LONNIE LYNN SWEAT, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE STEFANY MILEY, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 71110

October 5, 2017 403 P.3d 353

Original petition for a writ of prohibition or mandamus challenging a district court order denying a motion to dismiss a felony criminal charge.

Petition denied.

Philip J. Kohn, Public Defender, and *Howard Brooks* and *Kenton G. Eichacker*, Deputy Public Defenders, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Real Party in Interest.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

The Double Jeopardy Clause protects a defendant from multiple prosecutions for the same offense. This opinion addresses whether a defendant's failure to comply with the terms of a plea agreement with the State constitutes a waiver of that protection. We hold that where a defendant pleads guilty to a lesser charge pursuant to a plea agreement and fails to comply with the terms of that agreement, he waives his right to be protected from prosecution on a greater charge. Accordingly, we deny the petition.

FACTUAL AND PROCEDURAL HISTORY

On May 9, 2016, the State charged petitioner Lonnie Sweat by way of criminal complaint with battery constituting domestic violence, a category C felony.[1] Pursuant to negotiations with real party in interest the State of Nevada, Sweat agreed to plead guilty in justice court to one count of battery constituting domestic violence,

[1]Battery constituting domestic violence is a felony if the defendant has two or more prior convictions for domestic violence within seven years. Because Sweat had priors in 2010 and 2011, the State opted to proceed as a felony.

a misdemeanor, and in district court to one count of battery constituting substantial bodily harm, a felony. In exchange for his pleas, the State agreed to drop the charge of battery constituting domestic violence as a felony.[2] Per the agreement, Sweat pleaded guilty to the misdemeanor battery constituting domestic violence and was immediately sentenced to time served. Sweat also waived his right to a preliminary hearing and was bound over to district court for entry of plea on the felony count of battery causing substantial bodily harm.

Despite his prior agreement with the State, Sweat refused to plead guilty in the district court. As a result, the State filed an amended information pursuant to NRS 173.035, reinstating the original felony battery constituting domestic violence charge that it had dropped pursuant to the terms of the plea agreement. Sweat filed a motion to dismiss, arguing that his misdemeanor conviction in the justice court barred prosecution of the felony offense in the district court. The district court denied Sweat's motion. The district court held that plea agreements are subject to contract principles and that Sweat violated the spirit of negotiations by reneging on the plea agreement. The district court ordered the State to place the misdemeanor matter back on the calendar with the justice court to withdraw adjudication on the misdemeanor charge.

Sweat now petitions this court for a writ of prohibition, alleging that since he has already been convicted of misdemeanor battery in the justice court, the Double Jeopardy Clause protects him from prosecution for felony battery constituting domestic violence in the district court. We disagree.[3]

DISCUSSION

Sweat's petition should be entertained

A writ of prohibition "arrests the proceedings of any tribunal, corporation, board or person exercising judicial functions, when such proceedings are without or in excess of the jurisdiction of such tribunal, corporation, board or person." NRS 34.320. The issuance of the writ is purely discretionary, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), and it will general-

[2]This plea agreement allowed Sweat to avoid the mandatory prison term associated with the felony domestic battery while the State was able to secure both a felony conviction, albeit probation eligible, and a more recent and priorable domestic battery conviction.

[3]Sweat also argues that this court's decision in *Salazar v. State*, 119 Nev. 224, 70 P.3d 749 (2003), regarding the redundancy doctrine, requires dismissal. Specifically, Sweat relies on *Salazar* for the proposition that the two charges here are redundant because they arise from the same conduct. However, this portion of *Salazar* has been overruled. *See Jackson v. State*, 128 Nev. 598, 611, 291 P.3d 1274, 1282 (2012) ("[W]e disapprove of *Salazar*, *Skiba*, *Albitre*, and their 'redundancy' progeny to the extent that they endorse a fact-based 'same conduct' test for determining the permissibility of cumulative punishment."). Accordingly, this portion of Sweat's argument lacks merit.

ly not issue where the petitioner has a plain, speedy, and adequate remedy in the ordinary course of law. NRS 34.330. A writ of prohibition is an appropriate vehicle to address double jeopardy claims. *See Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009) ("A writ of prohibition will issue to interdict retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense."). Furthermore, considering the petition can be appropriate to clarify an important issue of law. *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997).

Here, Sweat asserts that the district court erred by denying his motion to dismiss on double jeopardy grounds. Sweat has another remedy because he could raise the double jeopardy issue on appeal from a judgment of conviction. *See* NRS 177.015; NRS 177.045. However, that remedy is not adequate to protect the right afforded by the Double Jeopardy Clause—to not be placed twice in jeopardy. Furthermore, Sweat's petition raises an important issue of law that needs clarification—whether a defendant's conviction on a lesser misdemeanor offense in the justice court, as part of a plea agreement with the State, precludes prosecution on a greater felony offense where the defendant has withdrawn from the plea agreement with the State. Accordingly, we exercise our discretion to entertain Sweat's petition.

The misdemeanor battery constituting domestic violence conviction is a lesser-included offense of the felony domestic violence charge

The Double Jeopardy Clause, as recognized by the United States Constitution and the Nevada Constitution, "protects against three abuses: (1) a second prosecution for the same offense after acquittal, (2) a second prosecution for the same offense after conviction, and (3) multiple punishments for the same offense." *Jackson v. State*, 128 Nev. at 604, 291 P.3d at 1278; *see* Nev. Const. art. 1, § 8. At issue in this case is the second protection: Sweat argues that he is being prosecuted twice for the same offense.

The same offense is prosecuted where the elements of one offense are entirely included within the elements of a second offense. *Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006); *see also Estes v. State*, 122 Nev. 1123, 1143, 146 P.3d 1114, 1127 (2006) ("To determine the existence of a lesser-included offense, this court looks to whether the offense in question cannot be committed without committing the lesser offense." (internal quotation marks omitted)). Here, the elements for the felony offense are identical to those elements required for a misdemeanor offense, with the additional requirement that for it to be considered a felony there must be two prior misdemeanors convictions for battery constitut-

ing domestic violence within the previous seven years. *See* NRS 33.018; NRS 200.481; NRS 200.485(1)(c). Thus, the misdemeanor offense constitutes "a lesser included offense and the Double Jeopardy Clause prohibits a prosecution for both offenses." *United States v. Dixon*, 509 U.S. 688, 696 (1993); *see also Estes*, 122 Nev. at 1143, 146 P.3d at 1127.

Sweat waived his double jeopardy claim by accepting a plea agreement and subsequently failing to comply with his obligations under the agreement

While we agree with Sweat's contention that the misdemeanor charge he pleaded guilty to in the justice court is a lesser-included offense of the felony charge he faces in the district court, we reject his contention that the Double Jeopardy Clause prohibits the State from prosecuting him on the felony under the circumstances.

The United States Supreme Court's decision in *Ricketts* guides our decision in this case. *Ricketts v. Adamson*, 483 U.S. 1, 8 (1987). In *Ricketts*, the defendant was indicted for first-degree murder but pleaded guilty to the lesser offense of second-degree murder in exchange for his testimony against two other suspects. *Id.* at 3. The plea agreement provided that "[s]hould the defendant refuse to testify or should he at any time testify untruthfully . . . then this entire agreement is null and void and the original charge will be automatically reinstated." *Id.* at 4. The state trial court accepted the plea agreement and the proposed sentence, but withheld imposition of the sentence. *Id.* The defendant testified at trial and the two suspects were convicted of first-degree murder. *Id.* While the suspects' convictions and sentences were on appeal, defendant was sentenced as per the terms of the plea agreement. *Id.* However, the suspects' convictions and sentences were later reversed by the Arizona Supreme Court and that court remanded their cases for retrial. *Id.*

During the second trial, the defendant was asked to testify as he had during the first trial. *Id.* The defendant refused to testify a second time. *Id*. at 4-5. The State thereafter filed a new information charging the defendant with first-degree murder. *Id.* at 5. The defendant's conviction on the lesser offense was vacated, and he was tried and convicted of first-degree murder. *Id.* at 7.

The United States Supreme Court held that the trial on first-degree murder after the defendant had already pleaded guilty to second-degree murder did not violate double jeopardy principles because the defendant waived his double jeopardy claims when he pleaded guilty and then breached the plea agreement. *Id.* at 11. Although the Court noted that the plea agreement did not explicitly mention the Double Jeopardy Clause or explicitly declare that the defendant would waive his double jeopardy rights if he violated the agreement, it deemed the plea agreement's terms—which stated

that the original first-degree murder charges would be automatically reinstated and the parties would be returned to the positions they occupied before the agreement should the defendant breach the plea agreement—to be the functional equivalent of an explicit waiver of the defendant's double jeopardy rights in the event he breached the agreement. *Id.* at 10. The Court stated that "the Double Jeopardy Clause does not relieve [a defendant] from the consequences of [the] choice" to breach a plea agreement. *Id.*

Other courts have similarly held that a defendant waives his double jeopardy rights where he fails to comply with his obligations under a guilty plea agreement, even if the terms of the agreement do not explicitly address double jeopardy. In *State v. De Nistor*, for example, the Supreme Court of Arizona, without addressing whether the plea bargain notified the defendant of her double jeopardy rights, stated that a defendant "of course waives the jeopardy defense" if the defendant "after acceptance of a guilty plea by the court, moves to withdraw his guilty plea" and the withdrawal is granted. 694 P.2d 237, 242 (Ariz. 1985). Similarly, in *Dutton v. State*, the Alaska Court of Appeals held that reinstatement of third-degree assault charges after defendant was convicted of fourth-degree assault charges, as part of a plea deal, did not violate defendant's double jeopardy rights where defendant withdrew from his plea deal. 970 P.2d 925, 935 (Alaska Ct. App. 1999). This applied although the plea agreement did not explicitly outline waiver of double jeopardy as part of the remedies upon withdrawal of the plea. *Id*. The *Dutton* court stated that "criminal defendants may relinquish their double jeopardy rights by their conduct . . . even though no judicial officer ever explains the double jeopardy consequences of his conduct beforehand." *Id.* at 932. The *Dutton* court held that, under these circumstances, the State could seek rescission of the plea agreement and reinstate the original charges. *Id.* at 933.

We agree, and hold that Sweat waived his right to be free from multiple prosecutions when he voluntarily failed to comply with the terms of his plea agreement with the State. The State agreed to drop the felony battery constituting domestic violence charge and allow Sweat to plead guilty in justice court to the charge of misdemeanor battery constituting domestic violence in exchange for Sweat pleading guilty in the district court to battery resulting in substantial bodily harm. Thus, Sweat only obtained the lesser charge as part of the plea bargain with the State. After he had been sentenced to credit for time served for the misdemeanor conviction, obtaining one of the benefits of his bargain, Sweat voluntarily failed to follow through with the remaining terms of the plea agreement, then looked to the Double Jeopardy Clause to protect him from the consequences of his decision to back out of the deal. As we stated in *Righetti v. Eighth Judicial District Court*, "[t]he Double Jeopardy Clause was designed to protect defendants from harassment and oppression, not

to shield defendants . . . from their decisions to gamble on novel interpretations of law which ultimately prove unsuccessful." 133 Nev. 42, 50, 388 P.3d 643, 649 (2017) (internal citations omitted).

Accordingly, we deny Sweat's petition.[4]

HARDESTY and PARRAGUIRRE, JJ., concur.

CAREY HUMPHRIES, AN INDIVIDUAL; AND LORENZA ROCHA, III, AN INDIVIDUAL, APPELLANTS, *v.* NEW YORK-NEW YORK HOTEL & CASINO, A NEVADA LIMITED LIABILITY COMPANY, DBA NEW YORK-NEW YORK HOTEL & CASINO, RESPONDENT.

No. 65316

October 5, 2017 403 P.3d 358

Appeal from a district court summary judgment in a negligence action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Reversed and remanded.

[Rehearing denied January 4, 2018]

[En banc reconsideration denied April 27, 2018]

PICKERING, J., dissented.

Drummond Law Firm and *Craig W. Drummond*, Las Vegas; *Hofland & Tomsheck* and *Joshua L. Tomsheck*, Las Vegas, for Appellants.

Kravitz, Schnitzer & Johnson, Chtd., and *Martin J. Kravitz* and *Kristopher T. Zeppenfeld*, Las Vegas, for Respondent.

Before PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

Appellants seek to hold the respondent casino civilly liable for injuries they suffered during an altercation with another patron on the respondent's casino floor. NRS 651.015 precludes such liability

[4]We note that this decision is limited to whether Sweat can be *prosecuted* for both the misdemeanor and felony charges. In light of the district court's minute order instructing the State to place the matter back on the calendar with the justice court to withdraw adjudication on the misdemeanor charge, we need not reach the issue of whether Sweat can be *convicted* on both charges.

unless the wrongful act that caused the injuries was foreseeable. The statute further provides that a wrongful act is not foreseeable unless the owner or innkeeper failed to exercise due care for the safety of the patron or other person on the premises or had notice or knowledge of prior incidents of similar wrongful acts on the premises.

In this case, the district court granted summary judgment in favor of respondent, finding that the casino did not owe a duty to appellants pursuant to NRS 651.015 because the casino had no "notice or knowledge" the other patron would assault appellants. We do not view a foreseeability analysis under NRS 651.015 to be so restrictive. Foreseeability based on the failure to exercise due care does not depend solely on notice or knowledge that a specific wrongful act would occur, but instead is about "the basic minimum precautions that are reasonably expected of an [owner or] innkeeper." *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 860, 265 P.3d 688, 691 (2011). And foreseeability based on notice or knowledge of "[p]rior incidents of similar wrongful acts," NRS 651.015(3)(b), requires a case-by-case analysis of similar wrongful acts, including, without limitation, the level of violence, location of attack, and security concerns implicated. Because the district court failed to properly consider NRS 651.015(3)(b), and the record shows respondent's knowledge of prior similar on-premises wrongful acts, we reverse the district court's order granting summary judgment.

