately stated a claim for wrongful death based upon professional negligence

Before addressing whether Engelson's complaint sufficiently stated a claim for wrongful death on behalf of the estate, we note that "[w]rongful death is a cause of action created by statute, having no roots in the common law." *Alsenz v. Clark Cty. Sch. Dist.*,

[9]We note that both St. Rose-Siena and Sage Creek have asked this court to decide whether Engelson's allegations are subject to NRS Chapter 41A and whether her complaint and expert declaration complied with NRS 41A.071.

109 Nev. 1062, 1064, 864 P.2d 285, 286 (1993). Nevada's wrongful death statute, NRS 41.085, provides that "[w]hen the death of any person . . . is caused by the wrongful act or neglect of another, the heirs of the decedent and the personal representatives of the decedent" may maintain a wrongful death claim for "damages against the person who caused the death." NRS 41.085(2). The statute thus "creates two separate wrongful death claims, one belonging to the heirs of the decedent and the other belonging to the personal representative of the decedent, with neither being able to pursue the other's separate claim." *Alcantara v. Wal-Mart Stores, Inc.*, 130 Nev. 252, 256, 321 P.3d 912, 914 (2014).

To state a wrongful death claim under NRS 41.085(2), Engelson's complaint needed to allege that the defendants' "wrongful act or neglect . . . caused" Meyer's death. NRS 41.085(2); *see also Gilloon v. Humana Inc.*, 100 Nev. 518, 521, 687 P.2d 80, 82 (1984) ("The death of the decedent being an essential element of the cause of action for wrongful death, there can be no legal injury until the death has occurred."). Further, Engelson needed to allege that she was among the classes of persons entitled to assert a wrongful death claim: a statutory heir, a personal representative, or both. *See* NRS 41.085(2). And depending on how Engelson self-identified in the complaint—as an heir or a personal representative—her available damages would have been limited. *See* NRS 41.085(4)-(5).

Nevada is a notice pleading jurisdiction that liberally construes pleadings. NRCP 8(a); *Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308, 468 P.3d 862, 878 (Ct. App. 2020). "A complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992). As mentioned, a complaint should be dismissed for failure to state a claim "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [her] to relief." *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

Although Engelson's complaint was inartfully drafted, it set forth the essential elements of a wrongful death claim against both St. Rose-Siena and Sage Creek. Engelson alleged that St. Rose-Siena and Sage Creek were both "vicariously responsible under the doctrine of respondeat superior . . . for the injuries *and death*" of Meyer. Engelson identified specific "wrongful act[s] or neglect" by both St. Rose-Siena and Sage Creek relating to the development and progression of the pressure ulcer. And Engelson alleged that as a "direct and proximate result" of the negligence by St. Rose-Siena and Sage Creek, Meyer was "caused to suffer serious bodily injury, including worsened pressure ulcer wounds, infection and great pain of mind and body, loss of a chance of a better outcome, *and contributed to her death*."

Importantly, Engelson self-identified as "the Special Administrator of the Estate of LENORE MEYER, deceased," and brought her lawsuit "on behalf of the Estate of LENORE MEYER, deceased." Thus, for purposes of Nevada's wrongful death statute, Engelson was Meyer's personal representative, *see* NRS 132.265 (defining the term "[p]ersonal representative" to include "a special administrator"), and was therefore entitled to seek the damages available to Meyer's estate under NRS 41.085(5). These allegations in the complaint, which we must accept as true, sufficed to state a claim for wrongful death against both St. Rose-Siena and Sage Creek under NRCP 8(a). Therefore, the district court abused its discretion when it found that Engelson's complaint failed to state a wrongful death claim.

Engelson's affidavit of merit satisfied NRS 41A.071

As noted, the district court also found that Engelson's affidavit of merit was insufficient to support a wrongful death claim pursuant to NRS 41A.071. St. Rose-Siena and Sage Creek contend that the affidavit of merit was insufficient because it failed to allege that they *caused* Meyer's death, where causation is an essential element of a wrongful death claim. Engelson responds that there is no requirement in NRS 41A.071 that an affidavit of merit must establish causation in wrongful death cases. To resolve this dispute, we must examine the statute.

When interpreting a statute, appellate courts look first to the statute's plain language. *Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021). If the statute's plain language is unambiguous, we will enforce the statute as written, without resorting to the rules of construction. *Local Gov't Emp.-Mgmt. Relations Bd. v. Educ. Support Emps. Ass'n*, 134 Nev. 716, 718, 429 P.3d 658, 661 (2018). However, if a statute's language is ambiguous, meaning it is susceptible to more than one reasonable interpretation, we will examine the provision's legislative history and the statutory scheme as a whole to ascertain the Legislature's intent. *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008); *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010).

NRS 41A.071 sets forth the requirements for an affidavit of merit in a professional negligence case. The statute states:

> If an action for professional negligence is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit that:
>
> 1. Supports the allegations contained in the action;
> 2. Is submitted by a medical expert who practices or has practiced in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence;

3. Identifies by name, or describes by conduct, each provider of health care who is alleged to be negligent; and

4. Sets forth factually a specific act or acts of alleged negligence separately as to each defendant in simple, concise and direct terms.

At the outset, we note that NRS 41A.071 does not specifically state that an affidavit of merit must opine as to causation. Indeed, the word "causation" does not appear anywhere in the text of NRS 41A.071. Rather, when describing the requisite contents of the affidavit, the statute provides only that the affidavit must support the complaint's allegations, identify the negligent providers of health care, and identify the specific act(s) of negligence alleged against each defendant. NRS 41A.071(1), (3), (4).[10] On its face, the plain language of NRS 41A.071 does not require any discussion of actual or proximate causation. Therefore, in order to conclude that an affidavit of merit must opine as to actual or proximate "causation," we would have to read that requirement into the statute. There are only two subsections where a causation requirement could possibly be found—either in NRS 41A.071(1) or in NRS 41A.071(4)—so we will address each in turn.[11]

To satisfy NRS 41A.071(1), an affidavit must "[s]upport[ ]" the allegations in the action. St. Rose-Siena and Sage Creek contend that an expert affidavit cannot support a wrongful death claim within the meaning of NRS 41A.071(1) unless it offers an opinion regarding causation. We disagree. In *Zohar v. Zbiegien*, the Nevada Supreme Court recognized that the support requirement "is ambiguous because it may reasonably be interpreted as merely providing some substantiation or foundation for the underlying facts within the complaint, or it may also be interpreted to require that the affidavit corroborate every fact within the complaint." 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). After finding that NRS 41A.071's support requirement is ambiguous, the court looked to the legislative history of the statute. *Id*.

The supreme court observed that NRS 41A.071 "was enacted to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff's right to litigate his or

[10]NRS 41A.071(2) does not address the contents of the affidavit; rather, it addresses the qualifications of the medical expert who submitted the affidavit. *See, e.g.*, *Monk v. Ching, M.D.*, 139 Nev. 155, 156, 531 P.3d 600, 602 (2023) ("Subsection 2 of NRS 41A.071 requires [affiant], as the medical expert submitting the affidavit in support of the complaint, to have practiced 'in an area that is substantially similar to the type of practice engaged in at the time of the alleged professional negligence.' ").

[11]A causation requirement cannot be found in NRS 41A.071(3), which simply requires identification of the negligent provider of health care.

her case and receive full compensation for his or her injuries." *Id.* at 738, 334 P.3d at 405-06. But because the legislative history of the statute did not reveal the "precise level of specificity" necessary for an affidavit to "support" the allegations of a medical malpractice claim, the court chose "to construe the statute in a manner that conforms to reason and public policy" while balancing the interests of both health care providers and injured patients. *Id.* at 738, 334 P.3d at 406.

As a result, the supreme court rejected the notion that an affidavit of merit must "independently state every fact required to demonstrate a cause of action for medical malpractice." *Id.* at 739, 334 P.3d at 406. Rather than isolating and subjecting the affidavit to hyper technical scrutiny, "district court[s] should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071." *Id.* at 735, 334 P.3d at 403.

