[Headnotes 19, 20]

On the bottom of Briones' Sentencing Scale form, the Division indicated that its sentencing recommendation deviated from the Sentencing Scale based on Briones' prior offenses. We conclude that this was a rational basis to deviate from and that Briones' sentencing forms did not constitute impalpable or highly suspect evidence. As a result, we cannot say that Briones' sentence was prejudiced because the district court did not rely on impalpable or highly suspect evidence, and, in fact, the court expressly disclaimed reliance on the PSI sentencing recommendation in reaching its "independent [sentencing] determination."

CONCLUSION

Based on the foregoing, we confirm Blankenship's judgment of conviction but vacate his sentence and remand his case for a new sentencing hearing. We instruct the district court that, prior to conducting a new sentencing hearing, the PSP, Sentencing Scale, and PSI must be amended to account for and score Blankenship's mental disabilities and their impact on his employability. However, because the district court in Briones' case did not abuse its sentencing discretion, we affirm his judgment of conviction.

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

LeCORY L. GRACE, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE DOUGLAS W. HERNDON, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 68929

July 21, 2016 375 P.3d 1017

Original petition for writ of mandamus challenging a district court order reversing a justice court's order of suppression.

Defendant was charged with possession of a controlled substance and moved to suppress evidence discovered in a purported search incident to arrest. The justice court suppressed the evidence and dismissed the case. State appealed. The district court reversed and remanded. Defendant petitioned for a writ of mandamus. The supreme court, Parraguirre, C.J., held that justice courts have authority to suppress illegally obtained evidence during preliminary hearings.

Petition granted.

Philip J. Kohn, Public Defender, and *Robert E. O'Brien* and *Howard Brooks*, Deputy Public Defenders, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Marc P. DiGiacomo* and *Steven S. Owens*, Chief Deputy District Attorneys, and *Ofelia L. Monje*, Deputy District Attorney, Clark County, for Real Party in Interest.

1. Courts.
   Justice courts are courts of limited jurisdiction and have only the authority granted by statute; however, justice courts also have limited inherent authority to act in a particular manner to carry out their authority granted by statute. Const. art. 6, § 8(1).
2. Criminal Law.
   In the criminal realm, justice courts are statutorily empowered to conduct preliminary hearings for gross misdemeanor and felony charges. NRS 171.196, 171.206.
3. Criminal Law.
   Justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings. Const. art. 1, § 18; U.S. Const. amend. 4; NRS 47.020, 48.025, 171.206.
4. Criminal Law.
   Motion to suppress is a term of art that is defined as a request for the exclusion of evidence premised upon an allegation that the evidence was illegally obtained.
5. Mandamus.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
6. Mandamus.
   It is within the discretion of the supreme court to determine if a petition for a writ of mandamus will be considered. NRS 34.160.
7. Courts; Mandamus.
   The supreme court may address writ of mandamus petitions when an important issue of law requires clarification and public policy is served by the court's exercise of its original jurisdiction. NRS 34.160.
8. Mandamus.
   The supreme court would exercise its discretion to entertain defendant's petition for writ of mandamus regarding whether justice courts have authority to rule on motions to suppress during preliminary hearings; petition raised significant public policy concerns, as petition raised important and novel legal issue regarding commonly utilized hearings and clarification on issue had broad and significant impact, and resolution promoted judicial economy by ensuring that justice courts had uniform view regarding their power.
9. Criminal Law.
   Questions of statutory construction are reviewed de novo.
10. Statutes.
    Statutory language must be given its plain meaning if it is clear and unambiguous.
11. Statutes.
    A statute is ambiguous if its language is susceptible to two or more reasonable interpretations.

12. Criminal Law.
    The rules of evidence apply at preliminary hearings. NRS 47.020.
13. Arrest; Searches and Seizures.
    The state and federal constitutions prohibit unreasonable searches and seizures such that warrantless searches are per se unreasonable unless an established exception, like a search incident to arrest, applies. Const. art. 1, § 18; U.S. Const. amend. 4.
14. Constitutional Law.
    The Fourth Amendment's bar on unreasonable searches and seizures applies to the states through the Fourteenth Amendment. U.S. Const. amends. 4, 14.
15. Criminal Law.
    Evidence derived from an unreasonable search typically must be suppressed. Const. art. 1, § 18; U.S. Const. amend. 4.
16. Criminal Law.
    The supreme court would decline to address State's argument that justice courts can only hear defendant's motion to suppress after the filing of a written motion, where briefing on that point was insufficiently developed.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, C.J.:

[Headnote 1]

In Nevada, justice courts "are courts of limited jurisdiction and have only the authority granted by statute." *Parsons v. State (Parsons III)*, 116 Nev. 928, 933, 10 P.3d 836, 839 (2000); *accord* Nev. Const. art. 6, § 8(1) ("The Legislature shall determine . . . the limits of [a justice court's] civil and criminal jurisdiction . . . ."). However, justice courts also have "limited inherent authority to act in a particular manner to carry out [their] authority granted by statute." *State v. Sargent*, 122 Nev. 210, 214, 128 P.3d 1052, 1054-55 (2006).

[Headnote 2]

In the criminal realm, justice courts are statutorily empowered to conduct preliminary hearings for gross misdemeanor and felony charges. NRS 171.196; NRS 171.206; *accord Parsons III*, 116 Nev. at 933, 10 P.3d at 839. During a preliminary hearing, justice courts must examine the evidence presented, and if "there is probable cause to believe that an offense has been committed and that the defendant has committed it, the [justice court] shall forthwith hold the defendant to answer in the district court; otherwise the [justice court] shall discharge the defendant." NRS 171.206.

[Headnotes 3, 4]

The present matter requires this court to determine whether Nevada's justice courts are authorized to rule on motions to sup-

press[1] during preliminary hearings. We now conclude that justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings.

FACTS

In March 2014, the State filed a criminal complaint against petitioner LeCory Grace in the Las Vegas Justice Court. The complaint charged Grace with one count of possession of a controlled substance. Soon after, the justice court held a preliminary hearing. There, the State called one witness, Las Vegas Metropolitan Police Department Officer Allyn Goodrich. Goodrich testified that he supervised the transfer of several people, including Grace, from Planet Hollywood's security office to a prisoner transport van. Goodrich was told Grace was arrested for a probation violation. However, Goodrich did not witness the arrest, he never received or reviewed any documents regarding Grace or his arrest, and he never learned the precise probation violation that led to Grace's detention.