FACTS AND PROCEDURAL HISTORY

Appellants Carey Humphries and Lorenzo Rocha were walking through respondent New York-New York Hotel & Casino's (NYNY) casino floor at 3:50 a.m. Humphries exchanged pleasantries with a woman who was accompanying another casino patron, Erick Ferrell. Ferrell began conversing with Humphries and allegedly made a vulgar comment to her. Humphries responded and made a spitting motion towards Ferrell and then turned to walk away. Ferrell attacked Humphries, hitting and kicking her multiple times, and allegedly throwing her into a slot machine. Rocha, who was playing a slot machine when the attack began, attempted to intervene and was also hit by Ferrell.

An NYNY security guard responded and immediately reported the altercation over his radio. The security guard then watched the attack for 12 to 15 seconds until backup arrived before intervening to break up the incident. The attack lasted a total of 17 seconds. As a result of the attack, Humphries suffered a skull fracture and some other minor injuries. Rocha received injuries to his face and head.

NYNY's casino floor is approximately 85,000 square feet. NYNY had not conducted a security audit to determine whether the number of guards staffed at any given time was sufficient to cover the casino floor. On the night in question, NYNY staffed five security guards

on the casino floor. Two of those security guards could not freely respond to incidents because they were responsible for money drops. However, there were additional security personnel from other parts of the property that could respond to incidents on the casino floor if necessary. Also, two officers from the Las Vegas Metropolitan Police Department were on the premises.

Humphries and Rocha filed a complaint against NYNY alleging that the casino was liable for the injuries they sustained. After significant discovery, the district court granted summary judgment in favor of NYNY, finding that NYNY did not owe a duty of care. Humphries and Rocha appeal.

DISCUSSION

This court reviews district court summary judgment orders de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment should only be granted when the pleadings and record establish that no genuine issue of material fact exists and "that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id.*

NRS 651.015's duty of care

A plaintiff must establish four elements to succeed in an innkeeper liability suit: "(1) duty, (2) breach, (3) proximate causation, and (4) damages." *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 858, 265 P.3d 688, 690 (2011). NRS 651.015(2)(a) states that innkeepers owe a duty of care for on-premises injuries caused by third parties when "[t]he wrongful act which caused the death or injury was *foreseeable*." (Emphasis added.) "The court shall determine as a matter of law whether the wrongful act [referred to in NRS 651.015(2)(a)] was foreseeable . . . ." NRS 651.015(2). "If an injury is unforeseeable, then the innkeeper owes no duty, and the district court has no occasion to consider the remaining elements of the plaintiff's cause of action . . . ." *Estate of Smith*, 127 Nev. at 859, 265 P.3d at 691.

For the purposes of determining duty under NRS 651.015(2)(a), NRS 651.015(3) provides that an incident may be foreseeable in two distinct ways:

> (a) The owner or keeper failed to exercise due care for the safety of the patron or other person on the premises; or
>
> (b) Prior incidents of similar wrongful acts occurred on the premises and the owner or keeper had notice or knowledge of those incidents.

See Estate of Smith, 127 Nev. at 862, 265 P.3d at 693 ("[P]roof of prior incidents of similar wrongful acts are sufficient, but not always necessary, for establishing the existence of a duty.").

The district court failed to properly consider NRS 651.015(3)

The district court's order, citing to *Estate of Smith*, stated: "Under Nevada law, an innkeeper may owe a duty when the circumstances prior to the subject incident provide 'requisite foreseeability' of the resultant crime." Determining that an innkeeper needed "notice or knowledge" to be liable, the court found that NYNY could not have foreseen the fight because the altercation between Ferrell and Humphries was spontaneous. Therefore, the court concluded that NYNY did not owe a duty of care to Humphries and Rocha.

In *Estate of Smith*, Daniel Ott and two friends joined a "boisterous group of people" that gathered in a casino lounge. 127 Nev. at 857, 265 P.3d at 690. The casino deployed security personnel to ask the group to leave the premises within five minutes of Ott's arrival. *Id.* Simultaneously, another casino patron, Allen Tyrone Smith, Jr., stood up and punched one of Ott's friends in the face. *Id*. In response, "Ott immediately revealed a concealed weapon and fatally shot Smith." *Id.* Smith's estate sued the casino under a theory of premises liability. *Id.*

To determine whether the casino owed Smith a duty of care, this court conducted a foreseeability analysis under both NRS 651.015(3)(a) and (b). In interpreting NRS 651.015(3)(a), we stated "that the circumstances surrounding the commission of a wrongful act may provide the requisite foreseeability for imposing a duty." *Id.* at 862, 265 P.3d at 693. We also stated that district courts should "consider . . . circumstances regarding the basic minimum precautions that are reasonably expected of an innkeeper"[1] and should "evaluat[e] foreseeability on a case-by-case basis." *Id*. at 860, 265 P.3d at 691-92. This court concluded that the casino exercised due care because "the circumstances leading up to [the patron]'s murder did not provide the requisite foreseeability for imposing a

[1]NYNY proposes that this court adopt a new test to determine whether an innkeeper has taken basic minimum precautions. The proposed test asks: (1) whether the innkeeper provided any security at the time of the third party's wrongful act, (2) whether the innkeeper's security complied with the law while responding to the wrongful act, and (3) whether the innkeeper's security complied with its own policies while responding to the wrongful act. NYNY fails to cite any authority for this proposed test. Limiting the "exercise due care" analysis in such a way is inappropriate for a few reasons. First, it is inconsistent with NRS 651.015(3)(a)'s plain language. In some situations, "due care" requires more than an innkeeper providing a minimum level of security. Second, the proposed test contradicts Nevada jurisprudence on the subject. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, allows courts to consider any relevant circumstances in determining foreseeability under NRS 651.015(3)(a). 127 Nev. 855, 860, 265 P.3d 688, 692 (2011). Third, the three proposed prongs are extraordinarily deferential to innkeepers; so much so that the test would practically eradicate any potential duty owed under NRS 651.015(3)(a). For these reasons, we do not adopt the test proposed by NYNY.

duty . . . under NRS 651.015(3)(a)" as security was promptly dispatched and there was no indication that the third party had a gun. *Id*. at 862, 265 P.3d at 693.

In regard to NRS 651.015(3)(b), we considered prior similar wrongful acts that had occurred at the casino. The record reflected numerous fistfights and robberies inside the casino, two reports of firearms being brandished in the casino parking lot, and one report of shots fired near the parking lot. *Id.* at 861-62, 265 P.3d at 693. However, this court determined that the prior incidents were not "similar" to Ott's shooting of Smith, and we therefore concluded that the casino did not owe Smith a duty of care. *Id.* at 862, 265 P.3d at 693.

Here, the district court failed to properly consider NRS 651.015(3) in reaching its decision. The court first impermissibly restricted NRS 651.015(3)(a)'s "fail[ure] to exercise due care" analysis to whether an innkeeper has notice that a specific wrongful act is about to occur. *Estate of Smith* was not intended to restrict NRS 651.015(3)'s duty analysis in such a way. To be sure, indications that a wrongful act is about to occur are relevant, but not dispositive, under paragraph (a). The proper analysis under NRS 651.015(3)(a) "is akin to [a] totality of the circumstances approach."[2] *Estate of Smith*, 127 Nev. at 860, 265 P.3d at 692 (internal quotation marks omitted).

Moreover, the district court wholly failed to consider NRS 651.015(3)(b) and whether NYNY had a duty of care because of prior similar on-premise incidents. NRS 651.015(3)'s plain language provides that a duty can be imposed under either (a) or (b) by joining the paragraphs with "or." *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 116 (2012) (stating that when considering a list of options, "or" creates alternatives while "and" creates a conjunctive list). As part of its motion for summary judgment, NYNY included a year's worth of incident reports detailing on-premise assaults and batteries; however, nothing in the district court's analysis demonstrates that the court considered this evidence before concluding that the battery on Humphries and Rocha was not foreseeable as "a matter of law." NRS 651.015(2).

The district court erred in concluding that NYNY did not owe Humphries and Rocha a duty of care

Under NRS 651.015(2) and 651.015(3)(b), this court is required to review de novo the district court's determination as to duty owed.

[2]Although we do not provide an analysis or arrive at a conclusion regarding NRS 651.015(3)(a) in this opinion, we note that the district court should have considered many other facts in its analysis, including the amount of security on premise, the length of time it took for security to intervene, and the fact that no security audit had been completed.

See Wood v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Similarly, foreseeability is a question of law that is also subject to de novo review. *Id*. As we indicated in *Estate of Smith*, we believe that, when determining whether prior wrongful acts are sufficiently similar, district courts should consider, among other things, the location, the level of violence, and security concerns implicated between the wrongful act in the lawsuit and any prior wrongful acts on the premises.

Location

The NYNY incident reports that are part of the record before us detail patron-on-patron batteries in night clubs near the casino floor and at the Center Bar adjacent to the casino floor. There were also documented patron-on-security guard incidents on the casino floor, at the Center Bar, and in bathrooms. Importantly, there was also deposition testimony from NYNY's security manager that there were approximately two to three fights a week on the casino floor:

> Q. Could you to your understanding tell us how many fights have occurred on the casino floor at New York-New York in 2010?
> A. I don't have that number.
> Q. Can you give us your best estimate? One a month?
> A. I wish.
> Q. Okay. Well, then can you please elaborate for us, sir?
> A. I would say two to three a week.

It is apparent from this testimony that NYNY was aware of numerous similar patron-on-patron incidents occurring on the casino floor.

Although nothing in the record demonstrates that any of these prior wrongful acts occurred in the exact location on the casino floor where Humphries and Rocha were attacked, requiring such an occurrence would contradict NRS 651.015(3)(b)'s plain language. A similar occurrence requires only general likeness, not factual conformity. *See Similar*, *Black's Law Dictionary* (6th ed. 1990); *cf. Estate of Smith*, 127 Nev. at 862, 265 P.3d at 693 (determining that prior wrongful acts involving firearms that occurred in the parking lot of the casino were dissimilar to the fatal shooting of Smith because no one was shot in the parking lot incidents, and there was no indication that any of the participants were actual patrons of the casino). Unlike in *Estate of Smith*, where Smith was shot inside the casino but many of the prior wrongful acts occurred outside the casino and did not involve casino patrons, in the instant case, Humphries and Rocha were attacked by another casino patron on the casino floor within approximately 200 feet of a nightclub and near the Center Bar, where numerous documented prior incidents involving physical altercations had occurred.

Level of violence

Like the battery against Humphries and Rocha, the documented prior wrongful acts at NYNY involved a similar level of violence. There were reports of patron-on-patron violence including a man head-butting another man in a club, a man punching a woman in a club, three women punching each other in the Center Bar, and a man inappropriately touching a woman and then being shoved over an ottoman in the Center Bar. Additionally, there were reports of casino security being punched, attacked, and assaulted on the casino floor.

During the battery on Humphries and Rocha, security footage shows Ferrell punch and kick Humphries several times in the face. Humphries may also have been pushed or thrown into a slot machine. This physical hand-to-hand altercation without the use of weapons shows a proportional level of violence was involved in the prior wrongful acts on and around NYNY's casino floor.

Security concerns implicated

In moving for summary judgment, Humphries and Rocha argued that NYNY "fail[ed] to provide adequate and reasonable security," and specifically challenged the security response times and staffing on the large, open casino floor. An NYNY security guard responded to the incident involving Humphries and Rocha and immediately reported the altercation over his radio. The security guard then watched the attack for 12 to 15 seconds until backup arrived, before intervening to break up the incident. Other prior wrongful acts also appear to call into question NYNY's staffing and response times.

After careful consideration of the evidence in the record before us, we conclude that the battery against Humphries and Rocha was foreseeable based on NYNY's notice or knowledge of "[p]rior incidents of similar wrongful acts [that] occurred on the premises." NRS 651.015(3)(b). We thus conclude that the district court erred in finding that, as a matter of law, NYNY did not owe a duty of care to Humphries and Rocha. Accordingly, we reverse the district court's order granting summary judgment and remand this matter for further proceedings consistent with this opinion. On this record, NYNY owed a duty of care to Humphries and Rocha under NRS 651.015(3)(b).

PARRAGUIRRE, J., concurs.

PICKERING, J., dissenting:

I would affirm the district court's order granting summary judgment based on NRS 651.015 and *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 265 P.3d 688 (2011).

The patron-on-patron fight in this case occurred on the casino floor and erupted without forewarning. A single security guard saw

it start and radioed for back up. Back up security arrived immediately and, together, the security guards broke up the fight; the fight lasted no more than 17 seconds in total, start to finish. *Smith* tells us that, in assessing statutory "foreseeability" for purposes of NRS 651.015, we look to dangers suggested by past incidents in the casino, not incidents that occurred in NYNY's parking lot, between couples in its guest rooms, or in its nightclub, 127 Nev. at 861, 265 P.3d at 692, and ask whether, based on that history, the security measures in place had proved inadequate. Though altercations had occurred in the past between NYNY casino patrons, in this case as in *Smith*, NYNY "casino security [had] handled the [past] disturbances . . . while maintaining the safety of customers inside the casino." *Id.* at 862, 265 P.3d at 693.