Reviewing the complaint in *Zohar* (which alleged specific conduct by individual hospital employees) alongside the expert affidavit, which opined that "the medical staff in the emergency department of [the hospital] *breached the standard of care* in their treatment of [the injured patient] through the inappropriately tight application of a wound dressing and/or bandage," the supreme court deemed the affidavit sufficient to satisfy the support requirement of NRS 41A.071. *Id.* at 741, 334 P.3d at 407 (emphasis added). The supreme court's analysis demonstrates that an affidavit of merit need not separately address causation and recite each of the other essential elements of a particular claim to satisfy the support requirement of NRS 41A.071. Rather, an affidavit of merit can adequately support a complaint's allegations of professional negligence when it opines as to the professional standard of care and the breach of that standard of care.[12]

Next, we must examine NRS 41A.071(4) to determine if that section requires an affidavit of merit to address causation. To comply with NRS 41A.071(4), an affidavit must identify the "specific act or acts of alleged negligence" engaged in by each defendant. Yet, unlike the support requirement in NRS 41A.071(1), the language of NRS 41A.071(4) is *not* ambiguous. First, we note that this subsection refers to an "act or acts" of negligence as opposed to a "claim or claims" of negligence. Even though causation is an *element* of a negligence claim, causation is not necessary to establish that an *act* was, in and of itself, negligent. *Compare Element*, *Black's Law Dictionary* (11th ed. 2019) (defining an "element" as "[a] constituent part of a claim that must be proved for the claim to succeed"), *with*

[12]We note that, although NRS 41A.071 was amended in 2015 after the decision in *Zohar*, those amendments did not substantively alter the support requirement. 2015 Nev. Stat., ch. 439, § 6, at 2527 (effective June 9, 2015).

Negligence, *Black's Law Dictionary* (11th ed. 2019) (defining "negligence," in relevant part, as "[t]he failure to exercise the standard of care that a reasonably prudent person would have exercised in a similar situation"). To specify an *act* of negligence, one need only describe the act that breached the duty of care; one need not demonstrate the consequences of that act.

Additionally, while NRS 41A.071(4) generically refers to acts of "negligence," the statute's prefatory language clarifies that the type of negligence at issue is "professional negligence" as expressly defined in NRS 41A.015. *See Nev. Pub. Emps. Ret. Bd. v. Smith*, 129 Nev. 618, 627, 310 P.3d 560, 566 (2013) ("A statute's express definition of a term controls the construction of that term no matter where the term appears in the statute." (quoting *Williams v. Clark Cty. Dist. Attorney*, 118 Nev. 473, 485, 50 P.3d 536, 544 (2002))).

NRS 41A.015 provides that, for purposes of NRS Chapter 41A, "'[p]rofessional negligence' means the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." While the statutory definition of "professional negligence" incorporates the concepts of both duty of care and breach, it *does not* include the concepts of actual or legal causation found in caselaw describing the elements of negligence claims. *Cf. Perez v. Las Vegas Med. Ctr.*, 107 Nev. 1, 4, 805 P.2d 589, 590-91 (1991) ("To prevail on a negligence theory, the plaintiff generally must show that: (1) the defendant had a duty to exercise due care towards the plaintiff; (2) the defendant breached the duty; (3) the breach was an *actual* cause of the plaintiff's injury; (4) the breach was the *proximate* cause of the injury; and (5) the plaintiff suffered damage."). Thus, read in context, the term "negligence" in NRS 41A.071(4) means "professional negligence" as defined in NRS 41A.015, rather than a cause of action for negligence as more broadly defined under common law. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 225, 228 (2012) (stating that "[d]efinition sections and interpretation clauses are to be carefully followed" and "[i]t is very rare that a defined meaning can be replaced with another permissible meaning of the word on the basis of other textual indications; the definition is virtually conclusive").

The 2015 amendment to the definition of "professional negligence" underscores that the Legislature did not intend for the affidavit requirement in NRS 41A.071(4) to include actual or proximate causation. The prior version of NRS 41A.015 was enacted pursuant to a ballot initiative in 2004 and defined "professional negligence" as "a negligent act or omission to act by a provider of health care in the rendering of professional services, *which act or omission is the proximate cause of a personal injury or wrongful*

death." Nevada Ballot Questions 2004, Nevada Secretary of State, Question No. 3 (emphasis added). However, as a result of the 2015 amendment, the Legislature removed all references to causation from this definition and, at the same time, added the language in NRS 41A.071(4). *See* 2015 Nev. Stat., ch. 439, § 1.5, at 2526. We presume that these changes were intended to remove causation from the definition of "professional negligence" and the related affidavit requirements in NRS 41A.071. *See McKay v. Bd. of Supervisors*, 102 Nev. 644, 650, 730 P.2d 438, 442 (1986) ("It is ordinarily presumed that the legislature, by deleting an express portion of a law, intended a substantial change in the law.").

The language of NRS 41A.100, the res ipsa loquitur statute, further supports our reading of NRS 41A.071's affidavit requirement. *See State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 295, 995 P.2d 482, 486 (2000) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules or statutes."). NRS 41A.100(1) sets forth five factual circumstances where a rebuttable presumption of professional negligence exists such that a plaintiff need not present expert testimony at trial. *See, e.g.*, *Cummings v. Barber*, 136 Nev. 139, 144-45, 460 P.3d 963, 968 (2020) (concluding that an injured patient was not required to present expert testimony to withstand summary judgment where she presented evidence giving rise to a presumption of negligence under NRS 41A.100(1)). However, NRS 41A.100(3) creates an exception to this rebuttable presumption when "a plaintiff submits an affidavit pursuant to NRS 41A.071, *or otherwise designates an expert witness to establish that the specific provider of health care deviated from the accepted standard of care*." (Emphasis added.) By discussing the affidavit requirement in this way, the statute confirms that the affidavit requirement is concerned with the alleged deviation from the standard of care, not causation.

Notably, although causation is not within the statutory definition of professional negligence for purposes of the affidavit requirement, it remains an element that must be proven at trial. *See* NRS 41A.100(1) ("Liability for personal injury or death is not imposed upon any provider of health care based on alleged negligence in the performance of that care unless evidence . . . is presented to demonstrate the alleged deviation from the accepted standard of care in the specific circumstances of the case *and to prove causation of the alleged personal injury or death*." (emphasis added)). When interpreting statutes, Nevada follows the maxim that "the mention of one thing implies the exclusion of another." *Rural Tel. Co. v. Pub. Utils. Comm'n*, 133 Nev. 387, 389, 398 P.3d 909, 911 (2017) (quoting *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009)). The Legislature's express statutory inclusion of causation as an element of professional negligence claims that

must be proven *at trial* further emphasizes the legislative intent to exclude causation from the affidavit requirements that must be established at the initial pleading stage.

In sum, we hold that NRS 41A.071 does not require an expert affidavit addressing legal or proximate causation in professional negligence cases. Thus, Engelson's complaint alleges claims of wrongful death, and we conclude that the complaint was adequately pleaded and supported by an affidavit of merit. The district court erred in concluding otherwise and thus abused its discretion in denying reconsideration on that basis.

The district court correctly concluded that Engelson's professional negligence claims against Sage Creek were subject to the requirements of NRS Chapter 41A

Finally, Engelson contends that the district court abused its discretion in denying her motion for reconsideration after erroneously finding that the claims against Sage Creek were subject to the one-year statute of limitations set forth in NRS 41A.097(2). Engelson contends that, because Sage Creek is a "skilled nursing facility," and such facilities are not included in the definition of "provider of health care" set forth in NRS 41A.017, the claims against Sage Creek are not governed by NRS Chapter 41A. We disagree.

Skilled nursing facilities *may* be covered under NRS Chapter 41A when a complaint alleges liability against the facility based on the professional negligence of its nurses, who are "providers of health care" as defined in NRS 41A.017.[13] For instance, in *Estate of Curtis v. South Las Vegas Medical Investors, LLC*, the Nevada Supreme Court determined that NRS Chapter 41A applied to the plaintiff's allegation that a nursing home, through its nursing staff, failed to monitor its patient after administering morphine. 136 Nev. 350, 358, 466 P.3d 1263, 1270 (2020). In *Yafchak v. South Las Vegas Medical Investors, LLC*, the supreme court clarified that the reason NRS Chapter 41A applied to the professional negligence allegation in *Estate of Curtis* was because the plaintiff had "specifically asserted that the underlying negligence was committed by a nurse (a person included within NRS 41A.017's definition of a provider of health care)." 138 Nev. 729, 732, 519 P.3d 37, 40 (2022). In addition,

[13]The version of NRS 41A.017 in effect at the relevant time defined "[p]rovider of health care" as

> a physician licensed pursuant to chapter 630 or 633 of NRS, physician assistant, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractic physician, doctor of Oriental medicine, holder of a license or a limited license issued under the provisions of chapter 653 of NRS, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees.

the supreme court explained that a "nursing home facility may be vicariously liable for the professional negligence of a nursing home employee who is a provider of health care, in which case the nursing home would be subject to NRS Chapter 41A." *Id.*

Engelson's complaint alleged that Sage Creek's nurses and staff were negligent in providing nursing care to Meyer, including by failing to properly treat her sacral bedsore. Engelson further alleged that Sage Creek was vicariously liable under the doctrine of respondeat superior for the negligence of its nursing staff. Insofar as the complaint seeks to hold Sage Creek vicariously liable for the professional negligence of its nurses, we conclude that NRS Chapter 41A necessarily applies to those claims.[14] Further, as we have noted, the district court erred in dismissing those claims as time-barred.