Goodrich watched as another officer performed what was purportedly a search incident to Grace's arrest. During that search, Goodrich observed a baggie containing a white substance around Grace's shoe, sock, or foot. That substance was later revealed to be cocaine. At his preliminary hearing, Grace orally moved to suppress the baggie of cocaine because the State failed to introduce evidence of Grace's lawful arrest, and without a lawful arrest, officers were not entitled to perform a search incident to arrest. The State opposed the motion, arguing the justice court lacked the authority to hear and rule on suppression issues.

The justice court determined that it had authority to rule on suppression issues because the Legislature had previously rebuffed efforts to strip Nevada's justice courts of the authority to hear such matters. Further, the justice court held that the State failed to meet its burden of showing a predicate lawful arrest before availing itself of the warrant exception for searches incident to arrest. Therefore, the justice court concluded that the search was unlawful, suppressed the evidence derived from that search, and dismissed the case against Grace for lack of probable cause.

Pursuant to NRS 189.120, the State appealed the justice court's order of suppression and dismissal to the Eighth Judicial District Court, again arguing the justice court lacked authority to rule on suppression issues. The district court found in the State's favor, concluding that Nevada's justice courts are limited jurisdiction courts without the power to adjudicate suppression issues in the preliminary hearing context.

---

[1]" 'Motion to suppress' is a term of art which is defined as a request for the exclusion of evidence premised upon an allegation that the evidence was illegally obtained." *State v. Shade*, 110 Nev. 57, 63, 867 P.2d 393, 396 (1994).

The district court remanded Grace's case back to the justice court. Soon after, Grace filed the instant petition, which seeks a writ directing the district court to vacate its "order ruling that Justice Courts in Nevada do not have authority to consider a motion to suppress where the State attempts to enter evidence at [a] preliminary hearing that was unlawfully obtained by a state actor in violation of the United States and Nevada Constitutions."

DISCUSSION

[Headnotes 5-7]

A writ of mandamus is available "to compel the performance of an act which the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007); *see also* NRS 34.160. "[I]t is within the discretion of this court to determine if a petition will be considered." *Schuster*, 123 Nev. at 190, 160 P.3d at 875. This court may also address writ petitions when "an important issue of law requires clarification and public policy is served by this court's exercise of its original jurisdiction." *Id.*

[Headnote 8]

We will exercise our discretion to entertain Grace's petition. First, Grace's petition raises an important and novel legal issue. Additionally, preliminary hearings are commonly utilized in Nevada, and a clarification on the issue raised here would have a broad and significant impact; thus, the petition raises significant public policy concerns. Moreover, our resolution of this matter will promote judicial economy by ensuring the state's justice courts have a uniform view regarding their power to suppress illegally obtained evidence during preliminary hearings.

Accordingly, our discretionary intervention is warranted here, and we must decide whether justice courts have the authority to suppress illegally obtained evidence during a preliminary hearing.

Justice courts have express authority to suppress illegally obtained evidence during preliminary hearings

Grace argues NRS 47.020 and NRS 48.025 expressly require justice courts to suppress illegally obtained evidence. The district court disagreed, holding that justice courts do not have the requisite statutory authorization to determine the constitutionality of evidence presented during a probable cause hearing. Upon review, we conclude Grace's argument has merit.

[Headnotes 9-11]

This court reviews questions of statutory construction de novo. *Sargent*, 122 Nev. at 213-16, 128 P.3d at 1054-56. Statutory language must be given its plain meaning if it is clear and unambigu-

ous. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). A statute is ambiguous if its language is susceptible to two or more reasonable interpretations. *Id.*

[Headnote 12]

First, the rules of evidence apply at preliminary hearings. NRS 47.020(1) states that NRS Title 4, which promulgates Nevada's rules for witnesses and evidence, "governs proceedings in the courts of this State and before magistrates" unless otherwise provided by rule or statute. Although NRS 47.020(3) expressly excludes certain proceedings from Title 4's evidentiary rules, it does not exclude preliminary hearings.[2] *Cf. Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (stating that "where the Legislature has . . . explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings"). The parties have not identified, and this court has not discovered, any statute exempting preliminary hearings from Title 4's evidentiary rules. We perceive no ambiguity here; therefore, NRS Title 4 applies to preliminary hearings.

[Headnotes 13-15]

Second, NRS 48.025, which is part of NRS Title 4, bars the admission of evidence that would be barred by the United States or Nevada Constitutions. Specifically, it provides that "[a]ll relevant evidence is admissible, except . . . [a]s limited by the Constitution of the United States or of the State of Nevada." NRS 48.025(1)(b). Article 1, Section 18 of the Nevada Constitution and the Fourth Amendment to the United States Constitution[3] prohibit unreasonable searches and seizures such that warrantless searches are per se unreasonable unless an established exception, like a search incident to arrest, applies. *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013); *Cortes v. State*, 127 Nev. 505, 514-15, 260 P.3d 184, 190-92 (2011). Evidence derived from an unreasonable search typically must be suppressed. *Somee v. State*, 124 Nev. 434, 444, 187 P.3d 152, 159 (2008). Therefore, when read together, the United States and Nevada Constitutions, NRS 48.025, and NRS 47.020 authorize justice courts to suppress illegally obtained evidence during preliminary hearings. *See* 4 Wayne R. LaFave et al., *Criminal Pro-*

---

[2]Specifically, NRS 47.020(3) excludes the following proceedings from Nevada's evidentiary rules: (1) proceedings related to issuing arrest warrants, search warrants, and criminal summonses; (2) bail proceedings; (3) sentencing and probation determinations; and (4) extradition proceedings.

[3]The Fourth Amendment's bar on unreasonable searches and seizures applies to the states through the Fourteenth Amendment. *Mapp v. Ohio*, 367 U.S. 643, 654-55 (1961).

cedure § 14.4(b) (4th ed. 2015) (explaining that Nevada's evidence rules likely require the suppression of illegally obtained evidence during preliminary hearings).

Justice courts also have limited inherent authority to suppress illegally obtained evidence during preliminary hearings

This court has held that "[a] justice court has the direct authority granted to it by statute and also has limited inherent authority to act in a particular manner to carry out its authority granted by statute." *Sargent*, 122 Nev. at 214, 128 P.3d at 1054-55 (citations omitted). In *Sargent*, this court held that justice courts do not have express or limited inherent authority to order a defendant to appear personally for a preliminary hearing. *Id.* at 217, 128 P.3d at 1056-57. In examining the extent of the justice court's limited inherent authority, we focused on whether a particular power was necessary for the justice court to "carry out its judicial functions." *Id.* at 216, 128 P.3d at 1056. Ultimately, we concluded that justice courts could perform their judicial function without the power to order defendants to appear for preliminary hearings because in-court identifications are but one of several ways the State can establish probable cause that the defendant was the person who committed the crime alleged. *Id.* at 215-16, 128 P.3d at 1055-56.