Under *Smith*, foreseeability of Ferrell's criminal act, as defined by NRS 651.015(3), was not established. The record demonstrates neither "[p]rior incidents of similar wrongful acts" that security did not contain nor a "fail[ure] to exercise due care." NRS 651.015(2) tasked the district court with making this judgment call, and it made the call correctly under *Smith*, 127 Nev. at 859, 265 P.3d at 691. But the majority goes further: It directs entry of partial summary judgment against NYNY. Given the record in this case, which shows virtually no history of patron-on-patron assaults on the casino floor that security did not contain, it is hard to imagine a casino floor fight case in which foreseeability will not be deemed established as a matter of law. As this result runs counter to both NRS 651.015 and *Smith*, I respectfully dissent.

ROBERT L. MENDENHALL, AN INDIVIDUAL; AND SUNRIDGE CORPORATION, A NEVADA CORPORATION, APPELLANTS, *v.* RONALD TASSINARI, AN INDIVIDUAL; AND AMERICAN VANTAGE BROWNSTONE, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 68053

October 5, 2017 403 P.3d 364

Appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Marquis Aurbach Coffing and *Micah S. Echols, Avece M. Higbee*, and *Adele V. Karoum*, Las Vegas; *Howard & Howard Attorneys PLLC* and *Gwen Rutar Mullins* and *Wade B. Gochnour*, Las Vegas, for Appellants.

Santoro Whitmire and *Nicholas J. Santoro* and *Oliver J. Pancheri*, Las Vegas; *Harry Paul Marquis, Chtd.*, and *Harry Paul Marquis*, Las Vegas; *Legal Offices of James J. Lee* and *James J. Lee*, Las Vegas, for Respondents.

Before DOUGLAS, GIBBONS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, J.:

This case addresses the tension in the law that arises where a party that served an NRCP 68 offer of judgment discovers facts, during the ten-day irrevocable period for acceptance of NRCP 68 offers, that would otherwise impact the offering party's decision to serve an NRCP 68 offer in the first instance. Specifically, we must determine whether claims that are brought by the offering party in a second action, and arise out of these facts that were discovered after serving the NRCP 68 offer, are barred by general principles of claim preclusion or by the very terms of the NRCP 68 offer.

We hold that both the general principles of claim preclusion and the terms in an NRCP 68 offer are implicated where a party seeks to relitigate claims after entry of a final judgment pursuant to the NRCP 68 offer, even when they arise out of facts discovered during the NRCP 68 offer's ten-day irrevocable period for acceptance. We further hold that these subsequent claims are barred where principles of claim preclusion apply or, in the alternative, where the terms of the offer of judgment indicate that such claims are barred. Because appellants' claims are barred by both the doctrine of claim preclusion and by the terms of the offer of judgment, we affirm the district court's decision.

FACTUAL AND PROCEDURAL HISTORY

This appeal involves two distinct cases. The first case was dismissed after payment of an accepted offer of judgment (district court case no. A653822, the First Action), and the second case was dismissed under the doctrine of claim preclusion because it raised claims that were or could have been raised in the First Action (district court case no. A708281, the Second Action).

In the First Action, Brownstone Gold Town, LLC, and Brownstone Gold Town CV, LLC (collectively, the Brownstone Entities), sued appellants Robert Mendenhall and Sunridge Corporation for allegedly breaching an agreement entered into by the parties (the Term Sheet).[1] Pursuant to the Term Sheet, appellants agreed to con-

[1]AVB was the parent company of the Brownstone Entities.

tribute real property for the development of a 300-room hotel with casino and convention space. In exchange for the contribution of the property, appellants agreed to receive a 27 percent membership interest. The Term Sheet further provided that the Brownstone Entities would contribute $1,500,000 for a 2.7 percent membership interest, while other unnamed, nonparty investors (the Other Investors) would contribute $7,000,000 for a 12.6 percent membership interest. Additionally, the Term Sheet included signature blocks for the following four parties: (1) respondent American Vantage Brownstone, LLC (AVB), (2) the Brownstone Entities, (3) appellants, and (4) the Other Investors.

Relying on the Term Sheet, the Brownstone Entities invested considerable time and expense in acquiring plans, surveys, approvals, and land use entitlements. However, in spite of their assurances that they would contribute the property, appellants failed to fulfill this obligation. Alleging that appellants had breached the Term Sheet, the Brownstone Entities brought suit.

Before trial commenced in the First Action, appellants presented the Brownstone Entities with an offer of judgment (the Offer) in the amount of $1,200,000. The Offer was "in settlement of all claims between and among ROBERT L. MENDENHALL, SUNRIDGE CORPORATION, BROWNSTONE GOLD TOWN, LLC and BROWNSTONE GOLD TOWN CV, LLC *or those asserted or that could have been asserted on behalf of each of them against one another*." (Emphasis added.) The Offer further stated:

> Acceptance of this Offer of Judgment would fully discharge and release any and all claims as alleged, *or that could have been alleged*, in this action by ROBERT L. MENDENHALL, SUNRIDGE CORPORATION, BROWNSTONE GOLD TOWN, LLC, and BROWNSTONE GOLD TOWN CV, LLC, including, but not limited to, those asserted in the Complaint *as well as any related or potential claims* that could be asserted in this action against one another.

(Emphases added.)

Near the end of discovery, and during the Offer's ten-day irrevocable period, appellants learned that respondent Ronald Tassinari, a corporate officer of AVB, allegedly committed fraud concerning the Term Sheet. In particular, Tassinari testified during his deposition that he signed the Term Sheet on behalf of the Other Investors, even though prior representations were made that there were nonparty investors who would contribute the required amount of capital. Thus, appellants filed for leave to amend their answer to add a third-party complaint against respondents and assert counterclaims against the Brownstone Entities. The proposed amended pleading

included allegations that Tassinari was a principal of the Brownstone Entities and AVB and that Tassinari, individually and in his role with the Brownstone Entities and AVB, misled appellants into believing there were other third-party investors. Appellants' motion argued that the claims arose out of the same set of facts and transactions as those set forth in the complaint.

The Brownstone Entities accepted the offer of judgment and the First Action was dismissed with prejudice, however, rendering appellants' motion moot. A few months after the Offer was accepted, appellants initiated the Second Action by filing a complaint that alleged fraud against respondents. Respondents subsequently filed a motion to dismiss appellants' complaint, which the district court granted. Ultimately, the district court determined that the doctrine of claim preclusion barred the Second Action. The court found that (1) the order of dismissal from the First Action was a final, valid judgment; (2) the claims asserted by appellants in the Second Action were based upon the same claims asserted in the First Action, or they could have been brought in the First Action; and (3) respondents were privies of the Brownstone Entities. This appeal followed.

DISCUSSION

The crux of appellants' argument is that the district court misinterpreted the doctrine of claim preclusion when it granted respondents' motion to dismiss. In particular, appellants argue that (1) respondents are not privies of the Brownstone Entities; (2) claim preclusion does not apply because the claims in the Second Action were not based on the same cause of action and were not "brought in the first case" because the district court did not consider them; (3) the fraud claims they asserted in the Second Action were not compulsory claims, but merely permissive claims, and thus the doctrine of claim preclusion does not apply; and (4) the fraud claims they asserted in the Second Action could not have been asserted in the First Action because they discovered respondents' alleged fraud during the Offer's ten-day irrevocable period, and thus, a formal barrier existed to their ability to bring the claims brought forth in the Second Action.

In deciding a motion to dismiss, if the district court considers matters outside the pleadings—as was the case here—the motion "shall be treated as one for summary judgment and disposed of as provided in Rule 56." NRCP 12(b); *Thompson v. City of N. Las Vegas*, 108 Nev. 435, 438, 833 P.2d 1132, 1134 (1992). Pursuant to NRCP 56(c), summary judgment is proper when no genuine issue of material fact remains and the movant is entitled to a judgment as a matter of law. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

Claim preclusion applies

This court has established a three-part test for determining whether claim preclusion applies. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008), *holding modified on other grounds by Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015). These three factors include determining whether "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id.* (footnote omitted).

The parties or their privies are the same

Nevada law previously limited the concept of privity to situations where the individual "acquired an interest in the subject matter affected by the judgment through . . . one of the parties, as by inheritance, succession, or purchase." *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 481, 215 P.3d 709, 718 (2009) (internal quotation marks omitted), *modified on other grounds by Garcia v. Prudential Ins. Co. of Am.*, 129 Nev. 15, 293 P.3d 869 (2013). More recently, in *Alcantara v. Wal-Mart Stores, Inc.*, this court adopted the Restatement (Second) of Judgments § 41, which additionally recognizes privity under an "adequate representation" analysis, but this applies only to persons who represent a litigant's interests. 130 Nev. 252, 261, 321 P.3d 912, 917 (2014).

"However, privity may also be found in other circumstances, beyond those categories noted in the Restatement . . . ." *Rucker v. Schmidt*, 794 N.W.2d 114, 118 (Minn. 2011). Indeed, "[c]ontemporary courts . . . have broadly construed the concept of privity, far beyond its literal and historic meaning, to include any situation in which the relationship between the parties is sufficiently close to supply preclusion." *Vets North, Inc. v. Libutti*, No. CV-01-7773-DRHETB, 2003 WL 21542554, at *11 (E.D.N.Y. Jan. 24, 2003) (internal quotation marks omitted). The United States Court of Appeals for the Ninth Circuit, for example, has stated that although the concept of privity was traditionally limited to certain "legal relationships in which two parties have identical or transferred rights with respect to a particular legal interest," such as co-owners of property, decedents and heirs, joint obligees, etc., *Headwaters Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1053 (9th Cir. 2005), it now encompasses a relationship in which "there is substantial identity between parties, that is, when there is sufficient commonality of interest." *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003) (internal quotation marks omitted). This expansion has been, at least in part, dictated by the reality that privity is not susceptible to a clear definition. *See Rucker*, 794 N.W.2d at 118; *Clemmer v. Hartford Ins. Co.*, 587 P.2d 1098,

1102 (Cal. 1978), *overruled on other grounds by Ryan v. Rosenfeld*, 395 P.3d 689 (Cal. 2017).

We recognize that privity does not lend itself to a neat definition, thus determining privity for preclusion purposes requires a close examination of the facts and circumstances of each case. *Rucker*, 794 N.W.2d at 118; *Citizens for Open Access to Sand & Tide, Inc. v. Seadrift Ass'n*, 71 Cal. Rptr. 2d 77, 88 (Ct. App. 1998); *see also Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015) (modifying the *Five Star* test to include claims that fall under a theory of nonmutual claim preclusion).

Here, the record demonstrates a substantial identity between the parties. Appellants were parties to both the First Action and the Second Action. Although respondents were not parties to the First Action, the district court found that they were privies of the Brownstone Entities, plaintiffs in the First Action. In particular, AVB was the Brownstone Entities' parent company and a party to the Term Sheet. Furthermore, Tassinari, in his capacity as a corporate officer of AVB, signed the Term Sheet. Appellants acknowledged this close relationship by alleging that Tassinari acted both individually and on behalf of the Brownstone Entities and AVB in making representations to appellants in order to induce them to execute the Term Sheet. Additionally, both respondents and the Brownstone Entities obtained a legal right under the Term Sheet, which appellants breached by failing to provide the property for development of the casino and convention space. More importantly, fraud in the inducement is an affirmative defense to a breach of contract claim, and respondents would have had the same interest in defending against fraud committed by the Brownstone Entities. Indeed, appellants seemed to recognize this when filing the motion to amend the pleadings in the First Action to include claims against respondents and the Brownstone Entities.

The final judgment is valid

Although we have never addressed whether an accepted offer of judgment and subsequent order under NRCP 68 constitutes a final judgment for purposes of claim preclusion, other courts have held that they do. *See Arizona v. California*, 530 U.S. 392, 414 ("In most circumstances, it is recognized that consent agreements ordinarily are intended to preclude any further litigation on the claim. . . ."), *supplemented*, 531 U.S. 1 (2000); *Mallory v. Eyrich*, 922 F.2d 1273, 1280 (6th Cir. 1991) (stating that a Rule 68 judgment is a particular type of consent judgment); *see also* 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443 (2d ed. 2002). We agree and hold that an order based on an accepted offer of judgment under NRCP 68 constitutes a final judgment for purposes of claim preclusion.

The Second Action is based on the same claims or any part of them that were or could have been brought in the First Action

Regarding the issue of commonality between the initial and subsequent claims, this court had previously articulated that "the first and second complaint" needed to be "based on the same set of common facts" and had to seek the same relief. *Edwards v. Ghandour*, 123 Nev. 105, 118, 159 P.3d 1086, 1094-95 (2007), *abrogated by Five Star*, 124 Nev. 1048, 194 P.3d 709. In addition, the court looked to "whether an identity of causes of action exist[ed] between the two complaints." *Id.* at 118, 159 P.3d at 1095. *Five Star*, however, signaled a departure from this "overly rigid" test for applying claim preclusion. *See* 124 Nev. at 1054, 194 P.3d at 712. The *Five Star* court rejected the test set forth in *Edwards* and applied claim preclusion where "the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Id.* at 1054, 194 P.3d at 713. The test for determining whether the claims, or any part of them, are barred in a subsequent action is if they are "based on the same set of facts and circumstances as the [initial action]." *Id.* at 1055, 194 P.3d at 714.