CONCLUSION

The evidence in this case did not irrefutably demonstrate that Engelson or Meyer discovered or should have discovered the legal injury more than a year before Engelson filed her complaint. Therefore, the survivorship claims should not have been dismissed as untimely as a matter of law. Moreover, Engelson's complaint adequately pleaded wrongful death claims based on professional negligence and was timely filed within one year of Meyer's death. Although the district court found the attached affidavit of merit deficient because it did not opine as to the cause of Meyer's death, the affidavit was not required to address causation and adequately supported the allegations of professional negligence for purposes of NRS 41A.071. Accordingly, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

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

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[14]In light of our disposition, we need not determine whether all of Engelson's allegations against Sage Creek and St. Rose-Siena sound in professional negligence as opposed to general negligence, or whether the statute of limitations on Engelson's claims was tolled by Governor Sisolak's emergency directives regarding the COVID-19 pandemic. *See Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008) (explaining that this court need not address issues that are unnecessary to resolve the case at bar).

DAVID WILLIAM McCORD, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 85271

December 28, 2023 540 P.3d 433

Appeal from a judgment of conviction, pursuant to a bench trial, of trafficking in a controlled substance, 100 grams or more but less than 400 grams. Second Judicial District Court, Washoe County; Scott N. Freeman, Judge.

Reversed and remanded.

Evelyn Grosenick, Public Defender, and *John Reese Petty* and *Kathryn E. Reynolds*, Chief Deputy Public Defenders, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, Washoe County, for Respondent.

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

OPINION

By the Court, Stiglich, C.J.:

Law enforcement pulled over appellant David McCord because McCord's Nevada license plate had a dealership frame around it that partially covered the word "NEVADA." According to the deputy who conducted the stop, although he was able to immediately identify the license plate and perform a license plate check, McCord's license plate was not legible as required by NRS 482.275(4). McCord was later charged with trafficking in a controlled substance after contraband was found in his car during the traffic stop. He sought to suppress the evidence on the basis that the traffic stop was unlawful. The State argued that the frame on McCord's license plate was foreign material and obscured the lettering imprinted on the plate, in violation of NRS 482.275(4), and served as probable cause for the traffic stop. The district court agreed and denied the motion to suppress.

In this opinion, we hold that a license plate frame does not constitute "foreign materials" within the meaning of NRS 482.275(4) and a license plate is "clearly legible" if the required registration information is readily identifiable. To hold otherwise would effectively ban license plate frames. Such an outcome would promote discretionary law enforcement and potentially subject otherwise law-abiding motorists to arbitrary or, as here, pretextual traffic

stops. Accordingly, the district court erred in denying McCord's motion to suppress evidence obtained during the traffic stop because there was no probable cause to support the stop based on a violation of NRS 482.275(4). We therefore reverse McCord's judgment of conviction and remand for further proceedings.[1]

FACTS AND PROCEDURAL HISTORY

Detective Apryl McElroy of the Regional Narcotics Unit (RNU) developed a confidential informant whom she instructed to contact McCord and arrange a purchase of methamphetamine. The RNU informed Deputy Ned Nemeth, a member of a canine unit, that McCord would be traveling to Reno and might be in possession of a large amount of methamphetamine. In an effort to protect the informant's identity, the RNU asked Deputy Nemeth to conduct a "wall stop."[2] To facilitate this plan, the RNU provided the deputy with McCord's name and a description of the vehicle he would be driving. According to Deputy Nemeth, the RNU often gave him minimal information about criminal suspects so that he could perform pretextual traffic stops to build cases against those suspects.

Using the information provided by the RNU, Deputy Nemeth located McCord's vehicle and watched for any traffic violations to justify a vehicle stop. Because Deputy Nemeth observed no moving violations, he focused on the vehicle's license plate and the license plate frame. Although Deputy Nemeth immediately identified the license plate as a standard issue Nevada plate and was able to perform a license plate check, he concluded that the license plate nonetheless violated NRS 482.275(4) because the dealership frame partially covered the name of the state. Based on that perceived violation, Deputy Nemeth initiated a traffic stop.

After pulling over McCord, Deputy Nemeth approached the vehicle and spoke with him. Deputy Nemeth told McCord that he would issue a warning for the license plate violation and directed McCord to exit the vehicle to observe the violation. With McCord out of the vehicle, Deputy Nemeth performed a pat down search, discovered a scale with a white crystalline substance on it in McCord's pocket, and asked McCord for permission to search the vehicle. McCord refused to consent to the search. Another deputy arrived on the scene shortly after Deputy Nemeth pulled over McCord. While that deputy worked on the warning citation for the obstructed license plate, Deputy Nemeth deployed his drug detection canine, and the canine

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

[2]A "wall stop," as explained by Detective McElroy, is a police technique where canine units "conduct their own investigation, their own stop and conduct their own probable cause to stop a suspicious subject or vehicle that [the RNU] provide to them."

alerted to the presence of drugs in the vehicle. A search revealed approximately 187 grams of methamphetamine. As a result, McCord was charged with trafficking in a controlled substance.

Before trial, McCord moved to suppress the evidence obtained during the search, arguing that Deputy Nemeth lacked probable cause to make the stop. The district court disagreed, finding that McCord's license plate violated the plain language of NRS 482.275(4) because the plate holder was "in itself a foreign material" and the words "NEVADA" and "Home Means Nevada" were obscured by the holder and thus provided probable cause for the stop. Accordingly, the district court denied the motion to suppress.

After a bench trial, McCord was found guilty of trafficking in a controlled substance, 100 grams or more but less than 400 grams, and was sentenced to serve a minimum of 60 months and a maximum of 150 months in prison. This appeal followed.

DISCUSSION

McCord argues that the district court erred in denying his motion to suppress and finding that the traffic stop was reasonable. A motion to suppress evidence presents mixed questions of fact and law. *State v. Beckman*, 129 Nev. 481, 485, 305 P.3d 912, 916 (2013). We "review[ ] findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo." *Id*. at 486, 305 P.3d at 916.

The Fourth Amendment safeguards individuals from unreasonable searches and seizures. U.S. Const. amend. IV; Nev. Const. art. 1, § 18. A traffic stop is a seizure and therefore is subject to the Fourth Amendment's requirement of reasonableness. *Whren v. United States*, 517 U.S. 806, 809-10 (1996). Such stops are "reasonable where the police have probable cause to believe that a traffic violation has occurred." *Id*. at 810. "The reasonableness requirement strikes a balance between the public interest and the individual's right to personal security free from arbitrary interference by law officers." *State v. Rincon*, 122 Nev. 1170, 1175, 147 P.3d 233, 236 (2006) (internal quotation marks omitted).

It is undisputed that Deputy Nemeth stopped McCord's vehicle under the pretext that the license plate frame obscuring the name of the issuing state violated NRS 482.275(4).[3] The district court found that there was probable cause for the stop because the license plate

[3]The State suggests that Deputy Nemeth had probable cause, independent from the license-plate violation, based on the information provided by the RNU. Although the State raised this alternative argument below, the district court denied the motion to suppress based solely on the alleged violation of NRS 482.275(4) as providing probable cause for the traffic stop. Therefore, we decline to address the State's alternative argument. *See McKay v. City of Las Vegas*, 106 Nev. 203, 207, 789 P.2d 584, 586 (1990) (declining to resolve an issue because the parties did not litigate and the district court did not decide the matter).

frame on McCord's vehicle covered parts of the lettering imprinted on the plate such that it was not "clearly legible" and because the license plate frame was "foreign material." McCord contends that the district court's interpretation of the statute was erroneous.

Statutory interpretation presents a question of law, which we review de novo. *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). When interpreting a statute, the objective "is to give effect to the Legislature's intent." *Id.* To determine legislative intent, we first look to the statute's plain language. *Id.* "[W]e interpret clear and unambiguous statutory language by its plain meaning unless doing so would lead to an unreasonable or absurd result." *Moore v. State*, 136 Nev. 620, 622-23, 475 P.3d 33, 36 (2020).