Sargent's rationale, if not its result, is compelling here. Justice courts must determine whether it appears "from the evidence . . . that there is probable cause to believe that an offense has been committed and that the defendant has committed it." NRS 171.206. We believe that vetting the State's probable cause evidence is an important part of the justice courts' judicial function. *See Goldsmith v. Sheriff of Lyon Cty.*, 85 Nev. 295, 303, 454 P.2d 86, 91 (1969) (holding that the evidence presented at a preliminary hearing "must consist of legal, competent evidence" (internal quotation marks omitted)); *see also* LaFave et al., *supra*, § 14.1(a) (discussing the role preliminary hearings play in "screening" the state's decision to bring charges). Therefore, justice courts' authority to make probable cause determinations includes a limited inherent authority to suppress illegally obtained evidence.

The Legislature's actions over several sessions support our conclusion

NRS 189.120; A.B. 65, 74th Leg. (Nev. 2007); and A.B. 193, 78th Leg. (Nev. 2015) support our conclusion that justice courts have express and limited inherent authority to suppress illegally obtained evidence during preliminary hearings. First, in 1969, the Legislature enacted NRS 189.120, which expressly envisions the appeal of

suppression orders made during a preliminary hearing. Specifically, it provides that "[t]he State may appeal to the district court from an order of a justice court granting the motion of a defendant to suppress evidence," NRS 189.120(1), and "[s]uch an appeal shall be taken . . . [w]ithin 2 days after the rendition of such an order during a . . . preliminary examination," NRS 189.120(2)(a).

The State correctly points out that NRS 189.120 is a procedural rule explaining how and when appeals must be taken, and it does not actually authorize justice courts to suppress illegally obtained evidence. Nevertheless, NRS 189.120 plainly allows the State to appeal a justice court's suppression order, made during a preliminary hearing, to the district court. Thus, NRS 189.120 demonstrates the Legislature's foundational presumption that justice courts are empowered to suppress illegally obtained evidence during preliminary hearings. NRS 189.120's legislative history further shows that the Legislature believed justice courts were empowered to suppress illegally obtained evidence. In discussing NRS 189.120's purpose, Assemblyman Torvinen stated:

> At the preliminary hearing [district attorneys] produce evidence and the court [suppresses] it because it was taken without a warrant or something. The case is dismissed and they turn the guy loose and that is the end of it. With this, the State can appeal the case.

Hearing on A.B. 641 Before the Assembly Judiciary Comm., 55th Leg. (Nev., March 19, 1969). Therefore, NRS 189.120 and its history demonstrate that the Legislature believed justice courts had the power to suppress illegally obtained evidence presented during a preliminary hearing.

Second, the Legislature rejected bills in 2007 (A.B. 65) and 2015 (A.B. 193) that would have barred justice courts from considering the constitutionality of evidence presented during a preliminary hearing. Again, the State correctly argues these failed bills do not confer jurisdiction upon Nevada's justice courts. However, the failed bills show that the Legislature believed justice courts already had the power to suppress illegally obtained evidence and declined to divest them of that power.

A.B. 65 would have amended (1) NRS 174.125 to clearly state that only district courts can hear motions to suppress in gross misdemeanor and felony matters, and (2) NRS 189.120 to remove any reference to appealing suppression orders made during preliminary hearings. A.B. 65, §§ 1, 2, 74th Leg. (Nev. 2007). Legislators heard testimony indicating that the current practice in Nevada's justice courts was for suppression issues to be heard during preliminary hearings. Hearing on A.B. 65 Before the Assembly Judiciary

Comm., 74th Leg. (Nev., Feb. 21, 2007). Ultimately, A.B. 65 failed when the Legislature declined to act on it.

Similarly, in 2015, the Legislature considered A.B. 193, which sought to amend NRS 174.125 and NRS 189.120 in essentially the same ways as A.B. 65 (2007). *Compare* A.B. 65, §§ 1, 2, 74th Leg. (Nev. 2007), *with* A.B. 193, §§ 11, 12, 78th Leg. (Nev. 2015) (as introduced). Legislators' comments largely show they believed evidentiary standards for preliminary examinations should not be relaxed. *See* Hearing on A.B. 193 Before the Assembly Judiciary Comm., 78th Leg. (Nev., March 13, 2015). The Legislature later removed the proposed amendments in A.B. 193's first reprint. *Compare* A.B. 193, §§ 11, 12, 78th Leg. (Nev. 2015) (as introduced), *with* A.B. 193, §§ 11, 12, 78th Leg. (Nev. 2015) (first reprint). Thus, A.B. 65 (2007) and A.B. 193 (2015) show that the Legislature has not been inclined to adopt legislation that would require justice courts to rely on evidence they know to be illegally obtained during preliminary hearings.

In sum, we conclude justice courts have the power to suppress illegally obtained evidence because (1) NRS 47.020 and NRS 48.025 expressly authorize justice courts to do so; (2) NRS 171.206 and *Sargent* show that justice courts have limited inherent authority to do so; and (3) NRS 189.120, A.B. 65 (2007), and A.B. 193 (2015) show that the Legislature envisions justice courts as having that power.

[Headnote 16]

Accordingly, we grant Grace's petition.[4] We direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its July 31, 2015, order concluding that the justice court lacked jurisdiction to adjudicate suppression issues during a preliminary hearing.

Hardesty, Douglas, Cherry, Saitta, Gibbons, and Pickering, JJ., concur.

---

[4]The State also argues that justice courts can only hear a defendant's motion to suppress after the filing of a written motion. Because the briefing on that point was insufficiently developed, we decline to address it at this time. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987).

Additionally, we note that Grace's petition does not require us to examine the merits of the justice court's suppression ruling, and we express no opinion on that matter.

RAYMOND RIAD KHOURY, Appellant, *v.*
MARGARET SEASTRAND, Respondent.

No. 64702

RAYMOND RIAD KHOURY, Appellant, *v.*
MARGARET SEASTRAND, Respondent.

No. 65007

RAYMOND RIAD KHOURY, Appellant, *v.*
MARGARET SEASTRAND, Respondent.