Here, both claims are based on the facts underlying the Term Sheet. The Brownstone Entities alleged a breach of contract based on appellants' failure to contribute the property upon which the 300-room hotel and casino with convention space would be built, as reflected in the Term Sheet. Appellants' claims in the Second Action are clearly based on the same circumstances as those in the First Action, as appellants allege that they were fraudulently induced into signing the Term Sheet by making it appear that other investors were contributing funds. These claims could clearly have been raised in the First Action as an affirmative defense. Furthermore, appellants' motion to amend the pleadings in the First Action reflects the reality that these claims could have been brought in the First Action. Accordingly, the third *Five Star* factor is met.[2]

The claims were not permissive counterclaims

Appellants also argue that claim preclusion does not apply because the claims brought in the Second Action were permissive in nature, as they had not matured at the time of the responsive pleading. We disagree. Under NRCP 13(a), a claim is compulsory "if it arises out of the transaction or occurrence that is the subject matter

[2]Appellants argue that for claim preclusion to apply in Nevada, the two sets of claims must be based on the same "cause of action" and that the test for identical causes of action is whether the sets of facts essential to maintain the two suits are the same. However, the cases that appellants cite in support of their contention all predate *Edwards*, 123 Nev. 105, 159 P.3d 1086, which, as we recognized in *Five Star*, was the first claim preclusion test espoused by this court. 124 Nev. at 1054, 194 P.3d at 712. Neither *Five Star* nor *Weddell* requires such a limited interpretation of claim preclusion.

of the opposing party's claim." NRCP 13(a) further instructs that "[a] pleading shall state [any compulsory claim] which at the time of serving the pleading the pleader has against any opposing party[.]" The definition of transaction or occurrence does not require an identity of factual backgrounds. *See Moore v. N.Y. Cotton Exch.*, 270 U.S. 593, 610 (1926). Instead, the relevant consideration is whether the pertinent facts of the different claims are so logically related that issues of judicial economy and fairness mandate that all issues be tried in one suit. *See United States v. Aquavella*, 615 F.2d 12, 22 (2d Cir. 1979); *see also* Michelle S. Simon, *Defining the Limits of Supplemental Jurisdiction Under 28 U.S.C. § 1367: A Hearty Welcome to Permissive Counterclaims*, 9 Lewis & Clark L. Rev. 295, 301-02 (2005) (stating that "[i]n the most common test, courts have held that the requirement of 'same transaction or occurrence' is met when there is a 'logical relationship' between the counterclaim and the main claim"). Here, both claims are logically related because they both arise out of the same transaction—the signing of the Term Sheet. The Brownstone Entities alleged that appellants breached their duties under the Term Sheet. On the other hand, appellants allege that they were fraudulently induced into signing the Term Sheet, an affirmative defense. Indeed, appellants' motion to amend the pleadings specifically states that the claims arose out of the same set of facts and transactions as those set forth in the complaint. Accordingly, we conclude that the claims set forth in the Second Action are so logically related to those in the First Action that issues of judicial economy and fairness mandate that they be tried in one suit.

Nevertheless, appellants are correct in that there is a maturity exception to compulsory claims. *See Stone v. Dep't of Aviation*, 453 F.3d 1271, 1276 (10th Cir. 2006) (stating that "a party need not assert a counterclaim if it has not matured at the time of the pleading, even if it arises from the same transaction or occurrence") (internal quotation marks omitted); *Stoller Fisheries, Inc. v. Am. Title Ins. Co.*, 258 N.W.2d 336, 342 (Iowa 1977) (analyzing the maturity exception to compulsory claims). "[A] claim matures when the holder thereof is entitled to a legal remedy" or when it accrues. *Stoller*, 258 N.W.2d at 342; *Harris Cty. v. Luna-Prudencio*, 294 S.W.3d 690, 698 (Tex. App. 2009). A legal remedy exists where "the events giving rise to the cause of action develop." *Sky View Fin., Inc. v. Bellinger*, 554 N.W.2d 694, 697 (Iowa 1996). A claim "accrues when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). Here, appellants were entitled to a legal remedy, and their claims had accrued. Tassinari had signed in the line marked for "Other Investor(s)" before the complaint was even filed. These signatures gave rise to the cause of action of fraud in the inducement. Furthermore, appellants sustained an injury when the Brownstone Entities filed a breach of contract claim based on a contract that

appellants were allegedly induced into signing. Thus, appellants' claims had matured.

There is also an exception for claims acquired after the responsive pleadings. *See* 6 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1428 (2010) (noting "[a]n after-acquired claim, even if it arises out of the transaction or occurrence that is the subject matter of the opposing party's claim, need not be pleaded supplementally; the after-acquired claim is not considered a compulsory counterclaim under Rule 13(a) and a failure to interpose it will not bar its assertion in a later suit"). When a party does not know of a claim until after its pleading, it constitutes an after-acquired claim. *See Loveland Essential Grp., LLC v. Grommon Farms, Inc.*, 318 P.3d 6, 11, 14 (Colo. App. 2012). However, even if appellants did not know of the alleged fraud until after the responsive pleading, their claim is not an "after-arising claim" if the lack of knowledge was due to their own negligence or lack of reasonable diligence. *Id.* at 11, 14. Here, appellants had the Term Sheet with Tassinari's signature on the signature blocks for both AVB and "Other Investor(s)" for nearly *seven years* prior to the deposition. At the very least, due diligence would have revealed what appeared to be identical signatures on the signature blocks for AVB and the "Other Investor(s)." Accordingly, the claims were compulsory and no exception applied.

No formal barriers existed that prevented appellants' claims in the First Action

Appellants also argue that the Offer's ten-day irrevocable period imposed a formal barrier for which an exception to claim preclusion should be recognized. The Restatement (Second) of Judgments does provide an exception to claim preclusion where "[t]he judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory . . . scheme . . . ." Restatement (Second) of Judgments § 26(1)(d) (Am. Law Inst. 1982). However, comment e, which elaborates on this subsection, clarifies that this exception only applies where "[t]he adjudication of a particular action . . . in retrospect appear[s] to create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for . . . ." *Id.*

As this court alluded to in *Nava v. Second Judicial District Court*, the statutory scheme provides parties in appellants' position with the ability to seek relief by filing a motion under NRCP 60(b). 118 Nev. 396, 398 n.2, 46 P.3d 60, 61 n.2 (2002). In *Nava*, a civil suit was brought against the defendant based on an accident where the defendant, under the influence of alcohol, rear-ended real party in interest's vehicle. *Id.* at 396-97, 46 P.3d at 60. The defendant was served with an offer of judgment by the real party in interest in the amount of $100,000. *Id.* at 397, 46 P.3d at 60. Under NRCP 68 and

former NRS 117.115,[3] the defendant was required to accept or deny the offer within ten days of service. *Id.* Five days after service of the offer, the defendant received notice that the offer was being withdrawn. *Id.* The reason for the withdrawal was that the real party in interest had elected to have back surgery as a result of the accident, which would increase the damages to more than the $100,000 that had been included in the offer. *Id.* The defendant accepted the offer within the ten-day acceptance period and ignored the notice of withdrawal. *Id.* This court concluded that the offer was irrevocable during the ten-day acceptance period and that there was no provision in the statute to withdraw before the ten days expired. *Id.* at 398, 46 P.3d at 61. However, this court also indicated that the real party in interest could file a motion under NRCP 60(b) to be relieved from a final judgment or order, and that the district court could then evaluate his claims. *Id.* at 398 n.2, 46 P.3d at 61 n.2.

As was the case for the real party in interest in *Nava*, appellants here allegedly discovered facts that would potentially affect the offer of judgment they served on respondents during the irrevocable ten-day period. Furthermore, as was the case for the real party in interest in *Nava*, NRCP 60(b) provides relief for appellants. Specifically, a party may be relieved from a judgment or order where there has been newly discovered evidence, or where there has been fraud, misrepresentation, or other misconduct by the opposing party. *See* NRCP 60(b). Thus, had appellants filed an NRCP 60(b) motion, "the district court could [have] evaluate[d] [their] claims." *Nava*, 118 Nev. at 398 n.2, 46 P.3d at 61 n.2. Accordingly, appellants' case does not fall under § 26(1)(d) of the Restatement (Second) of Judgments because the adjudication of their case in retrospect does not "create such inequities in the context of a statutory scheme as a whole that a second action to correct the inequity may be called for . . . ." Restatement (Second) of Judgments § 26(1)(d) cmt. e (Am. Law Inst. 1982).[4]

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[3]NRS 17.115 has since been repealed. *See* 2015 Nev. Stat., ch. 442, § 41, at 2569.

[4]Appellants raise several other issues regarding claim preclusion, including the arguments that (1) the district court intended to reserve the claims that were in appellants' motion to amend the pleadings, and (2) claim preclusion does not apply where the claims could not have been brought earlier under NRCP 11. We disagree. First, the case cited by appellants stands for the proposition that when a court fails to consider a particular claim that was a part of an action, that claim can reasonably be considered to be reserved. *See Dodd v. Hood River Cty.*, 59 F.3d 852, 862 (9th Cir. 1995). That case does not extend to situations, like here, where the district court fails to consider claims that *were not* part of the action. *See id.* Second, the record suggests that appellants had the Term Sheet in their possession for nearly seven years prior to filing the motion to amend the pleadings. Even without Tassinari's deposition, it is difficult to say that a court would have found that there was no good faith basis for bringing a fraud claim based on the Term Sheet signatures alone, such that NRCP 11 precluded the claim.

Because the three *Five Star* factors are met and no exception to claim preclusion applies, we hold that the claims brought in the Second Action are barred.

The terms in the Offer foreclose the claims in the Second Action

In spite of the claims in the Second Action being barred by general principles of claim preclusion, this court recognizes that a consent judgment, such as one based on an NRCP 68 offer and acceptance, may alter the preclusive effects of a judgment. *See May v. Parker-Abbott Transfer & Storage, Inc.*, 899 F.2d 1007, 1010 (10th Cir. 1990) ("This court recognizes that consent decrees are of a contractual nature and, as such, their terms may alter the preclusive effects of a judgment."); *Mallory*, 922 F.2d at 1280 (stating that an offer of judgment is a particular type of consent judgment); 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4443 (2d ed. 2002) (noting that the nature of consent judgments allows for claim preclusion based on the parties' intent). Therefore, it is also necessary to determine whether the claims in the Second Action are precluded by the consent decree in this case.[5] *See Garcia v. Scoppetta*, 289 F. Supp. 2d 343, 350 (E.D.N.Y. 2003) ("It would be a mistake to suggest that [offers of judgment] should be accorded no preclusive effect.").

As a consent decree is contractual in nature, it is interpreted according to general principles governing the interpretation of contracts. *See Hertz v. State, Dep't of Corr.*, 230 P.3d 663, 669 (Alaska 2010); *Commonwealth v. UPMC*, 129 A.3d 441, 463 (Pa. 2015); *State, Dep't of Ecology v. Tiger Oil Corp.*, 271 P.3d 331, 350 (Wash. Ct. App. 2012). "This court initially determines whether the language of the contract is clear and unambiguous; if it is, the contract will be enforced as written." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (internal quotation marks omitted). In interpreting a contract, "the court shall effectuate the intent of the parties, which may be determined in light of the surrounding circumstances if not clear from the contract itself." *Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215, 163 P.3d 405, 407 (2007) (internal quotation marks omitted). Furthermore, "[a] court

[5]We note that in *May v. Anderson*, this court stated that "once a case has been filed in court, the bar to relitigating that case after an offer of judgment has been accepted does not depend on the terms of a release but rather on the claim preclusion effect of res judicata." 121 Nev. 668, 674, 119 P.3d 1254, 1258 (2005). In *May*, however, we were addressing "whether the essential terms of a release are a material part of a settlement agreement, without which the settlement agreement is never formed, or whether the release's terms are inconsequential in determining whether the parties have reached a settlement agreement." *Id.* at 670, 119 P.3d at 1256. The preclusive effect of an offer of judgment was not squarely before this court, and, thus, these statements are not controlling. *See Kaldi v. Farmers Ins. Exch.*, 117 Nev. 273, 282, 21 P.3d 16, 22 (2001) (stating that dicta is not controlling).

should not interpret a contract so as to make meaningless its provisions," and "[e]very word must be given effect if at all possible." *Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 465, 306 P.3d 360, 364 (2013) (second alteration in original) (internal quotation marks omitted). Lastly, any ambiguity is construed against the drafter. *Anvui*, 123 Nev. at 215-16, 163 P.3d at 407.

Here, the terms of the Offer evince an intent by the parties to prevent a broad set of claims from being raised in a second action. The Offer settled "all claims between *and among*" the parties "or those asserted *or that could have been asserted* on behalf of each of them against one another." (Emphases added.) These included, "but [were] not limited to, those [claims] asserted in the [c]omplaint *as well as any related or potential claims that could* [*have*] *be*[*en*] *asserted in* [*the first*] *action* against one another." (Emphasis added.)

At the outset, it must be noted that the Offer uses the phrase "between *and among*" the parties. (Emphasis added.) *Merriam-Webster's* defines "among" as "in company or association with." *Merriam-Webster's Collegiate Dictionary* (11th ed. 2007). Thus, the very terms of the Offer extends the preclusive effects to claims that are associated with the parties. Appellants' claims against respondents are clearly in "association with" both appellants and the Brownstone Entities, as they are based on the duties arising under the Term Sheet and involve a subsidiary of AVB. The intent of the parties to give preclusive effect to a broad set of claims is further demonstrated by the Offer's terms that it was in settlement of the claims brought in the First Action, "as well as *any related or potential claims* that could [have] be[en] asserted in the [First] [A]ction." (Emphasis added.)

This broad language also comports with the purpose behind offers of judgment. The purpose of an offer of judgment under former NRS 17.115 and NRCP 68 is to facilitate and encourage a settlement by placing a risk of loss on the offeree who fails to accept the offer, with no risk to the offeror, thus encouraging both offers and acceptance of offers. *Matthews v. Collman*, 110 Nev. 940, 950, 878 P.2d 971, 978 (1994); *see also Marek v. Chesny*, 473 U.S. 1, 5 (1985) (noting that the primary purpose behind offers of judgment is to encourage the compromise and settlement of litigation and that they "prompt[ ] both parties to a suit to evaluate the risks and costs of litigation, and to balance them against the likelihood of success upon trial on the merits"); 12 Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 3001 (2014) (stating that by encouraging compromise, offers of judgment discourage both protracted litigation and vexatious lawsuits).