Proper display of license plates

In relevant part, NRS 482.275(4) provides that "[e]very license plate . . . must be maintained free from foreign materials and in a condition to be clearly legible." The statute thus requires that all license plates meet two requirements: (1) "be maintained free from foreign materials" *and* (2) "be clearly legible." The use of the conjunctive "and" means that if either condition is not satisfied, a license plate is not properly displayed. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 117 (2012) (explaining that "the conjunction *and*," when used between two elements, "entails an express or implied *both* before the first element"). Therefore, we address each requirement in turn.

Whether the license plate was free from foreign materials

McCord argues that the district court erred in concluding that the license plate frame constituted a "foreign material" for purposes of NRS 482.275(4). License plate frames "generally surround the periphery of the plate, leaving the numbers and place of origin readable." *United States v. Flores*, 798 F.3d 645, 649 (7th Cir. 2015). The district court acknowledged McCord's argument that license plate frames are widely used. Indeed, as evidenced by the frame at issue here, automotive dealerships regularly supply frames after a vehicle purchase. And many people attach frames to show allegiance to a social group, alma mater, or sports team as a means of self-expression. Although the Legislature did not define "foreign materials," we are not convinced that the Legislature intended the term to include all license plate frames.

We have already determined that maintaining a license plate "free from foreign materials" is its own requirement under NRS 482.275(4). But in determining the meaning of that requirement, we cannot read it in isolation but must construe the statutory provision as a whole. *See Orion Portfolio Servs. 2, LLC v. County of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531

(2010) (recognizing that "[t]his court has a duty to construe statutes as a whole"). Consistent with NRS 482.275(4)'s overall focus on visibility and legibility, the Legislature clearly intended to ensure that drivers display the required registration information. The purpose of requiring motorists to properly display a license plate is so that a vehicle, and its owner, can be easily identified. *See generally State v. Harrison*, 846 N.W.2d 362, 369 (Iowa 2014) (explaining that "[a]n important purpose of [Iowa's display-of-license-plates law], along with related sections, is to allow police and citizens to identify vehicles"). This purpose is not frustrated by a frame designed to go around the license plate, securing the plate—or the temporary dealer placard affixed after a sale—to the vehicle, which makes the frame sufficiently connected and related to the plate itself such that it is not "foreign." *See Foreign*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014) (defining "foreign," in part, as "alien in character: not connected or pertinent"). Reading the term "foreign materials" broadly to include any specialty or dealer license plate frame would yield an absurd result, as "[s]imply driving a car off the dealer's lot with that type of license plate frame would amount to a violation and give officers a basis to stop the car." *State v. Carter*, 255 A.3d 1139, 1156 (N.J. 2021). And allowing law enforcement the discretion to stop any vehicle with a frame attached to the license plate does not further NRS 482.275(4)'s purpose of ensuring vehicles can be identified. Considering common sense and the public policy interests underlying NRS 482.275(4), we believe that the context and intent of the statute requires a narrow application. Accordingly, we cannot read the requirement that license plates "be maintained free from foreign materials" as including all license plate frames.

Other courts have likewise concluded that license plate frames that do not conceal necessary identifying information do not constitute a traffic violation. In *Whitfield v. United States*, the United States Court of Appeals for the District of Columbia Circuit explained that a literal interpretation of a license plate display regulation would "effectuate a near-complete ban on the use of ubiquitous license plate frames." 99 A.3d 650, 652 (D.C. Cir. 2014). The regulation at issue provided that "[i]dentification tags shall be maintained free from foreign materials and in a clearly legible condition." *Id*. at 657 (quoting D.C. Mun. Regs. tit. 18, § 422.5 (2007)). The court was "not persuaded that a literal interpretation, prohibiting the placement of *any* foreign material over the tag, regardless of whether it obstructs relevant information, furthers any legitimate purpose and would not instead border on unreasonable." *Id*. at 661. Thus, the court declined to interpret the language of the regulation "so broadly as to effectuate a ban on virtually all license plate frames, even those which do not obstruct identifying information." *Id*. at 663; *see also State v. Morris*, 270 So. 3d 436, 439 (Fla. Dist. Ct. App. 2019) (holding that a license plate frame did not constitute

"obscuring matter" and therefore did not violate Florida's license plate display statute (internal quotation marks omitted)).

The Legislature is empowered to enact traffic laws as it sees fit to further the compelling public interest in safe roadways. *See Hinegardner v. Marcor Resorts, L.P. V.*, 108 Nev. 1091, 1096, 844 P.2d 800, 804 (1992) (observing that when an "issue involves many competing societal, economic, and policy considerations, the legislative procedures and safeguards are well equipped to the task of fashioning an appropriate change, if any"). As other courts have observed, "if the legislature wanted to outlaw license plate frames, which are most often placed on the plates by auto dealers, it could have done so." *Morris*, 270 So. 3d at 439. Absent a clear prohibition by the Legislature against the act of applying a license plate frame that does not prevent a vehicle from being identified, we decline to interpret NRS 482.275(4) as doing so.

Whether the license plate was clearly legible

McCord argues that the district court erred in concluding that he violated NRS 482.275(4) because the frame completely covered the phrase "Home Means Nevada" at the bottom of the plate and partially obscured the word "NEVADA" at the top of the license plate. The State contends that McCord's license plate violated the statute because the frame "intrudes onto the written portion of the plate itself."

A license plate frame covering nonessential information imprinted on a license plate does not violate NRS 482.275(4)

McCord asserts that the license plate frame covering the phrase "Home Means Nevada" imprinted on the bottom of the license plate is inconsequential. We agree. As acknowledged above, the Legislature intended to ensure that required information is displayed for the purpose of identification. The name of the state song is not necessary identifying information as required by Nevada law. *See Whitfield*, 99 A.3d at 664 (holding that law enforcement "made a mistake of law by stopping appellant's vehicle . . . when the plate's critical identifying information was clearly legible and the license plate frame only obstructed the Texas state nickname on the bottom of the plate"). Under NRS 482.270(5), license plates must display (1) the alphanumeric registration designation; (2) the state name, whether in full or abbreviated; and (3) either the calendar year of registration or the month and year when the registration will expire. A license plate frame covering nonessential information imprinted on license plates does not prevent a vehicle from being readily identified. Therefore, we conclude that a license plate frame covering optional phrases imprinted on standard or specialty license plates does not violate NRS 482.275(4).

A license plate is properly displayed if the necessary information is readily identifiable

McCord argues that the district court erred in concluding that the partial covering of the state name provided probable cause for the traffic stop. Despite the partial obstruction, we agree because the necessary information displayed on the license plate remained readily identifiable.

NRS 482.275(4) requires a license plate "to be clearly visible" and "clearly legible." "Legible" is generally defined as "capable of being read or deciphered" or "capable of being discovered or understood." *Legible*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014). There is a public policy interest in requiring motorists to display a legible license plate because "[l]aw enforcement officials frequently must determine from tag numbers whether a vehicle is stolen; whether it is properly registered; or whether its occupant is suspected of a crime, is the subject of a warrant, or is thought to be armed." *State v. Hayes*, 660 P.2d 1387, 1389 (Kan. Ct. App. 1983); *see also Hinojosa v. State*, 319 S.W.3d 258, 265 (Ark. 2009) (noting that "it is important that the name of the license plate's issuing state be clearly visible for law enforcement officers to identify vehicles that are the subject of 'NCIC BOLOS' (National Crime Information Center 'Be on lookout for' bulletins), and to facilitate citizens' identification of license plates in order to report reckless or intoxicated drivers").

We disagree with the State that NRS 482.275(4) prohibits "even slight infringements on the legibility of the license plate." Reading NRS 482.275(4) to prohibit frames that cover a fraction of some lettering on the license plate provides no guidance to law enforcement. Such an interpretation would give law enforcement nearly unlimited discretion to conduct pretextual stops of vehicles, some which may be random or discriminatory. To avoid similar concerns, the New Jersey Supreme Court in *Carter* chose to apply a narrow reading of the New Jersey license plate display law. 255 A.3d at 1157 ("Because we assume that the Legislature would want us to construe the statute in a way that conforms to the Constitution, we adopt the narrower reading." (internal quotation marks omitted)). Likewise, we construe NRS 482.275(4) narrowly.