No. 65172

July 28, 2016 377 P.3d 81

Consolidated appeals from a district court judgment, pursuant to a jury verdict, and post-judgment orders awarding costs and denying a new trial in a personal injury action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Motorist brought personal injury action against driver of second vehicle for injuries sustained in accident. The district court entered judgment on jury verdict awarding $125,238.01 to motorist, awarded motorist $75,015.61 in costs, and denied driver's motion for new trial. Driver appealed. The supreme court, Saitta, J., held that: (1) as an issue of first impression, allowing party to voir dire jury panel regarding specific verdict amount is within the district court's discretion; (2) the district court did not abuse its discretion by finding jury was not impermissibly indoctrinated; (3) as an issue of first impression, the district court's error in dismissing five jurors for case to avoid potential bias was harmless; (4) the district court did not abuse its discretion by admitting treating physician's testimony; (5) the district court did not abuse its discretion by admitting neurosurgeon's testimony; (6) evidence regarding sale of medical liens is irrelevant to jury's determination of reasonable value of medical services provided; (7) as an issue of apparent first impression, evidence of existence of medical liens to prove bias does not invoke collateral source rule; and (8) the district court's error in excluding evidence of motorist's medical liens to prove bias was harmless.

Affirmed in part, reversed in part, and remanded.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Hall Jaffe & Clayton, LLP*, and *Steven T. Jaffe*, Las Vegas; *Harper Law Group* and *James E. Harper*, Las Vegas; *Houser & Allison, APC*, and *Jacob S. Smith*, Las Vegas, for Appellant.

Richard Harris Law Firm and *Benjamin P. Cloward, Alison M. Brasier*, and *Richard A. Harris*, Las Vegas, for Respondent.

1. Trial.
   The decision whether to grant or deny a motion for mistrial is within the district court's discretion.
2. Jury.
   Allowing a party to voir dire the jury panel regarding a specific verdict amount is within the district court's discretion.
3. Jury.
   The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court.
4. Jury.
   While counsel, during voir dire, may inquire to determine prejudice, he or she cannot indoctrinate or persuade the jurors.
5. Jury.
   The district court did not abuse its discretion by finding that jury was not impermissibly indoctrinated when motorist's counsel told jury during voir dire that his client was suing in excess of $2 million and repeatedly brought up $2 million verdict amount with each individual juror in motorist's personal injury action against driver of second vehicle; counsel's comments were aimed more at acquisition of information than indoctrination.
6. Jury.
   During voir dire, district court judges must carefully consider the treatment of jurors during the selection process; the ultimate objective is to seat a fair and impartial jury.
7. Jury.
   Bias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict.
8. Jury.
   Inability by a juror to apply the law and instructions of the court displays bias.
9. Jury.
   The district court abused its discretion when it dismissed five jurors for cause who had expressed concerns about awarding large verdict amounts and/or pain and suffering damages but who later stated that they would be able to follow the law and award large verdict amounts and such damages in motorist's personal injury action against driver of second vehicle; the district court stated that it was excluding jurors to avoid potential of bias or prejudice, but potential bias was not valid basis for dismissing jurors for cause, and jurors' statements, when taken as whole, indicated that they could apply the law and instruction of court in deciding verdict, and, thus, they were not actually biased.
10. Jury.
    A district court's ruling on a challenge to a juror for cause involves factual determinations, and, therefore, the district court enjoys broad discretion, as it is better able to view a prospective juror's demeanor than a subsequent reviewing court.
11. Appeal and Error.
    The supreme court would deem waived for appellate review claim by driver of second vehicle that proper standard of review was de novo, not abuse of discretion, due to the district court's misinterpretation of statute governing grounds for challenges to jurors for cause in motorist's personal injury action against driver; driver raised issue for first time in his reply brief on appeal. NRS 16.050; NRAP 28(c).

12. Jury.

Jurors should only be excluded on the basis of an actual bias that prevents or substantially impairs the juror's ability to apply the law and the instructions of the court in deciding the verdict or for other grounds defined by statute. NRS 16.050.

13. Jury.

In determining whether jurors are biased and, thus, should be dismissed for cause, their statements must be taken as a whole, and detached language, considered alone, indicating that they may have difficulty awarding a large verdict amount is insufficient to demonstrate that they would be unable or substantially impaired in applying the law and the instructions of the court in deciding the verdict and thus actually biased against awarding large verdict amounts.

14. Appeal and Error.

The district court's error in dismissing five jurors for cause to avoid potential of bias or prejudice was harmless in motorist's personal injury action against driver of second vehicle; unlike abuse of discretion in refusing to dismiss juror, which could result in biased juror or jury, when the district court improperly struck juror, it did not prejudice driver, as, if competent and unbiased juror was selected and sworn, driver had trial by impartial jury, which was all that could be demanded.

15. Pretrial Procedure.

The district court did not abuse its discretion by admitting treating physician's testimony as to whether another treating doctor's workup of motorist was adequate in motorist's personal injury action against driver of second vehicle, even though there was no expert witness report for physician; physician's opinion of doctor's workup was formed in course of physician's treatment, as physician's review of treatment by doctor was helpful in making his diagnosis and treatment plan.

16. Appeal and Error.

The supreme court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion.

17. Pretrial Procedure.

While a treating physician is exempt from the expert witness report requirement, this exemption only extends to opinions that were formed during the course of treatment; where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements.

18. Appeal and Error.

Driver of second vehicle waived for appellate review claim that testimony by motorist's treating physician as to causation regarding motorist's injuries was improper in motorist's personal injury action against driver; driver did not object to testimony.

19. Evidence.

The district court did not abuse its discretion by admitting expert testimony by neurosurgeon about symptoms motorist experienced before accident in motorist's personal injury action against driver of second vehicle; testimony was within scope of neurosurgeon's specialized knowledge, as he typically used patient histories and physical examinations to reach diagnosis and decide whether neurological surgery was proper treatment for patient's diagnosis, and, to rule out surgery as treatment, neurosurgeon had to determine cause of patient's symptoms and whether they resulted

from something not neurologically related; thus, his opinion that motorist's prior symptoms were unrelated to neck and more likely related to heart or anxiety rested on reliable foundation of knowledge and experience of his practice. NRS 50.275.

20. Evidence.

To testify as an expert witness, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of scientific, technical, or other specialized knowledge (the qualification requirement); (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue (the assistance requirement); and (3) his or her testimony must be limited to matters within the scope of his or her specialized knowledge (the limited scope requirement). NRS 50.275.

21. Pretrial Procedure.

The district court did not abuse its discretion by allowing neurosurgeon to testify as to his opinion that motorist's prior injuries were unrelated to her neck in motorist's personal injury action against driver of second vehicle, despite claim that neurosurgeon was required to disclose that opinion in expert report but failed to do so; neurosurgeon disagreed with another expert's opinion that motorist had documented history of cervical and lumbar pain, by which he proffered opinion that motorist's symptoms during her doctor's visit were unrelated to neck, and neurosurgeon appeared to endorse doctor's assessment that symptoms were related to chest pain and stress by chiding doctor for conveniently omitting that fact. NRCP 16.1(a)(2)(B).