The fact that the claims in the Second Action were related or potential claims that could have been brought in the First Action, and that they involved claims "between and among [the parties]," is further reflected in the fact that appellants attempted to amend the

pleadings in the First Action to include these claims against respondents. As appellants' proposed amended pleading states, this was based on the assertion that Tassinari was acting on behalf of both the Brownstone Entities, as well as AVB, when he allegedly committed fraud. Furthermore, in their motion to amend the pleadings, appellants argued that these additional claims "ar[o]se out of the same set of facts set forth in the [c]omplaint," which conflicts with the position they now assert. Lastly, to the extent that there is any ambiguity in the phrase "between and among," this court construes the ambiguity against appellants, the drafters of the Offer. *Anvui*, 123 Nev. at 215-16, 163 P.3d at 407.

We hold that the broad scope of the Offer, drafted by appellants no less, evinces the parties' intent to preclude the types of claims set forth in the Second Action. We reiterate that appellants had an avenue for relief in order to clarify the terms of the Offer. We further reiterate that appellants failed to pursue this avenue for relief. Thus, the NRCP 68 order entered by the district court after acceptance of the Offer stands. Accordingly, as was the case under claim preclusion principles, the very terms of the Offer foreclose a different outcome.

CONCLUSION

We hold that appellants' claims in the Second Action are barred by claim preclusion. We further hold that the broad terms set forth in the offer of judgment evince an intent by the parties to similarly bar these claims. Accordingly, we affirm the district court's order dismissing the Second Action.

GIBBONS and PICKERING, JJ., concur.

CLARK COUNTY SCHOOL DISTRICT, APPELLANT, *v.* MAKANI KAI PAYO, RESPONDENT.

No. 68443

October 26, 2017 403 P.3d 1270

Appeal from a final judgment in a tort action. Eighth Judicial District Court, Clark County; Valorie J. Vega, Judge; Richard Scotti, Judge; Joseph Hardy, Jr., Judge.

Reversed.

GIBBONS, J., dissented in part.

Clark County School District, Office of the General Counsel, and *Daniel L. O'Brien*, Senior Assistant General Counsel, Las Vegas, for Appellant.

Kurth Law Office and *Robert O. Kurth, Jr.*, Las Vegas, for Respondent.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to reverse a judgment on a jury's negligence verdict, awarding past and future medical damages to a former middle school student who sustained an eye injury during his physical education class. According to appellant, the negligence claim is barred by two legal doctrines—implied assumption of risk and discretionary-function immunity—and, regardless, it was otherwise unsupported by evidence that would allow recovery. With regard to implied assumption of risk, we conclude that the doctrine does not apply here, as the student's participation in the physical education class was compulsory and thus lacks the required element of voluntariness on which assumption of the risk is based.

With regard to discretionary-function immunity, we conclude that the doctrine applies to the school district's decisions to add floor hockey as a unit of the physical education curriculum and to not provide safety equipment because those decisions meet both elements of the discretionary-function-immunity test in that they are both discretionary and policy-based. Although these decisions are protected under the discretionary-function-immunity doctrine, the school district is not immune from liability for allegedly negligent administration, instruction, and supervision of the floor hockey class as such decisions, while discretionary, are not based on policy and thus fail to meet both elements of the discretionary-function-immunity test.

Finally, upon review of the record, we agree with appellant that as a matter of law, respondent failed to provide sufficient evidence to support the jury's finding of proximate cause, and thus his negligence claim fails. Accordingly, we reverse the judgment.

FACTS AND PROCEDURAL HISTORY

In 2004, respondent Makani Kai Payo was an 11-year-old student attending C.W. Woodbury Middle School, a school located within appellant Clark County School District (CCSD). While participating in a floor hockey game as part of his mandatory physical education class, another student unintentionally struck Payo in the eye with his hockey stick. As a result of the accident, Payo required

[1]THE HONORABLE LIDIA S. STIGLICH, Justice, did not participate in the decision of this matter.

eye surgery and attended several medical appointments for his eye between 2004 and 2007.

Woodbury implemented floor hockey into its curriculum in 1997 with the approval of school district officials. Although the "Woodbury Hockey Unit" rules indicated that teams were supposed to have 6 players each, each team generally had 8 to 10 players because class sizes were large in 2004. While the unit rules also stated that the game was to be played with a specific type of ball, testimony indicated that a tennis ball may have been used instead. The unit rules did not mandate the use of safety equipment during floor hockey activities.

On September 21, 2012, Payo, then an adult, filed a complaint against CCSD alleging negligence, negligent infliction of emotional distress, negligence per se, and negligent supervision. CCSD moved to dismiss the complaint, arguing among other things that Payo's negligence claims were barred by the implied assumption of risk doctrine, Payo's parents were indispensable parties, Payo was not permitted to collect medical expenses that he did not incur, and the complaint failed to allege any facts to support a negligent supervision claim. The district court granted in part CCSD's motion, dismissing the negligent infliction of emotional distress and negligence per se claims, but the district court denied the motion as to the negligence and negligent supervision claims, finding that CCSD failed to meet its burden to show that there was no set of facts on which Payo could prevail.

CCSD later moved for summary judgment, arguing that it had no duty to provide safety equipment, being struck with a hockey stick is a risk inherent in the sport and CCSD did nothing to increase the risk such that it could be liable for Payo's injury, Payo failed to state any facts or identify admissible evidence to support his remaining claims, and regardless, Payo's damages should be limited to future medical expenses and past and future general damages. The district court denied CCSD's motion and Payo's countermotion for summary judgment, determining that genuine issues of material fact existed as to duty, whether CCSD exercised reasonable care in allowing floor hockey in P.E. class without providing safety equipment, whether the treatment and advice CCSD provided to Payo was reasonable, and whether additional training, supervision, or equipment could have prevented the injury.

Prior to trial, CCSD argued that it was entitled to discretionary-function immunity with regard to the decision to adopt floor hockey as a part of the P.E. curriculum and with regard to the decision to not provide safety equipment, but the district court rejected that argument and allowed Payo to allege negligence on those grounds. During closing arguments, Payo's counsel stated, "We're here be-

cause they dispute that they did anything wrong and we say they did do something wrong. They created this activity. Do they have to play floor hockey? . . . [W]hy make these kids play this activity?"[2] Counsel further argued, "they never should have been playing the game in the first place," and "[t]he school district has a general duty to exercise reasonable care. They increase the risk of harm by putting them into this activity, by agreeing to have the activity . . . ." Payo's counsel also argued, "Makani was damaged and injured because of the negligence on the part of the school district by not providing simple safety equipment by playing this game. Why play the game if you don't have the equipment?"

During trial, Payo argued that CCSD was negligent for violating the school's rules regarding team size, for using a tennis ball rather than a rubber ball as prescribed by the school's rules, for failing to provide safety equipment, and for negligently supervising and instructing the students. Todd Peterson, Payo's physical education teacher at the time of the accident, testified that he supervised the game, and, while the students were not required to wear any protective gear, he did instruct them on the rules of hockey, including the rule prohibiting "high-sticking." Although Payo did not recall Mr. Peterson giving such instructions, Payo did recall someone mentioning no "high-sticking," meaning no swinging the stick above the shoulder. Payo could not remember exactly where Mr. Peterson was during the game, but he testified that he did not believe that Mr. Peterson left the area. Payo further testified that Mr. Peterson could not have done anything to prevent the accident once it started because it occurred so quickly. When asked what wrongdoing caused his injury, Payo stated, "Maybe safety equipment could have been provided where I had head protection, maybe safety goggles or something."

The jury found in favor of Payo and awarded him $48,288.06 for past medical expenses, $10,000 for future medical expenses, $2,000 for past pain and suffering, and $0 for future pain and suffering. The district court entered a post-verdict order allowing Payo to recover past medical expenses and reducing Payo's damages to the then-applicable statutory cap of $50,000, pursuant to NRS 41.035.[3] The district court then entered a judgment in favor of Payo. CCSD appeals.

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[2]Counsel also suggested the choice to play floor hockey was negligent because there are many other sports to choose from: "there's plenty of other activities and—and sports and other events that they could do in physical education class, they didn't have to do this." Counsel later inquired, "Do they have to play floor hockey? Could they have played basketball?"

[3]Prior to trial, CCSD moved to strike Payo's damages calculation, arguing that Payo did not have any evidence to support his assertion that he incurred special damages and that Payo could not recover for medical expenses paid by his parents when he was a minor. The district court denied the motion.

DISCUSSION

On appeal, CCSD argues that the judgment should be reversed because (1) the implied assumption of risk doctrine bars Payo's claims; (2) Payo's claims should have been dismissed under the discretionary-function-immunity doctrine; and (3) regardless, the evidence did not support a finding of proximate cause.

Implied assumption of risk doctrine

CCSD argues that Payo is precluded from recovery under the implied assumption of risk doctrine. We review an order regarding summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the evidence and pleadings show that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." *Id*. (internal quotation marks omitted). When deciding a summary judgment motion, all evidence "must be viewed in a light most favorable to the nonmoving party." *Id.*

Implied assumption of risk requires "(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) (internal quotation marks omitted); *see also Papagni v. Purdue*, 74 Nev. 32, 35, 321 P.2d 252, 253 (1958) ("[A]ssumption of risk is founded on the theory of consent . . . .").

Physical education is mandated by the Legislature. *See* NRS 389.018(3)(d). Because Payo was required to participate in a physical education class, we cannot conclude that Payo "voluntar[ily] expos[ed]" himself to the dangers of physical education pursuant to the first requirement of the implied assumption of risk doctrine. *Sierra Pac. Power*, 77 Nev. at 71, 358 P.2d at 894. Accordingly, because the first requirement is not satisfied, we conclude that the implied assumption of risk doctrine does not apply to preclude a plaintiff from alleging negligence and seeking to recover damages for injuries sustained in compulsory physical education classes.

This conclusion is consistent with other jurisdictions that have rejected implied assumption of risk as a bar to negligence causes of action based on injuries that occurred in compulsory P.E. classes. *See, e.g.*, *Benitez v. N.Y.C. Bd. of Educ.*, 541 N.E.2d 29, 33 (N.Y. 1989) (declining to apply implied assumption of risk while explaining that there is "a distinction between the circumstances of a physical education course, where participation is compulsory, and purely voluntary activity in interscholastic sports"); *Hemady v. Long Beach Unified Sch. Dist.*, 49 Cal. Rptr. 3d 464, 476 (Ct. App. 2006) (rejecting application of primary assumption of risk while noting, "seventh grade students are required to take physical education," and "[p]roviding students with some choice in the matter as to what activities to take does not negate the fact that physical education and attend-

ing grade school are mandatory and compulsory"); *Stoughtenger v. Hannibal Cent. Sch. Dist.*, 935 N.Y.S.2d 430, 432 (App. Div. 2011) (concluding primary assumption of risk was an inapplicable defense and stating, "there are important distinctions between voluntary participation in interscholastic sports and recreation activities and compulsory participation in physical education class"); *see also* Frederic R. Pamp, *Cause of Action to Recover for Injury to or Death of Student Participating in Physical Education Class or School Athletic Activity*, 14 *Causes of Action* 505 § 12 (1987 & Supp. 2017) (explaining that "it may be possible to show the student's voluntary assumption of the risk of injury" in a mandatory physical education class if "the student was injured while voluntarily participating in a phase of the class or activity that was not required of all students").

Because Payo's injury occurred while he was participating in a required activity during his physical education class, the implied assumption of risk doctrine does not apply to bar Payo's negligence action. Therefore, we conclude that the district court properly denied CCSD's motion for summary judgment with regard to the implied assumption of risk doctrine.

Discretionary-function-immunity doctrine

In its answer to Payo's complaint, CCSD alleged that Payo's claims were barred by the doctrine of discretionary-function immunity. CCSD raised its discretionary-function-immunity argument in its motion for summary judgment and again in a pretrial brief before the district court. CCSD argued that the discretionary-function-immunity doctrine precluded Payo's recovery on his theories that CCSD was negligent in its implementation and administration of the floor hockey unit, which included a failure to provide for safety equipment. The district court rejected CCSD's argument and allowed Payo to argue that CCSD was negligent in implementing and administering floor hockey as part of the curriculum.

Questions of law are reviewed de novo. *Argentena Consol. Mining Co. v. Jolley Urga Wirth Woodbury & Standish*, 125 Nev. 527, 531, 216 P.3d 779, 782 (2009). Nevada jurisprudence provides a two-part test for determining whether discretionary-function immunity under NRS 41.032[4] applies to shield a defendant from liability. *Martinez v. Maruszczak*, 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007); *Butler v. Bayer*, 123 Nev. 450, 465-66, 168 P.3d 1055, 1066 (2007). Under the two-part test, a government defendant is not liable for an allegedly negligent decision if the decision (1) involves

[4]NRS 41.032(2) is an exception to the state's waiver of sovereign immunity, under which no civil action may be brought against the state or its political subdivisions "[b]ased upon the exercise or performance or the failure to exercise or perform a discretionary function or duty . . . whether or not the discretion involved is abused."

an "element of individual judgment or choice," and (2) is "based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729.