Carter further supports our interpretation of NRS 482.275(4). The *Carter* court had the opportunity to consider two alleged violations—one involving a license plate frame that covered the entire phrase "Garden State," and one involving a frame that covered 10 to 15 percent of the same phrase. 255 A.3d at 1148-49. The court determined that the license plate display law "require[d] that *all* markings on a license plate be legible or identifiable" and concluded there was a traffic violation where the frame entirely covered "Garden State." *Id.* at 1157 (emphasis added). For the frame that only partially covered the phrase, however, the court concluded that there was no

traffic violation because the license plate was still legible. *Id.* The court focused, as we do, on the legibility of the license plate and not on the fact that there was a slight obstruction by the frame.

We find further support for our interpretation from the United States Court of Appeals for the Seventh Circuit. In *Flores*, the court reviewed the reasonableness of a traffic stop for a license plate frame that covered the top portion of some of the lettering on the plate that identified the vehicle as registered in Baja California. 798 F.3d at 647. The police officer believed that the frame violated an Illinois statute requiring license plates "to be clearly visible" and "maintained in a condition to be clearly legible, free from any materials that would obstruct the visibility of the plate." *Id*. (quoting 625 Ill. Comp. Stat. Ann. 5/3-413(b) (West 2013)). The court explained that license plate frames are prevalent and reasoned that "[i]t seems to us unrealistic—and unreasonable—to expect a wide segment of the driving population to remove these conventional plate frames in order to avoid a traffic stop." *Id*. at 648-49. The court concluded that the police officer could not have reasonably believed that a driver's use of a license plate frame found on a "vast number of cars" violated the law. *Id*. at 649-50.

We are not presented, as the Kansas Court of Appeals was, with a case in which the license plate was issued by another state and the Nevada police officer was unable to identify the state name or otherwise identify the issuing state from the license plate. *Hayes*, 660 P.2d at 1388, 1390 (considering a scenario where the state name was not visible on the out-of-state license plate and the officer could not identify the issuing state based on the displayed state nickname and determining that "the covering of the state name on a vehicle's license tag renders the tag illegible within the prohibition" under Kansas' license plate display law and justified the traffic stop); *see also Nelson v. State*, 544 S.E.2d 189, 190 (Ga. Ct. App. 2001) (explaining that, "[a]lthough the [Georgia] officer testified that the tag appeared to be a Texas tag, officers should not be forced to guess at the origin of a vehicle tag"). Rather, the situation we consider is one where the deputy was able to immediately identify the issuing state. *See Carter*, 255 A.3d at 1157 (concluding that a partial obstruction of the words "Garden State" did not violate the law where the police officer "conceded he could clearly identify the phrase on the license plate").

In this case, McCord's license plate was clearly legible. Although the license plate frame covered a portion of the word "NEVADA," the word was still readily identifiable. Deputy Nemeth admitted as much when he testified that he identified the issuing state as Nevada and was able to perform a license plate check before initiating the traffic stop. Because the essential information displayed on McCord's license plate remained readily identifiable, we conclude the license plate was legible within the meaning of the statute.

Therefore, we conclude that the district court erred in finding that McCord's license plate violated NRS 482.275(4).[4]

CONCLUSION

A license plate frame does not in and of itself constitute a "foreign material" within the meaning of NRS 482.275(4), and a license plate is "clearly legible" when the required information remains readily identifiable. To hold otherwise would effectively ban the use of ubiquitous license plate frames and promote subjective law enforcement. Such an outcome would be for the Legislature to clearly authorize, not for this court to divine. Because the identifying information on McCord's license plate was readily identifiable, Deputy Nemeth lacked probable cause to justify the traffic stop for a violation of NRS 482.275(4). We therefore conclude that the district court erred in finding that the traffic stop was reasonable and in denying the motion to suppress evidence seized during the stop. Accordingly, we reverse the judgment of conviction and remand this matter for further proceedings consistent with this opinion.[5]

Lee and Bell, JJ., concur.

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[4]The State does not argue that this error was harmless, nor could it, given that the verdict depended entirely on the evidence obtained during the traffic stop.

[5]Given our conclusion, we need not address McCord's contention that the district court erred in denying a motion to suppress statements he made after the traffic stop.

AVA WHITNEY BLIGE, an Individual, Appellant, *v.*
CHRISTOPHER TERRY, an Individual, Respondent.

No. 85214

December 28, 2023 540 P.3d 421

Appeal from a district court amended default judgment in a tort action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Affirmed.

Ava Whitney Blige, Pro Se.

Holland & Hart LLP and *Lars K. Evensen*, *James M. DeVoy*, and *Jenapher Lin*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, C.J.:

Respondent Christopher Terry sued appellant Ava Blige for damages, asserting various contract-based and tort-based claims centered on allegations that Blige extorted cryptocurrency and money for cars from him under threat of publishing his personal information. As a result of discovery abuses, the district court struck Blige's answer to the complaint and entered a default. At a prove-up hearing, the court concluded that Terry had met his burden to establish a prima facie case on his claims of conversion, unjust enrichment, and intentional infliction of emotional distress, for which he was entitled to proven damages. The court also found that the factual allegations, deemed admitted, supported a claim for extortion, despite extortion not being pleaded as a specific claim in the complaint. It then entered a default judgment awarding damages to account for the emotional distress, moneys spent on cars for Blige, and cryptocurrency transferred to Blige; the judgment was later amended to account for the cryptocurrency's value.

On appeal, Blige argues that the district court erroneously determined that she impliedly consented to being sued under the unpleaded legal theory of extortion. We agree with Blige on this issue and hold that, in default proceedings, a defaulting party cannot be found to have impliedly consented to try claims that were not pleaded in the complaint. Although Blige also challenges the judgment on the conversion, unjust enrichment, and emotional distress claims, we conclude that the district court properly determined that Blige wrongfully dispossessed Terry of the cryptocurrency and

money for cars by way of extortive acts under these theories and caused him emotional distress. Accordingly, we affirm the judgment.

FACTS AND PROCEDURAL HISTORY

According to the complaint, Terry is the chief executive officer of an Internet company. Blige worked at that company, first as Terry's personal assistant and later as an independent contractor. Their professional association led to a romantic relationship. While they were romantically involved, Terry gave Blige several luxury items, including cars, cash, and cryptocurrencies. Once the relationship ended, Blige revealed to Terry that she had taken damaging or compromising photographs of him and had made audio and video recordings of his conversations and phone calls. She threatened to publicly release the photographs and recordings unless he complied with her demands for valuables, including cryptocurrency. Terry complied with Blige's demand to transfer Bitcoin to her in hopes that she would not release any of the photographs or recordings. However, after he complied, Blige continued to threaten to publicly release the information unless he met additional demands. To protect himself, Terry transferred more Bitcoin to Blige. Terry eventually made a report of extortion against Blige to the police.

In the underlying civil complaint, Terry sought relief against Blige, alleging, as relevant here, claims for breach of contract, breach of the covenant of good faith and fair dealing, conversion, unjust enrichment, and intentional infliction of emotional distress. Terry also sought declaratory and injunctive relief to prevent Blige from releasing the photographs and recordings. Blige filed an answer, but during discovery, she failed to produce electronically stored information, including the photographs and recordings, and she responded to only one set of discovery requests. As the discovery deadline approached, Blige fired her attorneys, who then filed a motion to withdraw, which the district court granted. The district court ordered Blige, who was proceeding pro se at the time, to respond to all discovery requests by a specified date. Blige failed to respond to the district court's order. Terry then moved for a default as an NRCP 37 sanction for failure to comply with discovery obligations. Blige failed to appear at the October 12, 2021, hearing on the motion, and the district court struck Blige's answer and entered a default, finding that Blige willfully and repeatedly failed to respond to discovery requests and failed to turn over electronically stored information in violation of court orders.

Blige moved to set aside the default, asserting that she was unaware of the court date. She also filed a supplement to her motion with a supporting declaration in which she asserted that (1) she was unaware of the outstanding discovery requests due to her former counsel's withdrawal; (2) she "did not personally receive any new

mail related to any outstanding discovery obligations"; (3) Terry served her with motions and papers by mailing those documents to her parents' house, where she did not live full time; (4) she could not find anything after police had "trashed" the house when executing a warrant; and (5) she was arrested on October 18, 2021, and in jail until around October 23, 2021. The district court denied the motion to set aside the default, noting that the address Blige provided in the motion was identical to the address at which she was served by mail with the order directing her to respond to the discovery requests.

Terry moved for a default judgment, requesting compensatory and punitive damages. At this point, both parties were represented by counsel and appeared at the prove-up hearing, and both Blige and Terry testified. To support his damages, Terry presented screenshots of Bitcoin transfers to Blige and to his car dealer, as well as copies of text messages between him and "Ava," "AvaLavaa," and "Ava 2." Blige objected to the admission of this evidence, but the district court overruled her objection.