22. Appeal and Error.

The supreme court would decline to consider argument by driver of second vehicle that neurological expert's reports were not timely disclosed and should have been excluded on that basis in motorist's personal injury action against driver; driver's brief did not specifically argue that any particular report was made outside of time limitations and merely set forth those limitations without stating which report was untimely under time limit. NRCP 16.1(a)(2)(C).

23. Damages.

Evidence regarding the sale of medical liens is irrelevant to a jury's determination of the reasonable value of medical services provided in a personal injury case.

24. Appeal and Error.

Driver of second vehicle waived for appellate review claim that the district court erred by refusing to allow him to examine motorist's medical providers as to reasonable value of motorist's medical care in motorist's personal injury action against driver; claim was misrepresentation of issue presented to, and ruled on, by the district court, as driver actually moved to limit motorist's presentation of past medical special damages at trial to amounts actually paid by or on behalf of motorist, not to examine motorist's treatment providers about reasonable value of medical care, and arguments driver made on issue in his brief were not raised before the district court.

25. Damages.

Evidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion; this is because the write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the

medical provider, and not necessarily relating to the reasonable value of the medical services.

26. Damages.
Evidence of the existence of medical liens to prove bias does not invoke the collateral source rule.

27. Damages.
The collateral source rule provides that if an injured party received some compensation for his or her injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages that the plaintiff would otherwise collect from the tortfeasor.

28. Appeal and Error.
The district court's error in excluding evidence of motorist's medical liens to prove bias under collateral source rule was harmless in motorist's personal injury action against driver of second vehicle; terms of motorist's medical liens indicated that she would owe money to her medical providers whether or not she was successful in lawsuit, providers were paid for time they spent preparing for trial and testifying in court, driver was able to cross-examine providers about any bias that resulted from payments, and driver did not present any arguments or evidence supporting contention that verdict in case was close and that allowing him to use evidence of liens to establish bias in providers would have resulted in different verdict. NRCP 61.

29. Appeal and Error.
To be reversible, an error must be prejudicial and not harmless; to demonstrate that an error is not harmless, a party must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached. NRCP 61.

30. Trial.
Use of "claim" by motorist's counsel during opening arguments did not warrant mistrial in motorist's personal injury action against driver of second vehicle, despite claim that counsel improperly informed jury that driver had insurance coverage; "claim" was not uniquely insurance term, as it could also mean claim for relief in court of law, and since counsel's use of "claim" was in regard to unrelated car accident, use indicated to whether motorist or another party in that accident was insured, not whether driver was insured in current case.

31. Costs.
The district court abused its discretion by awarding $42,750 as expert witness fees to motorist in her personal injury action against driver of second vehicle; the district court awarded expert fees in excess of $1,500 without stating basis for its decision. NRS 18.005(5).

32. Appeal and Error.
The supreme court would decline to consider on appeal claim by driver of second vehicle that, because trial preparation costs and costs for medical records were not specifically listed as recoverable under statute defining costs, they were routine part of normal legal overhead and, thus, the district court abused its discretion by awarding them in motorist's personal injury action against driver; driver made only one-sentence argument and provided no further analysis or authority for argument. NRS 18.005.

Before the Court En Banc.[1]

[1]The Honorable Ron Parraguirre, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, SAITTA, J.:

As any trial attorney is aware, the jury voir dire process can be as important to the resolution of their claim as the trial itself. In this case we are asked to consider whether an attorney may ask prospective jurors questions concerning a specific verdict amount to determine potential bias or prejudice against returning large verdicts and whether repeatedly asking questions about that specific verdict amount results in jury indoctrination warranting a mistrial. We also consider the question of when a district court abuses its discretion in dismissing jurors for cause under *Jitnan v. Oliver*, 127 Nev. 424, 254 P.3d 623 (2011).

We hold that while it is permissible for a party to use a specific award amount in questioning jurors regarding their biases towards large verdicts, it is the duty of the district court to keep the questioning within reasonable limits. When the district court fails to do so, this can result in reversible error due to jury indoctrination. We also distinguish our holding in *Jitnan* to emphasize that a juror's statements must be taken as a whole when deciding whether to dismiss for cause due to bias. Just as detached language considered alone is insufficient to establish that a juror is *unbiased*, it is also insufficient to establish that a juror is *biased*.

In the current case, we hold that, while troubling, the plaintiff's questioning of the jurors during voir dire did not reach the level of indoctrination. Furthermore, we hold that the district court abused its discretion by dismissing for cause five jurors because their statements, when taken as a whole, did not indicate that they were biased against large verdict amounts. However, the district court's error was harmless. Next, the district court did not abuse its discretion by admitting opinion and causation testimony by respondent's treating physician, by admitting testimony by respondent's expert witness, or by excluding evidence of the amount that respondent's medical providers received for the sale of her medical liens. However, the district court did abuse its discretion by excluding evidence of the medical lien's existence to prove bias in Seastrand's medical providers, but the error was harmless. Lastly, we hold that the district court abused its discretion by awarding respondent expert witness fees in excess of $1,500 per expert because it did not state a basis for its award. Therefore, we reverse the district court's decision as to the award of expert witness fees and remand to the district court with instructions to redetermine the amount of expert witness fees and, if greater than $1,500 per witness, to state the basis for its decision.

FACTUAL AND PROCEDURAL HISTORY

Respondent Margaret Seastrand and appellant Raymond Riad Khoury were in an automobile accident where Khoury's car rear-

ended Seastrand's car. Following the accident, Seastrand received extensive treatment to both her neck and back, including surgeries. Seastrand brought the underlying personal injury action against Khoury to recover damages.

Khoury stipulated to liability for the accident, and the only issues contested at trial were medical causation, proximate cause, and damages. Khoury argued that Seastrand's injuries leading to the surgeries were preexisting and were not caused by the accident. During voir dire, Seastrand stated that she was seeking $2 million in damages and was permitted to question the jurors regarding whether they had hesitations about potentially awarding that specific verdict amount. After this questioning, the district court granted Seastrand's motion to dismiss several jurors for cause but denied Seastrand's motion to dismiss five other jurors for cause. However, the next day, the district court reconsidered its previous ruling and dismissed those five jurors for cause.

During trial, multiple expert witnesses testified, including Dr. Jeffrey Gross, a neurological expert, and Dr. William S. Muir, one of Seastrand's treating physicians. After a ten-day trial, the jury returned a verdict in the amount of $719,776. Seastrand then filed a memorandum of costs in the amount of $125,238.01 and a motion for attorney fees. Khoury opposed the motion and moved to retax costs. The district court granted in part Seastrand's motion for costs, awarding her $75,015.61, denied Seastrand's motion for attorney fees, and denied Khoury's countermotion to retax costs. Khoury then made a motion for a new trial, alleging various errors. The district court denied Khoury's motion. Khoury appeals from the judgment, the costs award, and the order denying his new trial motion.