In *Martinez*, the plaintiff sued a physician employed by the state university medical school for medical malpractice, and the physician sought a declaration that he was entitled to judgment in his favor on sovereign immunity grounds. The district court determined that the physician was not entitled to sovereign immunity. On appeal, this court adopted the federal two-part test for determining when discretionary-function immunity applies and concluded that the physician's diagnostic and treatment decisions, while discretionary in that they involved judgment or choice, failed to meet the second part of the test because those decisions were not based on policy considerations. *Id.* at 447, 168 P.3d at 729. In so doing, this court explained that determining whether discretionary-function immunity applies involves (1) an assessment of the facts; (2) recognizing that Nevada's waiver of sovereign immunity applies broadly and exceptions to it are strictly construed; and (3) consideration of the exception's purpose, which is to " 'prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic and political policy.' " *Id.* at 446, 168 P.3d at 729 (quoting *United States v. Varig Airlines*, 467 U.S. 797, 814 (1984)); *see Butler*, 123 Nev. 450, 465-66, 168 P.3d 1055, 1066 (recognizing that the purpose of the waiver of sovereign immunity is " 'to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated' " and rejecting defendants' discretionary-function-immunity defense because the decision to leave a disabled paroled prisoner in a precarious situation, while discretionary, was not policy-based and thus not entitled to discretionary-function immunity (quoting *Harrigan v. City of Reno*, 86 Nev. 678, 680, 475 P.2d 94, 95 (1970))).

Although this court has not addressed whether discretionary-function immunity applies in the context of an injured student's allegations of negligent supervision or instruction in a P.E. class, other courts have addressed the issue with mixed outcomes. Some courts have concluded that teachers are immune from liability for claims of negligent supervision of a P.E. class. *See Mosely v. Dayton City Sch. Dist.*, No. 11336, 1989 WL 73988, at *3 (Ohio Ct. App. July 6, 1989) (finding that the manners in which the physical education teacher conducted and instructed his class in the absence of wanton or reckless conduct were decisions protected by discretionary immunity). Other courts, with whom we agree, have determined that discretionary-function immunity does not apply in cases alleging inadequate supervision or instruction because the decisions related to supervising and instruction, while discretionary, are not policy-based, as required by the second part of the discretionary-function-immunity test.

For example, a New Jersey appellate court considered whether a physical education teacher and township board of education were immune from liability where a middle school student was injured during floor hockey when the hockey puck struck his eye. *Sutphen v. Benthian*, 397 A.2d 709 (N.J. Super. Ct. App. Div. 1979). The student alleged that the teacher and school board were negligent because although school authorities knew that his eye sight was deficient in one eye, they required "him to participate in the hockey game, with an excess number of players on each team, in a playing area that was too small for the purpose and without providing him with, and requiring him to use, proper protective equipment during the contest." *Id.* at 710. The court determined that the teacher and the board of education could be liable for the alleged negligence because the decisions the plaintiff complained of were not high-level policy decisions entitled to discretionary immunity. *Id.* at 711.

A trial court in Connecticut analyzed the claim of a college student who was injured in a cheerleading stunt that she performed as a member of a self-governing, but officially school-recognized, cheerleading club to determine whether the defendants (the New Hampshire University System, the director of the student center, the club's advisor, and the club's coach) were entitled to summary judgment on sovereign immunity grounds.[5] *Gonzalez v. Univ. Sys. of New Hampshire*, No. 451217, 2005 WL 530806, at *17 (Conn. Super. Ct. Jan. 28, 2005). The court denied summary judgment on the defendants' discretionary-function-immunity defense, noting that such immunity applies to "conduct involving an executive or planning function characterized by the exercise of a high degree of official judgment or discretion." *Id.* at *16. The trial court pointed to the New Hampshire Supreme Court's statement that "it would be possible for workers to implement a faulty design or plan, for which no tort liability should result, but that if, on the other hand, workers negligently follow or fail to follow an established plan or standards, and injuries result, then a *government entity* could be subject to tort liability." *Id.* at *17 (quoting *Mahan v. N.H. Dep't of Admin. Servs.*, 693 A.2d 79, 82 (N.H. 1997) (emphasis added)). Applying the New Hampshire Supreme Court's reasoning, the trial court concluded that the "state is not entitled to sovereign immunity for the acts or omissions of [the student center director, club advisor, or coach]," as "[n]one had an executive or planning function 'characterized by the exercise of a high degree of official judgment or discretion.'" *Id.* (quoting *Mahan*, 693 A.2d at 82).

In reaching that conclusion, the court recognized that the coach had broad discretion in implementing coaching methods and the advisor had broad discretion in how often she met with the club, but

[5]Defendants in that case also sought summary judgment based on the assumption of risk doctrine.

that those coaching and advising decisions were not entitled to discretionary immunity unless they entailed "governmental planning or policy formulation, involving the evaluation of economic, social, and political considerations." *Id.* The trial court concluded that there was no evidence that the decisions by the coach, advisor, or director "entailed such considerations," and thus, "the defendants [we]re not entitled to summary judgment on the ground of sovereign immunity." *Id.*

The reasoning in *Gonzalez* and *Sutphen* is consistent with the way this court has resolved cases involving the application of discretionary-function immunity as that reasoning recognizes that for immunity to apply, the decision in question must be both discretionary and policy-based. *Martinez*, 123 Nev. at 445-47, 168 P.3d at 728-29; *Butler*, 123 Nev. at 466-67, 168 P.3d at 1066 (concluding that the Nevada Department of Corrections, the State of Nevada, and two correctional officers were not entitled to discretionary-function immunity for their actions in leaving a paroled prisoner, who suffered from brain damage and quadriplegia, at his girlfriend's residence despite evidence that neither the girlfriend nor her residence were equipped to handle the prisoner's special needs because those "actions were not based on the consideration of any social, economic, or political policy").

Applying the same reasoning to the present case, the supervision of the floor hockey unit and decisions to (1) allow more players on the floor than indicated in the rules; (2) play with a different type of ball than set forth in the rules; and (3) supervise the class in the manner Mr. Peterson did, although discretionary, were not based on policy considerations to which immunity would typically apply. *Martinez*, 123 Nev. at 445-47, 168 P.3d at 728-29; *Butler*, 123 Nev. at 466-67, 168 P.3d at 1066; *Sutphen*, 397 A.2d at 709; *Gonzalez*, 2005 WL 530806, at *17. Thus, to the extent that Payo argued that CCSD was liable for the coach's negligent supervision or instruction during the floor hockey class, the district court properly determined that discretionary-function immunity did not apply to preclude Payo from moving forward on his claims.

On the other hand, CCSD's decisions to add the floor hockey class to the curriculum and to not provide safety equipment were policy-based and discretionary, and thus meet both parts of the discretionary-function test. The physician in *Martinez* is analogous to Mr. Peterson in this case because in both the hospital and the school district settings, discretionary policy decisions are made at a broad level that impact how the physician and Mr. Peterson can do their jobs as state employees, such as the choice to open a public hospital in *Martinez* and the choice to add floor hockey to the P.E. curriculum and to not provide safety equipment because of budgetary concerns in this case. However, the discretionary decisions based on each employee's choice and judgment that the *Martinez* physician

made in providing medical treatment to individual patients and that Mr. Peterson made in supervising his P.E. class, such as the choices regarding team size and game instruction, are not policy-based decisions that are entitled to discretionary immunity. *Martinez*, 123 Nev. at 447, 168 P.3d at 729 (noting that "the decision to create and operate a public hospital and the college of medicine are the type of decisions entitled to discretionary-function immunity, because those decisions satisfy both prongs of the *Berkovitz-Gaubert* test; namely, they involve elements of judgment and choice, and they relate to social and economic policy"); *Butler*, 123 Nev. at 467, 168 P.3d at 1066 (concluding that while respondents were not entitled to discretionary-function immunity for their actions of leaving Butler at his girlfriend's house, "several decisions, including the decision to parole Butler and the formulation of any overarching prison policies for inmate release are policy decisions that require analysis of multiple social, economic, efficiency, and planning concerns," and thus would have been entitled to immunity); *Hacking v. Town of Belmont*, 736 A.2d 1229 (N.H. 1999) (concluding that the defendant school district and town (1) were entitled to discretionary-function immunity to the extent that plaintiff, who was injured in a school basketball game, was alleging that defendants were liable for negligently training and supervising coaches and referees because those decisions involved policy and planning choices, but (2) were not entitled to discretionary-function immunity to the extent that plaintiff alleged liability based on the in-game decisions of the coaches and referees, including decisions on whether to substitute a player and call a foul, because those decisions were not policy-based).

Accordingly, discretionary-function immunity bars Payo's arguments that CCSD was negligent in deciding to add a floor hockey unit to the P.E. curriculum and adopt rules that excluded safety equipment. These decisions were policy-based and discretionary, and thus entitled to discretionary-function immunity. On the other hand, discretionary-function immunity does not apply to nonpolicy based decisions to allow (a) a nonregulation ball to be used, and (b) permit more students on the floor than indicated in the rules.

The jury did not use special verdict forms; therefore, it is unclear how the jury assessed CCSD's negligence. Because we conclude that discretionary-function immunity bars only some of Payo's allegations, it is necessary to discuss the sufficiency of evidence for proximate cause for Payo's remaining negligence claims.

Proximate cause

Although we determine that Payo's claim for negligent administration of the floor hockey class is not barred under the assumption of risk or discretionary-function-immunity doctrines, CCSD argues that Payo failed to produce substantial evidence that any conduct on

behalf of CCSD was the proximate cause of Payo's injuries. The jury found CCSD negligent and, therefore, found that CCSD breached a duty to Payo and that the breach was the proximate cause of Payo's injury, which resulted in Payo's damages. In considering CCSD's argument that the verdict is not supported by substantial evidence, we must assume that the jury believed all the evidence favorable to Payo and drew all reasonable inferences in his favor. *Paullin v. Sutton*, 102 Nev. 421, 423, 724 P.2d 749, 750 (1986). Further, this court will overturn the jury's verdict only if there is no substantial evidence to support it. *Id.* "Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion." *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 73, 270 P.3d 1259, 1262 (2012) (quoting *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001) (internal quotation marks omitted)). Although proximate cause is generally a question of fact for the jury, this court will not uphold a verdict where the plaintiff as a matter of law cannot recover. *See Lee v. GNLV Corp.*, 117 Nev. 291, 296, 22 P.3d 209, 212 (2001).

"It is well established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). Causation has two components: actual cause and proximate cause. *Dow Chem. Co. v. Mahlum*, 114 Nev. 1468, 1481, 970 P.2d 98, 107 (1998), *disfavored on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 270-71, 21 P.3d 11, 14-15 (2001). Proximate cause is defined as "any cause which in natural [foreseeable] and continuous sequence unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred." *Goodrich & Pennington Mortg. Fund, Inc. v. J.R. Woolard, Inc.*, 120 Nev. 777, 784, 101 P.3d 792, 797 (2004) (quoting *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) (internal quotation marks omitted)).

Payo's negligence claim was based on the type of ball used, the large team sizes, and the alleged lack of instruction provided by Mr. Peterson.[6] However, no evidence in the record supports a finding that any of these three assertions was the proximate cause of Payo's injury. *See Odekirk v. Bellmore-Merrick Cent. Sch. Dist.*, 895 N.Y.S.2d 184, 186 (App. Div. 2010) (affirming summary judgment

[6]Although Payo also asserted a claim for negligent supervision, and in closing arguments his counsel argued that CCSD negligently supervised the first aid safety assistant, Payo offered no testimony, expert or otherwise, to show how CCSD negligently supervised the first aid safety assistant or Mr. Peterson. *See Hall v. SSF, Inc.*, 112 Nev. 1384, 1393, 930 P.2d 94, 99 (1996) (describing a claim for negligent supervision as an employer having a "duty to use reasonable care in the training, supervision, and retention of his or her employees to make sure that the employees are fit for their positions").

in favor of school district, concluding that plaintiff failed to demonstrate proximate cause because plaintiff's injuries "could not have been prevented by the most intense supervision" (quoting *Scarito v. St. Joseph Hill Acad.*, 878 N.Y.S.2d 460, 462 (App. Div. 2009))).

Payo testified that a tennis ball was used during the game rather than a specific type of rubber ball prescribed by the rules. However, Payo failed to offer any testimony or evidence that would demonstrate how using the tennis ball caused the injury to his eye. Similarly, Mr. Peterson testified that each team generally had 8-10 players, which demonstrated that the teams were larger than the school rules indicated, but Payo failed to offer any testimony or evidence to show that the larger team sizes contributed to his injury. When asked what conduct caused his injuries, Payo suggested that the school could have provided safety equipment; however, as discussed above, CCSD's decision to exclude safety equipment from the floor hockey rules was entitled to discretionary-function immunity. And the rules did not require safety equipment. Further, Payo produced no evidence or expert testimony to show how the lack of safety equipment caused his injury. *See Walker v. Commack Sch. Dist*., 820 N.Y.S.2d 287, 288 (App. Div. 2006) (finding summary judgment warranted for the school district when a student alleged negligence for failing to provide mouth protectors during floor hockey when she was struck in the mouth by another student's hockey stick because there were no standards requiring mouth protectors and because no amount of supervision could have prevented the accident).