The district court granted Terry's motion for a default judgment as to his claims for conversion, unjust enrichment, and intentional infliction of emotional distress, finding that Terry had made a prima facie showing of liability under these theories and had proven resultant damages. Moreover, relying on NRCP 15(b)(2), the district court amended the pleadings to conform to the evidence and found Blige liable for damages resulting from the tort of extortion, even though that tort was not included as a specified claim in the complaint. The court denied Terry's motion as to all other causes of action asserted and instructed Terry to prove the value of the transferred Bitcoin. Terry subsequently submitted his counsel's affidavit in support of the judgment calculation, which relied on the *Wall Street Journal Pro Central Banking*. Over Blige's objection, the district court accepted Terry's valuation and amended its judgment accordingly. In total, the court awarded Terry $2,631,708.86 in compensatory damages and, finding Blige's conduct malicious, oppressive, and in conscious disregard for the consequences, awarded $2,201,358.44 in punitive damages. Blige appeals.

DISCUSSION

Blige contends that the district court abused its discretion by denying her motion to set aside the entry of default. Blige also asserts that the district court (1) improperly found that Blige impliedly consented under NRCP 15(b)(2) to trying a claim for the tort of extortion; (2) admitted and considered unauthenticated evidence of damages; and (3) erred in concluding that Terry made prima facie showings that supported liability and resulting damages for conversion, unjust enrichment, and intentional infliction of emotional distress. We address each of Blige's contentions in turn.

The district court properly denied Blige's motion to set aside the default

Blige argues that the district court abused its discretion by finding no good cause to set aside the default. Specifically, she contends that she demonstrated that her failure to respond to discovery requests resulted from her being unaware of any such requests or of pending hearings, in part because she was arrested on October 18 and detained for five days, and in part because she did not otherwise personally receive mailed orders and notices notifying her of obligations in the case. Blige also argues that she could not have complied with directives to provide the electronically stored photographs and recordings because her electronic devices were seized by the police.

We review the district court's decision regarding whether to set aside a default for an abuse of discretion. *Sealed Unit Parts Co. v. Alpha Gamma Chapter of Gamma Phi Beta Sorority Inc. of Reno*, 99 Nev. 641, 643, 668 P.2d 288, 289 (1983), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997). NRCP 55(c) provides that a district court may set aside a default for "good cause." In asking to set aside a default for good cause, "the moving party must show some excuse for its failure to answer or otherwise defend." *Sealed Unit Parts*, 99 Nev. at 643, 668 P.2d at 289. The "good cause" standard includes NRCP 60(b)(1) grounds for relief, including "mistake, inadvertence, surprise or excusable neglect." *See Intermountain Lumber & Builders Supply, Inc. v. Glens Falls Ins. Co.*, 83 Nev. 126, 129, 424 P.2d 884, 886 (1967).

The record on appeal undermines Blige's claim that she was unaware of the outstanding discovery requests and the hearing date. Blige stated in her declaration in support of the motion to set aside that she reviewed the outstanding requests and provided responses and documentation for the requests to her former attorneys on July 28, 2021. Although she claimed that she believed her former attorneys had turned over those responses to Terry, her former attorneys' sworn declaration in support of their motion to withdraw as counsel confirms that Blige fired her former attorneys on that same day, July 28, 2021, and the attorney-client relationship was irretrievably broken to the extent that counsel had to have Blige escorted out of the law offices by police. Thus, the record contradicts Blige's representations that she reasonably believed the requests were no longer outstanding because former counsel responded to them on her behalf.

Further, the address where Blige was served the order directing her to respond to discovery and the NRCP 37 motion, in which Terry sought an order striking Blige's answer to the complaint and a default, was the same address that Blige used in her motion to set aside. *See Durango Fire Prot., Inc. v. Troncoso*, 120 Nev. 658,

663, 98 P.3d 691, 694 (2004) (declining to set aside a judgment on excusable neglect grounds after rejecting a party's claimed lack of knowledge of a scheduled hearing when notice of the hearing was mailed to the party's address of record). Moreover, a copy of the NRCP 37 motion was served on Blige by email, and Blige did not refute that opposing counsel had the correct email addresses.

Similarly, the district court was within its discretion to find that Blige's arrest on October 18 does not constitute good cause for why she did not attend the October 12 hearing on the NRCP 37 motion. Blige's argument that she could not produce the photographs and recordings because her devices were seized also fails, given that she did not timely claim that those materials were unavailable to her. Therefore, because Blige failed to demonstrate mistake, surprise, excusable neglect, inadvertence, or other excuse that amounted to good cause, we perceive no abuse of discretion in the district court's denial of her motion to set aside the default.

Claims that were not pleaded cannot be tried by implied consent against a defaulting party

Although Terry contends the argument was waived, Blige permissibly argues on appeal that the district court erred when it sua sponte amended the pleadings to include an unpleaded claim of extortion. Blige argues the district court erred by relying on NRCP 15(b)(2) to find that she and Terry impliedly consented to trying extortion as a tort claim because Nevada does not recognize a tort of extortion. We need not resolve whether a party may sue for an extortion tort in Nevada, however, because we conclude that a defaulting party cannot be found to have impliedly consented to try a claim under NRCP 15(b)(2) if the claim was not pleaded in the complaint, even for a clearly established cause of action.

We review a district court's legal conclusions regarding court rules for an abuse of discretion. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). NRCP 15(b)(2) provides that when an issue that is not raised in the complaint is "tried by the parties' express or implied consent, it must be treated in all respects as if raised in the pleadings." An amendment by implied consent is permissible "if prejudice does not result." *Schwartz v. Schwartz*, 95 Nev. 202, 205, 591 P.2d 1137, 1139 (1979) (internal quotation marks omitted).

After default, when a plaintiff's claim is for an amount of damages that is uncertain, the plaintiff must apply to the district court for a default judgment. NRCP 55(b)(2). Further, if the defendant has appeared, the defendant must be served with written notice at least seven days before the district court conducts a prove-up hearing on the default judgment. *Id.* The purpose of this prove-up hearing is limited to determining the amount of damages, conducting an

accounting, establishing the truth of any allegation by evidence, and investigating any other matter. *Id.*

Generally, "[a] default judgment must not differ in kind from, or exceed in amount, what is demanded in the pleadings." NRCP 54(c). *See generally Mitchell v. Mitchell*, 28 Nev. 110, 79 P. 50, 50 (1904) (concluding in default "the relief granted to the plaintiff, if there be no answer, shall not exceed that which . . . [was] demanded in [the] complaint"). However, we have held that when a defaulting party has failed to comply with a discovery order, a plaintiff can amend their complaint to conform with the evidence presented at the prove-up hearing to support a damages award. *Hamlett v. Reynolds*, 114 Nev. 863, 866, 963 P.2d 457, 459 (1998); *see also Kelly Broad. Co. v. Sovereign Broad., Inc.*, 96 Nev. 188, 192-93, 606 P.2d 1089, 1092 (1980) (concluding plaintiff could amend his prayer for relief to conform to the trial evidence for additional amounts that were not pleaded when the defaulting party failed to comply with a court order), *superseded by statute on other grounds as recognized in Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 741 n.39, 192 P.3d 243, 254 n.39 (2008). We have not addressed whether a defaulting party may impliedly consent to an unpleaded *claim* being tried against them in default proceedings.

The Alabama Court of Appeals has addressed the issue in an appeal from a default divorce decree. *Maxwell v. Maxwell*, 188 So. 3d 695 (Ala. Civ. App. 2015). In that case, after the wife defaulted on the divorce claims regarding property distribution, the husband claimed at the prove-up hearing that he should be awarded attorney fees, although he did not plead for such in his complaint. *Id.* at 696. The final judgment included a $5000 award for the unpleaded request for attorney fees. *Id.* When the wife appealed, the husband argued that the claim was tried by implied consent at the divorce proceedings under Alabama Rules of Civil Procedure 15(b) because the issue was raised at trial when his attorney asked if he was requesting attorney fees and because the wife, who was not present at trial, failed to object. *Id.* at 697. In rejecting that argument, the court noted that an issue cannot be tried by implied consent if the opposing party is absent from the proceedings and that "[a] party should have the right to assume that a court's judgment following his default will not extend beyond the issues presented by the complaint." *Id.* (internal quotation marks omitted). *Cf. Matsushima v. Rego*, 696 P.2d 843, 845-46 (Haw. 1985) (concluding under Hawaii's Rule 54(c) that judgment as to quieting title was void because it was not requested in the pleadings); *In re Marriage of Hughes*, 116 P.3d 1042, 1043, 1046 (Wash. Ct. App. 2005) (internal quotation marks omitted) (determining under Washington's Rule 54(c) that "a court has no jurisdiction to grant relief beyond that sought in the complaint" and must "vacate the default to the extent it differed from the

original [complaint]" when the plaintiff alleged she was not pregnant yet changed her pregnancy status and denied her husband's paternity in her default dissolution decree).