Khoury raises the following issues on appeal: whether the district court abused its discretion by (1) denying Khoury's motion for a mistrial due to jury indoctrination, (2) dismissing jurors for cause that displayed concerns about their ability to award large verdicts and/or damages for pain and suffering, (3) admitting causation and opinion testimony by one of Seastrand's treating physicians, (4) admitting testimony by one of Seastrand's expert witnesses that was outside the scope of his specialized knowledge and/or undisclosed in a timely expert report, (5) excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens, (6) excluding evidence of her medical liens, (7) refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments, and (8) awarding costs to Seastrand.

DISCUSSION

The voir dire process

Khoury argues that the district court abused its discretion by allowing Seastrand to voir dire the jury panel about their biases

regarding large verdicts. Khoury contends that Seastrand's questioning indoctrinated the jury to have a disposition towards a large verdict. Khoury argues that by asking jurors if they were uncomfortable with a verdict in excess of $2 million, Seastrand's attorney "improperly implanted a numerical value in the minds of the jury as representative of plaintiff's damages *before* the jurors heard or considered any admitted evidence." Therefore, Khoury urges this court to "rule that such questions are *per se* improper."

[Headnote 1]

The decision whether to grant or deny a motion for mistrial is within the trial court's discretion. *Owens v. State*, 96 Nev. 880, 883, 620 P.2d 1236, 1238 (1980).

Questioning jurors during voir dire about specific verdict amounts is not per se indoctrination

[Headnotes 2-4]

"The purpose of jury voir dire is to discover whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011) (internal quotation marks omitted). "While counsel may inquire to determine prejudice, he cannot indoctrinate or persuade the jurors." *Scully v. Otis Elevator Co.*, 275 N.E.2d 905, 914 (Ill. App. Ct. 1971).

Although we have not yet considered the issue of jury indoctrination in the civil context, we have considered it, albeit briefly, in criminal proceedings. *See Hogan v. State*, 103 Nev. 21, 23, 732 P.2d 422, 423 (1987); *see also Johnson v. State*, 122 Nev. 1344, 1354-55, 148 P.3d 767, 774 (2006). In *Hogan*, the court indicated that it was not an abuse of discretion for the district court to refuse to allow voir dire questions that were "aimed more at indoctrination than acquisition of information." 103 Nev. at 23, 732 P.2d at 423. In *Johnson*, the court indicated that allowing the State to ask "prospective jurors about their ability to carry out their responsibilities[,]" by sentencing the defendant to death, was within the district court's discretion. 122 Nev. at 1354-55, 148 P.3d at 774.

Other jurisdictions have considered the indoctrination issue in the civil context and have addressed the particular issue raised here—whether asking jurors if they have any hesitations about awarding a specific amount of damages results in indoctrination per se. In *Kinsey v. Kolber*, the Appellate Court of Illinois held that questioning jurors about specific verdict amounts was not indoctrination because it "tended to uncover jurors who might have bias or prejudice against large verdicts." 431 N.E.2d 1316, 1325 (Ill. App. Ct. 1982); *see also Scully*, 275 N.E.2d at 914 (suggesting that allowing the plaintiff to question jurors about specific amounts was not an abuse of discretion because "[s]ome prospective jurors may have had fixed

opinions, which indicate bias or prejudice against large verdicts, and which might not readily yield to proper evidence." (internal quotation marks omitted)).

Alternatively, some jurisdictions have found that it is within the discretion of the district court to *refuse* to allow the plaintiff to ask questions about specific dollar amounts. This is because "they may tend to influence the jury as to the size of the verdict, and may lead to the impaneling of a jury which is predisposed to finding a higher verdict by its tacit promise to return a verdict for the amount specified in the question during the voir dire examination." *Trautman v. New Rockford-Fessenden Co-op Transp. Ass'n*, 181 N.W.2d 754, 759 (N.D. 1970); *see also Henthorn v. Long*, 122 S.E.2d 186, 196 (W. Va. 1961). However, these courts did not state that questions about specific dollar amounts were per se improper; rather, the courts in these cases merely held that it was within the district court's discretion to refuse to allow the plaintiff to ask questions about specific dollar amounts. *See Trautman*, 181 N.W.2d at 759 ("It is well within the trial court's discretion to sustain objections to such questions."); *Henthorn*, 122 S.E.2d at 196 ("While jurors may be interrogated on their *voir dire* within reasonable limits, to elicit facts to enable the litigants to exercise intelligently their right of peremptory challenge, the nature and extent thereof should be left largely to the discretion of the trial court." (internal quotation marks omitted)).

We agree with other courts that have considered this issue and do not find the use of specific dollar amounts in voir dire to be per se improper. Indeed, it may be appropriate to use a specific amount in order to discover a juror's biases towards large verdicts. Simply asking jurors about their feelings regarding "large" awards or some similarly vague adjective may be insufficient to determine if a juror has a preconceived damages threshold for a certain type of case. A juror may consider himself or herself capable of awarding a verdict of $100,000, a verdict which in his or her mind may be fabulously large, but be unable to follow the law and award a verdict with another zero attached. Therefore, we hold that allowing a party to voir dire the jury panel regarding a specific verdict amount is within the district court's discretion.

Courts should remain vigilant of the danger of indoctrination during voir dire

[Headnote 5]

During the three-day voir dire, Seastrand's attorney asked the jurors the following question:

> I'm going to be brutally honest with you folks right now. I'm going to say something that's a little uncomfortable for me to say. My client is suing for in excess of $2 million, and that's—you know, that's—that's what it is, and I'm putting that out

> there. I'm just going to be brutally honest about that. And I know that some of you folks, you know, you had different views and different beliefs in—in the jury questionnaire, and that's fine. But I want to talk about that right now.
>
> So who here is a little uncomfortable, even if it's just a little bit, with what I just said?

Seastrand's attorney did not stop there, however. He repeatedly brought up the $2 million verdict amount with each individual juror. In his quest to discover the jurors' feelings on that specific verdict amount, the record indicates that his actions bordered on badgering. One juror stated that Seastrand's attorney had used a "bullying tactic" in his "overemphasis on money" that "left a very bad taste in [his] mouth." The record also reflects that the questioning almost reduced another juror to tears.