Finally, Payo testified that while he could not remember Mr. Peterson giving instructions prior to playing floor hockey, he did remember someone mentioning no "high-sticking," and Mr. Peterson testified that he gave such an instruction. Payo could not say whether additional or different measures could have prevented his injury. Payo further acknowledged that his teacher did not do anything to cause his injury and he knew of nothing the teacher did wrong. In fact, Payo testified that the incident happened so quickly that there was no way to prevent his injury. *See Bramswig v. Pleasantville Middle Sch.*, 891 N.Y.S.2d 160, 162 (App. Div. 2009) (concluding that the proximate cause of alleged injuries sustained by student, who was struck by teammate's hockey stick, was not school's alleged failure to issue proper instruction regarding "high-sticking," and thus school could not be held liable for student's injuries based on negligent instruction theory); *Mayer v. Mahopac Cent. Sch. Dist.*, 815 N.Y.S.2d 189, 191 (App. Div. 2006) (determining that inadequate supervision was not the proximate cause of student's injuries where school district did not have any prior notice of any similar conduct to suggest that the accident was foreseeable); *Spaulding v. Chenango Valley Cent. Sch. Dist.*, 890 N.Y.S.2d 162, 164 (App. Div. 2009) (concluding that the school's alleged lack of supervision was not the proximate cause of student's injury resulting from being

struck by ball when another student was aiming for the goal because it was a spontaneous and unintentional accident that no amount of supervision could have prevented); *see also Scarito*, 878 N.Y.S.2d at 462 (finding that the school was entitled to judgment as a matter of law because the student's injuries were caused by another student's accidental conduct in a soccer game in "such a short span of time that it could not have been prevented by the most intense supervision," and the failure to provide shin guards was insufficient to create liability).

We conclude that the jury could not have found CCSD's conduct was the proximate cause of Payo's injury or reached its negligence verdict on any fair interpretation of the evidence, and thus, the verdict must be overturned.[7]

Accordingly, for the reasons set forth above, the judgment against CCSD is reversed.

Cherry, C.J., and Douglas, Pickering, and Parraguirre, JJ., concur.

Gibbons, J., concurring in part and dissenting in part:

I concur with the majority as to all the issues except the negligence claim. I would affirm the judgment of liability and for pain and suffering damages since substantial evidence supports the jury's verdict.

LEE E. SZYMBORSKI, Appellant, *v.* SPRING MOUNTAIN TREATMENT CENTER; and DARRYL DUBROCA, in His Official Capacity, Respondents.

No. 66398

October 26, 2017 403 P.3d 1280

Appeal from a district court order dismissing a medical malpractice action. Eighth Judicial District Court, Clark County; Joseph T. Bonaventure, Senior Judge, and Joanna S. Kishner, Judge.

Affirmed in part, reversed in part, and remanded.

Hardesty, J., dissented in part.

Garman Turner Gordon LLP and *Eric R. Olsen*, Las Vegas, for Appellant.

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[7]CCSD argues reversal is also warranted because Payo is unable to recover past medical expenses incurred by his parents while he was a minor and because Payo's future medical expenses were unsubstantiated. Based on our disposition, we decline to reach those issues.

Hall Prangle & Schoonveld, LLC, and *Tyson J. Dobbs* and *Michael E. Prangle*, Las Vegas, for Respondents.

Before PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, PICKERING, J.:

This is an appeal from a district court order dismissing a complaint against a medical treatment center for failure to attach a medical expert affidavit pursuant to NRS 41A.071. The district court determined that the allegations in appellant's complaint regarding the discharge of his son from respondent's treatment center were for medical malpractice, and because appellant did not attach a medical expert affidavit, his complaint required dismissal under NRS 41A.071. Appellant contends that the district court erred in dismissing his complaint because his claims are based in ordinary negligence, not medical malpractice, and therefore, an affidavit was not required. We agree as to appellant's claims for negligence, social-worker malpractice, gross negligence, negligence per se, and negligent hiring, supervision, and training, and disagree as to his claim for professional negligence. We therefore affirm in part, reverse in part, and remand.

I.

We accept as true the following facts alleged in appellant's complaint: Appellant Lee Szymborski's (Szymborski) adult son, Sean Szymborski (Sean), was admitted to Spring Mountain Treatment Center (Spring Mountain) for care and treatment due to self-inflicted wounds. When it came time to discharge Sean, licensed social workers undertook the discharge planning, but also delegated some tasks to a Masters of Arts (MA). Szymborski and Sean had a turbulent relationship, and Sean was discharged with diagnoses of psychosis and spice abuse. A social worker documented that Szymborski directed a case manager not to release Sean to Szymborski's home upon discharge and that the case manager would help Sean find alternative housing. Spring Mountain nurses also documented that Sean did not want to live with his father, noting that he grew agitated when talking about his father and expressed trepidation about returning to his father's home. Due to this ongoing conflict, Sean participated in treatment planning to find housing independent of Szymborski.

On the day of Sean's release, an MA met with Sean to confirm the address of the apartment where Sean planned to live upon discharge. The MA noted, and Sean's continuing patient care plan confirmed,

that Sean was vague about the apartment's address and wanted to stop at his father's house first to retrieve his debit card before going to his own apartment. The MA and case manager never verified that Sean had arranged to live elsewhere, and informed Sean that they would only give him enough money to take a taxi to his father's home. Spring Mountain did not inform Szymborski that they were releasing Sean, nor did they inform him that they were sending Sean to his residence that day. After being dropped off, Sean vandalized Szymborski's home, causing $20,000 in property damage, then disappeared until his arrest three weeks later. Szymborski was not home when Sean arrived.

Szymborski then filed a complaint with the State of Nevada Department of Health and Human Services—Division of Public and Behavioral Health (Division) about Sean's discharge and Spring Mountain's disregard of the discharge planning obligations imposed on it by NAC 449.332. After investigation, the Division issued a report crediting Szymborski's claims and finding that Spring Mountain committed multiple violations of NAC 449.332.

In his complaint, Szymborski asserted four claims against Spring Mountain, its CEO, Daryl Dubroca, and various social workers and MAs (collectively, Spring Mountain): negligence (count I); professional negligence (count II); malpractice, gross negligence, negligence per se (count III); and negligent hiring, supervision, and training (count IV). Szymborski attached the Division's report to his complaint, but not an expert medical affidavit. Spring Mountain moved to dismiss the complaint because Szymborski failed to attach an expert medical affidavit pursuant to NRS 41A.071.[1] The district court granted Spring Mountain's motion to dismiss, finding that the claims in the complaint were for medical malpractice and required an expert medical affidavit. Szymborski appeals.

II.

"This court rigorously reviews de novo a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief." *DeBoer v. Sr. Bridges of Sparks Fam. Hosp.*, 128 Nev. 406, 409, 282 P.3d 727, 730 (2012).

[1]Spring Mountain argues as an alternative basis for affirmance that it did not owe a duty of care to Szymborski, a nonpatient third party, to protect him from the property damage caused by Sean. We do not consider this issue, as Spring Mountain raises it for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("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."). Our analysis is confined to the NRS 41A.071 affidavit issues raised and resolved in district court, not the legal sufficiency of Szymborski's claims.

A complaint should only be dismissed for failure to state a claim if "it appears beyond a doubt that it could prove no set of facts, which, if true, would entitle it to relief." *Id.* at 410, 282 P.3d at 730 (internal quotation marks omitted). In contrast, NRS 41A.071 provides that "[i]f an action for medical malpractice . . . is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without a[ ] [medical expert] affidavit."[2]

A.

Spring Mountain argues that because Szymborski's claims involve employees of a hospital rendering services, the claims must be for medical malpractice and NRS 41A.071's affidavit requirement applies. However, when a hospital performs nonmedical services, it can be liable under principles of ordinary negligence. *See DeBoer*, 128 Nev. at 411-12, 282 P.3d at 731-32 ("[A] healthcare-based corporation's status as a medical facility cannot shield it from other forms of tort liability when it acts outside of the scope of medicine."). "[U]nder general negligence standards, medical facilities have a duty to exercise reasonable care to avoid foreseeable harm when they furnish nonmedical services." *Id.* at 412, 282 P.3d at 732. For example, in *DeBoer*, the district court erred in classifying the patient's claim as one for medical malpractice as opposed to ordinary negligence because the claim "was not related to medical diagnosis, judgment, or treatment." *Id.* at 408, 282 P.3d at 731-32. Thus, the mere fact that Szymborski's claims are brought against Spring Mountain, a mental health treatment center rendering services, does not mean the claims sound in medical malpractice.

B.

Instead, we must determine whether Szymborski's claims involve medical diagnosis, judgment, or treatment or are based on Spring Mountain's performance of nonmedical services.[3] *See id.*; *see also*

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[2]As written at the time of filing, NRS 41A.071 only applied to actions for medical or dental malpractice. *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013). In 2015, the Nevada Legislature amended NRS 41A.071 to apply to claims for "professional negligence" and eliminated the terms "medical malpractice" and "dental malpractice" from the statute. 2015 Nev. Stat., ch. 439, § 6, at 2527. The revisions to NRS 41A.071 still require that the expert affidavit be submitted by a *medical* expert who practices in a substantially similar area as the alleged professional negligence. *See* NRS 41A.071(2).

[3]Szymborski argued in his reply brief that "his claims are not and cannot be for medical malpractice, because he was not a patient receiving services at the hospital. Only Sean Szymborski can bring such a claim." Szymborski failed to make this argument in his opening brief and thus, we do not consider it. *See LaChance v. State*, 130 Nev. 263, 277 n.7, 321 P.3d 919, 929 n.7 (2014) ("Because the Nevada Rules of Appellate Procedure do not allow litigants to raise new issues for the first time in a reply brief, we decline to consider this argument.").

Gold v. Greenwich Hosp. Ass'n, 811 A.2d 1266, 1270 (Conn. 2002) (determining that the plaintiff's complaint was for medical malpractice because the "alleged negligence [was] substantially related to medical diagnosis and involved the exercise of medical judgment"); *Gunter v. Lab. Corp. of Am.*, 121 S.W.3d 636, 640 (Tenn. 2003) ("When a plaintiff's claim is for injuries resulting from negligent medical treatment, the claim sounds in medical malpractice. When a plaintiff's claim is for injuries resulting from negligent acts that did not affect the medical treatment of a patient, the claim sounds in ordinary negligence.") (citation omitted).

Allegations of breach of duty involving medical judgment, diagnosis, or treatment indicate that a claim is for medical malpractice. *See Papa v. Brunswick Gen. Hosp.*, 517 N.Y.S.2d 762, 763 (App. Div. 1987) ("When the duty owing to the plaintiff by the defendant arises from the physician-patient relationship or is substantially related to medical treatment, the breach thereof gives rise to an action sounding in medical malpractice as opposed to simple negligence."); *Estate of French v. Stratford House*, 333 S.W.3d 546, 555 (Tenn. 2011) ("If the alleged breach of duty of care set forth in the complaint is one that was based upon medical art or science, training, or expertise, then it is a claim for medical malpractice."), *superseded by statute* Tenn. Code. Ann. 29-26-101 *et seq*. (2011), *as recognized in Ellithorpe v. Weismark*, 479 S.W.3d 818, 824-26 (Tenn. 2015). By extension, if the jury can only evaluate the plaintiff's claims after presentation of the standards of care by a medical expert, then it is a medical malpractice claim. *See Bryant v. Oakpointe Villa Nursing Ctr.*, 684 N.W.2d 864, 872 (Mich. 2004); *Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 550-51, 376 P.3d 167, 172 (2016) (reasoning that a medical expert affidavit was required where the scope of a patient's informed consent was at issue, because medical expert testimony would be necessary to determine the reasonableness of the health care provider's actions). If, on the other hand, the reasonableness of the health care provider's actions can be evaluated by jurors on the basis of their common knowledge and experience, then the claim is likely based in ordinary negligence. *See Bryant*, 684 N.W.2d at 872.

C.

The distinction between medical malpractice and negligence may be subtle in some cases, and parties may incorrectly invoke language that designates a claim as either medical malpractice or ordinary negligence, when the opposite is in fact true. *See Weiner v. Lenox Hill Hosp.*, 673 N.E.2d 914, 916 (N.Y. 1996) ("[M]edical malpractice is but a species of negligence and no rigid analytical line separates the two.") (internal quotation marks omitted). Given the subtle distinction, a single set of circumstances may sound in both ordinary negligence and medical malpractice, and an inartful

complaint will likely use terms that invoke both causes of action, particularly where, as here, the plaintiff is proceeding pro se in district court. *See Mayo v. United States*, 785 F. Supp. 2d 692, 695 (M.D. Tenn. 2011) ("The designations given to the claims by the plaintiff or defendant are not determinative, and a single complaint may be founded upon both ordinary negligence principles and the medical malpractice statute."). Therefore, we must look to the gravamen or "substantial point or essence" of each claim rather than its form to see whether each individual claim is for medical malpractice or ordinary negligence. *Estate of French*, 333 S.W.3d at 557 (citing *Black's Law Dictionary* 770 (9th ed. 2009)); *see State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (in determining whether an action is for contract or tort, "it is the nature of the grievance rather than the form of the pleadings that determines the character of the action"); *Benz-Elliott v. Barrett Enters., LP*, 456 S.W.3d 140, 148-49 (Tenn. 2015) (the gravamen of the claims rather than the gravamen of the complaint determines statute of limitations issues because "parties may assert alternative claims and defenses and request alternative relief in a single complaint, regardless of the consistency of the claims and defenses"). Such an approach is especially important at the motion to dismiss stage, where this court draws every reasonable inference in favor of the plaintiff, and a complaint should only be dismissed if there is no set of facts that could state a claim for relief. *DeBoer*, 128 Nev. at 409, 282 P.3d at 730.