Unlike the wife in *Maxwell*, Blige was present at the prove-up hearing. But the defaulting party's presence at a damages prove-up hearing is inapposite to a determination of their liability on a claim that was not pleaded and on which they therefore could not have defaulted. A defaulting party who has made an appearance in the case receives notice of the prove-up hearing. At that point, the defaulting party can assess the claims pleaded against them and the potential damages arising from those claims. On that basis, they may decide not to attend the hearing to contest those damages. A default judgment that reflects those claims and related damages will be entered against them as a result. Likewise, a defaulting party who attends the hearing receives notice of the claims pleaded against them and that the damages arising from those claims will be tried at the prove-up hearing. Therefore, the default judgment entered against a defaulting party who attends the hearing must similarly be limited to damages for the claims pleaded against them. In this regard, we agree with the Alabama appellate court and conclude that, in default proceedings, a defaulting party cannot be found to have impliedly consented to try and be held liable for claims that were not pleaded in the complaint. Accordingly, the district court erred by finding in the default judgment that Blige impliedly consented to try the unpleaded tort of extortion.

The district court did not err in admitting evidence

Blige argues that the district court abused its discretion by admitting evidence related to Bitcoin transfers to Blige and to Terry's car dealer, text messages, and Bitcoin valuations. We review a district court's decision to admit evidence for an abuse of discretion. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005). Nevada's evidence code provides that "[t]he requirement of authentication or identification as a condition precedent to admissibility is satisfied by evidence or other showing sufficient to support a finding that the matter in question is what the proponent claims." NRS 52.015(1). "The testimony of a witness is sufficient for authentication or identification if the witness has personal knowledge that a matter is what it is claimed to be." NRS 52.025.

The district court did not abuse its discretion in admitting evidence related to Bitcoin transfers and text messages

Blige argues that Terry failed to authenticate screenshots of Bitcoin transfers to her and to Terry's car dealer, as well as copies of text messages between Terry and "Ava," "AvaLavaa," and "Ava 2."

When a text message's admissibility is objected to on authentication grounds, the proponent of such evidence must explain the purpose for which they are offering the text message and "provide sufficient direct or circumstantial corroborating evidence of [its] authorship." *Rodriguez v. State*, 128 Nev. 155, 162, 273 P.3d 845, 849 (2012) (internal citation omitted). "Thus, some additional evidence, which tends to corroborate the identity of the sender, is required." *Id.* at 161, 273 P.3d at 849 (internal quotation marks omitted). This evidence "may include the context or content of the messages themselves." *Id.*

Regarding the Bitcoin transfers, Terry testified that he took the screenshots showing the transfers on his phone. He testified that the screenshots depict Bitcoin transactions from his wallet to Blige. Terry testified that all the transactions at issue were transfers to Blige. Similarly, Terry testified that the screenshot exhibit presented in the prove-up hearing depicted a transfer of funds to his car dealer to purchase cars for Blige. This corroboration was sufficient for the district court to determine that Terry authenticated the screenshots of the transfers to Blige and to his car dealer.

As to the text messages, Terry testified that "Ava," "AvaLavaa," and "Ava 2" were all names attached to Blige's phones. He testified that Blige had several phone numbers and that she occasionally spoke on the phone with him using the Ava 2 number. Terry also identified the general time period when the text messages were sent, which was during the alleged extortion. Even Blige testified during the hearing that she was the recipient and Terry was the sender of one of the messages. Terry offered copies of the text messages to show that Blige threatened him with exposure of personal information. Further, the contents of the messages were consistent with Blige and Terry being in a relationship. One of the text messages included a photograph of Blige and Terry posed together while traveling in Europe. In others, the sender "Ava 2" referred to Terry as "baby" or "love." Thus, the content of the text messages also provides circumstantial evidence that "Ava," "AvaLavaa," and "Ava 2" are Blige. *Rodriguez*, 128 Nev. at 162, 273 P.3d at 849. Accordingly, the district court properly determined that Terry authenticated the text messages and acted within its discretion by admitting and considering the screenshots of the Bitcoin transfers and the text messages.

Blige also contends that admitting the text messages violated the best evidence rule. Terry offered the screenshots to prove the content of the text messages, which show that Blige threatened to publish photos and recordings of him. Terry's screenshots satisfy the best evidence rule because Blige has not raised a genuine question regarding the authenticity of the original text messages or shown that it would be unfair to use duplicates, i.e., screenshots of

the original text messages. NRS 52.245(1) (addressing best evidence requirements). Blige provides no support that it was unfair to use the screenshots in lieu of the originals or that she was not the text messages' author. *Id.* Accordingly, we conclude the screenshots did not violate the best evidence rule.

The district court did not abuse its discretion by admitting the evidence related to the Bitcoin valuations

Blige contends that the district court erred in accepting Terry's valuation of the Bitcoin transferred to Blige from May 17, 2019, to October 2020. She argues that Terry failed to provide authority to support his calculation and that he did not establish the *Wall Street Journal* as a reliable source for cryptocurrency valuations.

This court reviews a district court's calculation of damages for an abuse of discretion. *Flamingo Realty, Inc. v. Midwest Dev., Inc.*, 110 Nev. 984, 987, 879 P.2d 69, 71 (1994). NRS 47.130(2)(b) provides that a court may take judicial notice of facts "[c]apable of accurate and ready determination by resort to sources whose accuracy cannot be reasonably questioned, so that the fact is not subject to reasonable dispute."

As evidence of the Bitcoins' value during the relevant period, Terry relied on the *Wall Street Journal Pro Central Banking*'s historical Bitcoin price for each corresponding date of transfer. This process involved taking the average of the "open amount, high, low, and close amount" of the Bitcoin value on the date of transfer and multiplying it by the amount of Bitcoin transferred. The district court found that the *Wall Street Journal Pro Central Banking* was a legitimate source and took judicial notice of its valuations. *See Fierle v. Perez*, 125 Nev. 728, 737 n.6, 219 P.3d 906, 912 n.6 (2009) (observing that courts may take judicial notice of facts "capable of verification from a reliable source"), *as modified* (Dec. 16, 2009), *overruled on other grounds by Egan v. Chambers*, 129 Nev. 239, 240-41, 299 P.3d 364, 365 (2013). Blige does not dispute the numbers or provide any reason why the *Wall Street Journal* did not reflect accurate pricing. Thus, we conclude that Blige has not shown that the district court abused its discretion by taking judicial notice of the *Wall Street Journal* price records to calculate the Bitcoin valuation.

Terry made prima facie showings of conversion, unjust enrichment, and intentional infliction of emotional distress to support the damages awards

Blige argues that the district court impermissibly awarded Terry damages for conversion, unjust enrichment, and intentional infliction of emotional distress. Specifically, Blige contends damages were impermissibly awarded because Terry failed to make prima

facie showings of conversion, as he did not make a demand, and of intentional infliction of emotional distress, as he only experienced stress.

A district court's decision to enter a default judgment as a discovery sanction is reviewed for abuse of discretion. *Kelly*, 96 Nev. at 192, 606 P.2d at 1092. When default judgment is entered "as a discovery sanction, the nonoffending party need only establish a prima facie case." *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 94, 787 P.2d 777, 781 (1990). To do so, the nonoffending party must present sufficient evidence "for each cause of action as well as demonstrat[e] by substantial evidence that damages are attributable to each claim" and their amounts are proven. *Foster v. Dingwall*, 126 Nev. 56, 60, 68, 227 P.3d 1042, 1045, 1050 (2010); *see Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) ("Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008))), *abrogated on other grounds by Tahican, LLC v. Eighth Judicial Dist. Court*, 139 Nev. 11, 15-16, 523 P.3d 550, 554 (2023). Further, the nonoffending party must "show that the amount of damages sought is . . . designed to either compensate the nonoffending party or punish the offending party." *Foster*, 126 Nev. at 64, 227 P.3d at 1047. During the prove-up hearing, the district court considers the allegations in the pleadings deemed admitted in determining "whether the nonoffending party has established a prima facie case for liability." *Id.* at 67, 227 P.3d at 1049-50.