[Headnote 6]

Although our review of the voir dire transcript indicates that it was aimed more at acquisition of information than indoctrination, it was uncomfortably close. If the conduct by Seastrand's attorney had been allowed to become any more egregious, it would have reached the level of reversible error due to jury indoctrination. We take this opportunity to remind district court judges of their role in carefully considering the treatment of jurors during the selection process and the ultimate objective of seating a fair and impartial jury. However, we ultimately hold that the district court did not abuse its discretion in finding that the jury was not impermissibly indoctrinated in its denial of Khoury's motion for a mistrial.

The dismissals for cause

Khoury argues that the district court abused its discretion by misapplying *Jitnan v. Oliver*, 127 Nev. 424, 254 P.3d 623 (2011), to dismiss jurors for cause who expressed concerns about awarding a large verdict amount. Khoury argues that a juror's prejudice against large verdict amounts or pain and suffering damages is not a form of bias. Therefore, he maintains that the district court abused its discretion in dismissing for cause jurors displaying such a prejudice. Khoury further asserts that the district court abused its discretion by denying his motion for a mistrial on these issues. *See Owens*, 96 Nev. at 883, 620 P.2d at 1238.

During voir dire, the district court initially denied a motion to dismiss for cause five individual jurors. However, after reviewing our decision in *Jitnan*, the district court reconsidered its prior ruling and dismissed the five jurors for cause "in an abundance of caution" because "[e]ach one of them talked about the fact . . . that $2 million was too much." In making its ruling, the district court was particularly concerned with whether the prospective jurors could state "un-

equivocally" that they did not have a preconception that a personal injury case could not support a large damages verdict. *See Jitnan*, 127 Nev. at 432, 254 P.3d at 629 (holding that "[d]etached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state *unequivocally* that a preconception would not influence her verdict." (emphasis added) (internal quotation marks omitted)). The district court stated that "the unequivocal language [in *Jitnan*] is the language that I keep coming back to and in order to avoid the potential of bias or prejudice, I'm going to exclude them all."

A juror's bias against large verdict amounts or pain and suffering damages is a form of bias

[Headnote 7]

"[B]ias exists when the juror's views either prevent or substantially impair the juror's ability to apply the law and the instructions of the court in deciding the verdict." *Sanders v. Sears-Page*, 131 Nev. 500, 507, 354 P.3d 201, 206 (Ct. App. 2015).

[Headnote 8]

Here, jurors were dismissed for cause on the grounds that they indicated they were predisposed against awarding a large amount of damages or damages for pain and suffering and would not be able to apply the law and the instructions of the court to the evidence presented because of their preconceived views. Inability by a juror to apply the law and instructions of the court displays bias. Therefore, we next consider whether such a bias existed in the jurors dismissed for cause by the district court.

The district court abused its discretion by dismissing jurors for cause that displayed a "potential" bias against large verdicts

[Headnotes 9-11]

"A district court's ruling on a challenge for cause involves factual determinations, and therefore, the district court enjoys broad discretion, as it is better able to view a prospective juror's demeanor than a subsequent reviewing court." *Jitnan*, 127 Nev. at 431, 254 P.3d at 628 (internal quotation marks omitted).[2] In *Jitnan*, we stated:

> In determining if a prospective juror should have been removed for cause, the relevant inquiry focuses on whether the juror's views would prevent or substantially impair the performance of his duties as a juror in accordance with his

[2]Khoury argues in his reply brief that the district court misinterpreted NRS 16.050 and that therefore the proper standard of review is de novo, not abuse of discretion. Because Khoury raises this issue for the first time in his reply brief, it is deemed waived and we do not consider it here. NRAP 28(c).

> instructions and his oath. Broadly speaking, if a prospective juror expresses a preconceived opinion or bias about the case, that juror should not be removed for cause if the record as a whole demonstrates that the prospective juror could lay aside his impression or opinion and render a verdict based on the evidence presented in court. But detached language considered alone is not sufficient to establish that a juror can be fair when the juror's declaration as a whole indicates that she could not state *unequivocally* that a preconception would not influence her verdict.

Id. at 431-32, 254 P.3d at 628-29 (emphasis added) (citations and internal quotation marks omitted).

Here, the district court initially denied Seastrand's motion to dismiss five jurors for cause who had expressed concerns about awarding large verdict amounts and/or pain and suffering damages, but later stated under cross-examination by Khoury that they would be able to follow the law and award a large verdict amount and/or pain and suffering damages. However, the next day, the district court reconsidered its prior ruling and dismissed the jurors for cause, reasoning that "the unequivocal language [in *Jitnan*] is the language that I keep coming back to and in order to avoid the *potential* of bias or prejudice, I'm going to exclude them all." (Emphasis added.)

[Headnote 12]

This statement encapsulates the district court's error. *Potential* bias is not a valid basis for dismissing a juror for cause. Jurors should only be excluded on the basis of an *actual* bias that prevents or substantially impairs the juror's ability to apply the law and the instructions of the court in deciding the verdict or for other grounds defined by statute. *See* NRS 16.050. It is clear from the district court's oral reasoning that it was focused on the last sentence of *Jitnan* and, specifically, the single word "unequivocally," while ignoring the context provided by the remainder of the paragraph in which it is contained. If potential bias was all that were required to dismiss a juror for cause, then *any* expression of doubt, no matter how small, by a juror would be grounds to dismiss for cause. Under such a standard, rehabilitation by the opposing party's attorney would be impossible. No matter how fervent a juror's statements indicating that the juror could follow the law, the potential for bias would remain.

[Headnote 13]

Jitnan, when read in context, states that jurors' statements expressing a potential bias are not enough, when taken alone, to mean that they cannot "unequivocally" follow the law. 127 Nev. at 432, 254 P.3d at 629. While *Jitnan* only states that "[d]etached language considered alone is not sufficient to establish that a juror can be

fair," this is also true for establishing whether a juror *cannot* be fair. *Id.* (internal quotation marks omitted). Jurors' statements must be taken "as a whole," and "[d]etached language, considered alone[,]" indicating that they may have difficulty awarding a large verdict amount is insufficient to demonstrate that they would be unable or substantially impaired in applying the law and the instructions of the court in deciding the verdict and thus actually biased against awarding large verdict amounts. *Id.* (internal quotation marks omitted).

After reviewing the voir dire transcript, we conclude that the district court got it right the first time when it refused to dismiss the five jurors for cause. Therefore, we hold that the district court abused its discretion by improperly dismissing jurors for cause whose statements, when taken as a whole, indicate that they could apply the law and the instructions of the court in deciding the verdict and thus were not actually biased.

The error was harmless

[Headnote 14]

Khoury argues that excluding jurors for their biases against large verdict amounts was reversible error because it prevented the jury from being a fair cross-section of society. Khoury equates this to excluding jurors on the basis of political affiliation, which some courts do not allow.