Here, Szymborski's complaint alleges four claims for relief. Our case law declares that a medical malpractice claim filed without an expert affidavit is "void *ab initio*." *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006); *but cf. Szydel v. Markman*, 121 Nev. 453, 458-59, 117 P.3d 200, 204 (2005) (determining that an NRS 41A.071 medical expert affidavit is not required when the claim is for one of the res ipsa loquitur circumstances set forth in NRS 41A.100). Under this precedent, the medical malpractice claims that fail to comply with NRS 41A.071 must be severed and dismissed, while allowing the claims for ordinary negligence to proceed. *See Fierle v. Perez*, 125 Nev. 728, 740, 219 P.3d 906, 914 (2009), *as modified* (Dec. 16, 2009), *overruled on other grounds by Egan*, 129 Nev. 239, 299 P.3d 364. Therefore, with the above principles in mind, we next determine which of Szymborski's claims must be dismissed for failure to attach the required medical expert affidavit, and which claims allege facts sounding in ordinary negligence. Because the district court's sole basis for dismissal was Szymborski's failure to attach a medical expert affidavit, the question before us is not the validity, sufficiency, or merit of Szymborski's claims. Instead, the issue is whether the claims are for medical malpractice, requiring dismissal under NRS 41A.071, or for ordinary negligence or other ostensible tort.

III.

A.

Szymborski's first claim for relief is for negligence. Szymborski alleges that Spring Mountain "in the exercise of reasonable care had a duty to know, or should have known, that they are required to comply with NAC 449.332, regarding discharge plan of Patients; and with NRS 449.765 to 449.786." He accuses Spring Mountain of breaching its duty by failing to "carefully investigate, monitor and/or oversee discharge activities . . . including but not limited to, the development, implementation, and supervision of discharge policies and practices." Spring Mountain also negligently "permitted the dumping of [Sean], by taxi to the home of [Szymborski], without notice to [Szymborski], in violation of their own internal policies; NAC 449.332; and NRS 449.[7]65 to 449.786."

The essence of this claim is that Spring Mountain was negligent in discharging Sean in a taxi with only enough money to go to his father's house, without informing his father. The alleged negligence or breach of duty does not involve medical judgment, treatment, or diagnosis, and would not require medical expert testimony at trial. The allegations are based on Spring Mountain employees performing nonmedical functions such as failing to verify Sean had his own apartment, arranging for Sean to be dropped off at his father's house with no way to get to his supposed apartment, and declining to notify Szymborski of this plan despite knowledge of his volatile and contentious relationship with his son. *See DeBoer*, 128 Nev. at 411, 282 P.3d at 731 ("Aside from the wide range of medical services healthcare-based facilities provide, they also offer diverse nonmedical services to the public, including, but not limited to, aftercare planning with social workers.").[4]

We note that there are allegations in Szymborki's first claim that could involve medical diagnosis, treatment, and judgment. Regardless, at this stage of the proceedings this court must determine whether there is any set of facts that, if true, would entitle Szymborski to relief and not whether there is a set of facts that would not provide Szymborski relief. Therefore, we conclude that Szymborski's first claim for relief alleges a set of duties and facts for ordinary negligence and should not have been dismissed for want of an NRS 41A.071 medical expert affidavit.

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[4]Spring Mountain argues that Szymborski's citations to NAC 449.332 and NRS 449.765-449.786 demonstrate that the claim is based on Spring Mountain's failure to perform medical functions. Although determining whether a patient will likely suffer negative health consequences upon discharge is a medical function, Szymborski's allegations stem from Spring Mountain's failure to follow policies and procedures in the manner that it discharged Sean.

B.

Szymborski's second claim is for professional negligence. Szymborski alleges that defendants, including Spring Mountain, licensed social workers, registered nurses, psychiatrists, and the hospital administrator, "owed [Szymborski] a duty to employ medical staff adequately trained in the care and treatment of patients consistent with the degree of skill and learning possessed by competent medical personnel practicing in the United States of America under the same or similar circumstances; and a duty to comply with Nevada statutes, including NRS 41A.015." The defendants breached their duty of care by "failing to function as a patient advocate by providing proper care to the patients at the time of discharge."

Szymborski argues that to the extent the claim alleges professional negligence of social workers and the hospital administrator in discharge planning, no medical expert affidavit is required. However, Szymborski's claim for professional negligence does not allege how these professionals were involved in the nonmedical aspects of Sean's discharge. This claim only involves allegations of medical duties and would require medical expert testimony to assist the jury in determining the standard of care. We cannot discern a set of duties or facts in this claim based in ordinary negligence. As such, Szymborski's professional negligence claim against Spring Mountain is grounded in medical malpractice and was properly dismissed for failure to attach a medical expert affidavit pursuant to NRS 41A.071.[5]

C.

The third claim for relief is titled "malpractice, gross negligence, and negligence per se." In this composite claim, Szymborski appears to be asserting a claim for social worker malpractice. Thus, he cites NAC 641B.225(1), defining "malpractice" in the practice of social work as "conduct which falls below the standard of care required of a licensee under the circumstances and which proximately causes damage to a client." He also cites to NAC 641B.225(3), which

[5]Szymborski argues on appeal that the district court erred in denying his motion for reconsideration because the district court did not consider a letter from the Bureau Chief of the Division, providing that the Division's investigation substantiated Szymborski's complaints against Spring Mountain. However, whether the district court considered this letter is immaterial because the district court had determined that Szymborski's claims were for medical malpractice and the letter did not satisfy the requirements of NRS 41A.071. *See Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 202, 234 P.3d 920, 922 (2010) ("NRS 41A.071 imposes an affidavit requirement, which NRS 53.045 permits a litigant to meet either by sworn affidavit or unsworn declaration made under penalty of perjury.").

defines gross negligence in the practice of social work as "conduct which represents an extreme departure from the standard of care required of a licensee under the circumstances and which proximately causes damage to a client." He states, "[d]efendants including JOHN DOE 1 in the capacity of Licensed Social Worker (LSW) is entrusted to provide medical care owed to patients and a duty to provide adequate medical treatment, to protect the patient and the public at large." Moreover, "[s]aid Defendant breached the duty of care by discharging the patient, paying for a taxi only to Plaintiff's address (although the patient asked to pick up a debit card, then be transported to another residence), in violation of discharge policies and procedures, pursuant to NAC 449.332."

Although Szymborski uses terms like "medical care" and "medical treatment" in the description of the duty of care owed, the gravamen of this claim is that the social worker committed malpractice and was grossly negligent because the social worker discharged Sean to Szymborski's home, despite knowing of the deeply troubled relationship between Sean and his father, the father's request that Sean not be discharged to his home, and Sean's request to continue on to another location. This breach of the standard of care was not based on the social worker's medical judgment. A social worker, or perhaps the Division, rather than a medical expert, would be required to aid the jury in determining the applicable standard of care for Szymborski's malpractice and gross negligence claims.

For his negligence per se claim, Szymborski argues that Spring Mountain violated NAC 449.332. While some of the provisions in NAC 449.332 invoke medical judgment, the factual allegations in the complaint and the Division's findings demonstrate that Szymborski alleges violations of NAC 449.332 that do not involve medical judgment, treatment, or diagnosis. For instance, Szymborski alleges that Spring Mountain violated NAC 449.332(4)[6] because they did not discharge Sean to a safe environment. Szymborski alleges that he was not given notice of Sean's discharge in violation of NAC 449.332(11) (requiring hospitals to provide patient's families with information necessary to care for the patient post-discharge). He argues that Spring Mountain failed to document that Sean had arranged for a place to live and, therefore, breached NAC 449.332(4) and NAC 449.332(9) (providing that the evaluation of the needs of the patient in discharge planning and the discharge plan must be doc-

[6]NAC 449.332(4) provides:

> An evaluation of the needs of a patient relating to discharge planning must include, without limitation, consideration of:
>
> (a) The needs of the patient for postoperative services and the availability of those services;
>
> (b) The capacity of the patient for self-care; and
>
> (c) The possibility of returning the patient to a previous care setting or making another appropriate placement of the patient after discharge.

umented). Finally, he contends that Spring Mountain failed to follow their own discharge policies in violation of NAC 449.332(1)(b) (mandating that hospitals "develop and carry out policies and procedures regarding the process for discharge planning"). The factual allegations underlying these specific regulatory violations do not involve medical diagnosis, treatment, or judgment. *See Lee v. Detroit Med. Ctr.*, 775 N.W.2d 326, 332-34 (Mich. Ct. App. 2009) (recognizing that a social worker's and doctor's dereliction of the statutory duty to report abuse was ordinary negligence and did not require an affidavit of merit). As such, Szymborski makes claims for malpractice, negligence, and negligence per se that do not sound in medical malpractice and, therefore, do not require a medical expert affidavit under NRS 41A.071. To the extent this count alleges violations of NAC 449.332 involving medical judgment, diagnosis, or treatment, those allegations must be severed from Szymborski's claims moving forward in the litigation.

D.

Szymborski's final claim for relief is negligent hiring, supervision, and training. He alleges that Spring Mountain "owed a duty to its patients, and the community at large, to hire, train, and/or supervise competent medical and staff personnel, including supervisors, and LSW, to provide care and treatment to its patients." Spring Mountain breached its duty of care "by failing to adequately provide competent employees, in the performance of the job . . . ." Moreover, Spring Mountain "established unsafe medical practices, including 'dumping' patients without complying with discharge instructions." "As a result of the lack of medical care and treatment provided by Defendant, Defendants breached their duty to Plaintiff and the members of the class by failing to protect them from foreseeable harm, resulting in a lack of mental health treatment for Plaintiff and the public at large."

A medical malpractice statute will not apply to claims for negligent supervision, hiring, or training where the underlying facts of the case do not fall within the definition of medical malpractice. *See Burke v. Snyder*, 899 So. 2d 336, 341 (Fla. Dist. Ct. App. 2005) (holding that the pre-suit requirements of a medical malpractice claim did not apply to plaintiff's claim for negligent hiring, supervising, and retaining the physician because "the claim of sexual misconduct in this case is not a claim arising out of negligent medical treatment"); *compare with Blackwell v. Goodwin*, 513 S.E.2d 542, 545-46 (Ga. Ct. App. 1999) (determining that the statute of repose for medical malpractice applies to plaintiff's claims against the nurse's employer for negligent hiring, retention, supervision, and entrustment because the claims arose out of the nurse's administration of an injection). Here, as discussed above, the underlying

facts of this complaint do not involve medical judgment, treatment, or diagnosis. Instead, Szymborski seeks remedy for the actions of various social workers, case managers, and MAs not finding Sean suitable accommodations and transportation after he was medically discharged despite accepting, or appearing to accept, the responsibility of doing so. Therefore, drawing every reasonable inference in favor of Szymborski, we hold that his claim for negligent hiring, supervision, and training does not sound in medical malpractice and therefore, does not need to meet the requirements of NRS 41A.071.

IV.

A claim is grounded in medical malpractice and must adhere to NRS 41A.071 where the facts underlying the claim involve medical diagnosis, treatment, or judgment and the standards of care pertaining to the medical issue require explanation to the jury from a medical expert at trial. Here, Szymborski's claims for negligence, malpractice, gross negligence, negligence per se, and negligent hiring, training, and supervision state claims for relief not based in medical treatment or judgment and, therefore, were not for medical malpractice and should not have been dismissed for failure to attach the NRS 41A.071 affidavit. But, Szymborski's claim for professional negligence against Spring Mountain sounds in medical malpractice and was properly dismissed for failure to attach a medical expert affidavit. Accordingly, we reverse in part, affirm in part, and remand.

PARRAGUIRRE, J., concurs.

HARDESTY, J., concurring in part and dissenting in part:

I concur with the majority's determination that a reviewing court should review allegations in a complaint not only by the words used but by the gravamen of the action. *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972). I also concur that under that standard, the gravamen in counts I and IV fall outside claims for medical malpractice. But, as the majority determines, the essence of the allegations in count II seeks damages for medical malpractice because that count is asserting a breach of the exercise of medical treatment, diagnosis, or judgment. I would equally apply that analysis to the allegations made in count III. In count III, Szymborski explicitly seeks recovery for actions that fall within NRS 41A.009's definition of medical malpractice and specifically required an affidavit to assess any breach of the standard of care.

Count III alleges malpractice, gross negligence, and negligence per se, and that defendants, including the LSW, "[are] entrusted to provide medical care owed to patients and a duty to provide adequate medical treatment." Count III further alleges that the LSW

"breached the duty of care by discharging the patient . . . in violation of discharge policies and procedures, pursuant to NAC 449.332." Szymborski also cited NAC 641B.225, which defines the standard of care for professional incompetence in the context of social work. Szymborski similarly alleges that the hospital negligently discharged Sean in count I; however, count III is expressly couched in terms of medical care and medical treatment.

Szymborski referenced several documents in his complaint, including the patient continuing care plan, the nursing progress note, and the acute physician discharge progress note, but these documents are not in the record. As described in the complaint, both the nursing progress note and the acute physician discharge progress note indicated that Sean was reluctant to return to his father's home. However, the patient continuing care plan stated that upon discharge, Sean was to first go to his father's house and then to a different Las Vegas address. The acute physician discharge progress note also noted that Sean had "participated in treatment planning to find housing." Further, Szymborski alleged that the MA met with Sean prior to Sean's release and the MA documented that Sean was vague about the address for his apartment. The social services discharge note did not include an address for the apartment.

It appears these documents were prepared by physicians, which demonstrates that the decisions regarding Sean's discharge involved medical judgment or treatment, and the claims Szymborski alleges are breaches of that judgment or treatment and are grounded in medical malpractice. Thus, the gravamen of this claim is that the LSW, an "employee of a hospital," failed to render services using "the reasonable care, skill or knowledge ordinarily used under similar circumstances." NRS 41A.009. Therefore, an affidavit was required to connect the patient continuing care plan and other discharge documents with Sean's release in order to determine whether the social worker's conduct fell below the standard of care. Accordingly, I would affirm the district court with regard to counts II and III.