The transfer of property under duress can constitute conversion, and in such cases, demand is not required

Blige argues that Terry did not make a prima facie case for conversion because he did not show that he demanded the return of his property or that such demand would be futile. Nevada appellate courts have yet to address whether a party may successfully assert a claim for conversion when that party turns over property to another based on an arrangement that inherently involves duress, and if so, whether a demand is required.

In *Wantz v. Redfield*, we defined conversion "as a distinct act of dominion wrongfully exerted over another's personal property in denial of, or inconsistent with his title or rights therein or in derogation, exclusion, or defiance of such title or rights." 74 Nev. 196, 198, 326 P.2d 413, 414 (1958). Conversion does not require a manual or physical taking of property. *Bader v. Cerri*, 96 Nev. 352, 357 n.1, 609 P.2d 314, 317 n.1 (1980), *overruled in part on other grounds by Evans v. Dean Witter Reynolds, Inc.*, 116 Nev. 598, 608, 5 P.3d 1043, 1050 (2000). Indeed, tangible and intangible property alike can be converted. *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*,

124 Nev. 901, 904, 193 P.3d 536, 538-39 (2008). The effect of the act is critical to conversion, not the converter's intent, and thus conversion is sufficiently shown when an owner is deprived of their property by the wrongful act of another who assumes dominion over the property. *See Studebaker Bros. Co. of Utah v. Witcher*, 44 Nev. 442, 462, 195 P. 334, 340 (1921). However, conversion must "be essentially tortious," meaning it must be an unlawful act. *Wantz*, 74 Nev. at 198, 326 P.2d at 414 (internal quotation marks omitted).

To that end, other state courts have recognized that conversion includes takings induced by duress. For example, the Supreme Court of Oregon stated, "[i]t is a conversion to obtain chattel property from another by duress." *Gowin v. Heider*, 386 P.2d 1, 18 (Or. 1963). The court affirmed on rehearing that it would be "an unlawful interference with the true owner's dominion" for a wrongdoer to take possession of a motor vehicle by using duress to obtain a power of attorney from the true owner. *Gowin v. Heider*, 391 P.2d 630, 636 (Or. 1964). Similarly, the highest court of Maryland held that "conversion may consist of a wrongful, tortious or unlawful taking of property from the possession of another by theft, trespass, duress, or fraud and without his consent or approbation, either express or implied." *Saunders v. Mullinix*, 72 A.2d 720, 722 (Md. 1950). And the Supreme Court of Mississippi has concluded that there is no liability for conversion if possession was assented to, "unless the assent was obtained by duress or from one lacking capacity to consent or was obtained or acted upon fraudulently." *Latimer v. Stubbs*, 161 So. 869, 869 (Miss. 1935) (internal quotation marks omitted); *see also* Restatement (Second) of Torts § 221(b) (Am. Law Inst. 1965) (recognizing that a conversion may be committed by intentionally "obtaining possession of a chattel from another by fraud or duress"); *id.* § 223(a) ("A conversion may be committed by intentionally . . . dispossessing another of a chattel as stated in §§ 221 and 222 . . . .").

We agree with these courts. Moreover, we note that, while conversion may be established by the refusal of a demand for the property, *Ward v. Carson River Wood Co.*, 13 Nev. 44, 61 (1878), *superseded by statute on other grounds as stated in Menteberry v. Giacometto*, 51 Nev. 7, 12, 267 P. 49, 50 (1928), a demand for return of converted property is not required when the "holder [of the property] asserts ownership," *W. Indus., Inc. v. Gen. Ins. Co.*, 91 Nev. 222, 230, 533 P.2d 473, 478 (1975); *see also Ward*, 13 Nev. at 61-62 ("When there has been an actual conversion, no demand is necessary in order to sustain the action of trover."). Thus, when property is unlawfully obtained through duress, no demand is required.

Here, Terry alleged that he transferred the Bitcoin and money for cars to Blige under duress, to protect himself, because Blige was threatening to publicly release his highly personal information

unless he complied with her demands. Blige's threats were thus wrongful acts used to obtain dominion over Terry's personal property rights. To compensate Terry, the district court awarded him the value of the Bitcoin and the cash used to purchase cars transferred to Blige. Relatedly, the district court awarded Terry the value of the converted Bitcoin as punitive damages to punish Blige. Terry properly supported the calculation of the converted Bitcoin and cash with exhibits and the historical Bitcoin price records. Accordingly, we conclude that the district court did not abuse its discretion by finding that Terry established a prima facie case for conversion and awarding damages.[1]

The district court properly awarded damages for Terry's claim of intentional infliction of emotional distress

Blige argues that Terry failed to establish a prima facie showing of intentional infliction of emotional distress because Terry's stress was insufficient to support severe or extreme emotional distress. Intentional infliction of emotional distress has four elements: "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998). The district court found that the evidence, including the Bitcoin transfers and the text messages between Terry and Blige, was sufficient to establish that Blige's conduct was extreme and outrageous and that she had intent to cause emotional distress or recklessly disregarded the likelihood of doing so. The district court also found that Blige's conduct actually caused Terry extreme or severe emotional distress.

We conclude that substantial evidence supports these findings. Specifically, with respect to the third element, Terry testified he was stressed, and he texted Blige that he had trouble sleeping, had to worry every second, and was afraid. We perceive no error in the district court's conclusion that Blige's conduct caused Terry to succumb to numerous extortions, resulting in him transferring Bitcoin to Blige on 70 occasions to protect himself. Terry's compliance under threat with Blige's outrageous demands for numerous Bitcoin transfers are objectively verifiable indicia that he suffered extreme or severe emotional distress, and Blige's outrageous conduct was so extreme that Terry was not required to show more. *See Miller*, 114 Nev. at 1300, 970 P.2d at 577 (concluding district court did not err in rejecting claim of intentional infliction of emotional

[1]We do not reach Blige's challenge to unjust enrichment because it was not cogently argued. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

distress when the plaintiff "presented no objectively verifiable indicia of the severity of his emotional distress"); *Franchise Tax Bd. of State of Cal. v. Hyatt*, 133 Nev. 826, 855, 407 P.3d 717, 742 (2017) (concluding when "facts support the conclusion that th[e] . . . [conduct] is at the more extreme end of the scale . . . less in the way of proof as to emotional distress suffered . . . is necessary"), *rev'd and remanded on other grounds sub nom. Franchise Tax Bd. of Cal. v. Hyatt*, 587 U.S. 230 (2019). We conclude the district court was in the best position to evaluate the testimony and the veracity of the manifestations of Terry's distress. To compensate Terry, the district court awarded him $70,000. The award was attributable to Terry's claim for intentional infliction of emotional distress because it was for $1000 for each of the 70 times Blige obtained Bitcoin from Terry by threatening him. Thus, the district court found each independent threat sufficiently extreme or outrageous to merit an award of $1000. We determine that substantial evidence supports the district court's finding that Terry established a prima facie case for intentional infliction of emotional distress, and we perceive no error in its resulting award of damages.[2]

CONCLUSION

Because a party cannot default on claims that were not pleaded in the complaint, the defaulting party cannot be found to have impliedly consented to try claims unless the plaintiff included the claims in their pleadings. Regarding the district court's conclusion that the facts supported Terry's claim for conversion, we agree, because although Terry transferred the cryptocurrencies and money for cars in exchange for Blige's promise not to reveal personal information about Terry, that arrangement inherently involved duress. We conclude that when a party uses duress to obtain wrongful dominion over another's property, that act of duress properly supports a claim for conversion under Nevada law. As to the remaining issues, we conclude that the district court acted within its discretion by denying the motion to set aside the default and by admitting the evidence that Blige challenged. It likewise properly exercised its discretion by awarding damages based on its findings that Terry made prima facie showings of conversion, unjust enrichment, and intentional infliction of emotional distress. Thus, we affirm the district court's judgment as to those claims. We conclude, however,

[2]We have considered Blige's remaining arguments, including her assertions that the district court mistakenly stated that discovery abuses had gone on for over a year, that the NRCP 37 sanction was improper, that some of the text messages could have been sent outside of the relevant time period and therefore cannot prove threats during that period, that the district court erred by taking judicial notice of DMV records, and that Terry failed to show Blige caused his stroke, and we find no errors.

that the district court erred by finding that Blige impliedly consented to try the claim of extortion when it was not pleaded in the complaint. Although the claim for extortion was not properly added to the complaint, the district court's award pertaining to that claim is otherwise supported under theories of conversion and unjust enrichment. Further, the award for intentional infliction of emotional distress is likewise appropriate. Accordingly, we affirm.

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