Although we have not yet considered this issue, most jurisdictions have held that when the district court abuses its discretion in dismissing a juror for cause, it is not reversible error. *See Jones v. State*, 982 S.W.2d 386, 392 (Tex. Crim. App. 1998) ("The law in Texas for civil cases is like that of the federal courts and the courts of the other states. It has long been the established rule in this state that even though the challenge for cause was improperly sustained, no reversible error is presented unless appellant can show he was denied a trial by a fair and impartial jury." (internal quotation marks omitted)); *see also Basham v. Commonwealth*, 455 S.W.3d 415, 421 (Ky. 2014) (holding that even when a trial court abuses its discretion in dismissing a juror for cause, it is not reversible error unless that abuse was "tantamount to some kind of systematic exclusion, such as for race"). This is because, unlike an abuse of discretion in *refusing* to dismiss a juror, which can result in a biased juror or jury, when the district court improperly strikes a juror, it "[does] not prejudice the [appellant]." If a "competent and unbiased juror was selected and sworn," the appellant had "a trial by an impartial jury, which was all it could demand." *N. Pac. R.R. Co. v. Herbert*, 116 U.S. 642, 646 (1886).

Khoury is unable to provide any persuasive authority to support his contention that improperly dismissing jurors with a perceived bias for cause is reversible error. Rather, Khoury relies on *Powers v.*

Ohio, 499 U.S. 400, 422 (1991), which holds that dismissing jurors on the basis of race prevents a jury from being "a fair cross section of the community." We do not conclude exclusion on the basis of race to be comparable to exclusion due to a mistaken finding of bias. Likewise, we reject Khoury's argument that dismissing for cause due to bias against large verdicts is comparable to dismissing for cause due to political affiliations. While at least one court has held that "[a]ffiliations with political parties constitute neither a qualification nor disqualification for jury service," *State v. McGee*, 83 S.W.2d 98, 106 (Mo. 1935), it did not hold that dismissing for cause on this issue is reversible error. Therefore, we hold that the district court's error was harmless and does not warrant reversal of the judgment or the order denying Khoury's new trial motion.

Dr. Muir's testimony

Khoury argues that Seastrand's treating physician, Dr. Muir, should have been precluded from testifying about the cause of Seastrand's injuries and his opinion on the treatment provided by Dr. Marjorie E. Belsky because Seastrand failed to conform to the testifying expert witness disclosure requirements in presenting Dr. Muir as a witness.

The district court did not abuse its discretion by admitting Dr. Muir's testimony

[Headnotes 15-17]

This court reviews the decision of the district court to admit expert testimony without an expert witness report or other disclosures for an abuse of discretion. *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 433-34, 335 P.3d 183, 190 (2014) (reviewing for an abuse of discretion a district court's decision to allow physician testimony without an expert witness report and disclosure). "While a treating physician is exempt from the report requirement, this exemption only extends to 'opinions [that] were formed during the course of treatment.'" *Id*. at 433, 335 P.3d at 189 (quoting *Goodman v. Staples the Office Superstore, LLC*, 644 F.3d 817, 826 (9th Cir. 2011)). "Where a treating physician's testimony exceeds that scope, he or she testifies as an expert and is subject to the relevant requirements." *Id*. at 433, 335 P.3d at 190.

On direct examination, the following exchange occurred between Dr. Muir and Seastrand's attorney:

> Q. Dr. Muir, No. 1, do you feel that there was an adequate workup of the patient prior to getting to you?
>
> A. Yes.

Khoury argues that Dr. Muir improperly opined on the reasonableness of Dr. Belsky's treatment in this exchange because Dr.

Muir did not form this opinion during the course of his treatment of Seastrand.

At trial, evidence was presented supporting the contention that Dr. Muir's opinion of the workup of Seastrand by Dr. Belsky was formed in the course of Dr. Muir's treatment. Dr. Muir testified that Dr. Belsky referred Seastrand to him after the injections given by Dr. Belsky failed to cause her condition to improve. Dr. Muir testified that both he and Dr. Belsky believed that Seastrand's symptoms were caused by the same portions of the spine. Dr. Muir further testified that the injections given by Dr. Belsky "help[ed] to determine if a particular nerve is being irritated or maybe damaged." He testified that it is possible that "after a couple of injections, maybe the body has healed itself . . . [a]nd you can treat the problem in a less aggressive way or maybe it won't require any treatment after a period of time." Lastly, Dr. Muir testified that he took into consideration the course of treatment of other providers in making his diagnosis and treatment plan.

[Headnote 18]

Dr. Muir's testimony indicates that the injections given by Dr. Belsky were helpful in determining which of Seastrand's nerves were damaged and whether aggressive treatment would be necessary. His testimony also indicated that his review of the treatment of other providers is helpful in making his diagnosis and treatment plan. Thus, Dr. Muir's testimony indicates that his opinion of Dr. Belsky's treatment was formed in the course of his own treatment. Therefore, we hold that the district court did not abuse its discretion by admitting Dr. Muir's testimony as to whether Dr. Belsky's workup of Seastrand was adequate.[3]

Dr. Gross's testimony

Khoury argues that the district court abused its discretion by allowing Dr. Gross to testify about symptoms that Seastrand experienced before the accident, as such testimony was outside the scope of his specialized knowledge as a neurosurgeon and was an opinion that was not disclosed in Dr. Gross's expert report. Therefore, Khoury argues that the district court abused its discretion by admitting the testimony.

On direct examination, the following exchange occurred between Seastrand's attorney and Dr. Gross:

---

[3]Khoury also argues that Dr. Muir's testimony as to causation regarding Seastrand's injuries was improper. However, because Khoury did not object to Dr. Muir's testimony on causation, he has waived this issue on appeal. *See In re Parental Rights as to J.D.N.*, 128 Nev. 462, 468, 283 P.3d 842, 846 (2012) ("[W]hen a party fails to make a specific objection before the district court, the party fails to preserve the issue for appeal.").

> [The court, repeating a question from Seastrand's attorney.] Is it more probable those findings were—of the numbness and tingling were coming from the neck or more probable it was from the heart event for which she had a positive stress test?
>
> [Dr. Gross]: It is more probable that the arm symptoms are unrelated to the neck and more likely related to the heart or anxiety or both.

Dr. Gross was referring to symptoms that Seastrand had prior to the accident giving rise to the current case. This was relevant because Khoury's defense was that Seastrand's injuries predated the accident, and thus, he was not liable for damages related to those injuries.

> *The district court did not abuse its discretion by admitting testimony by Dr. Gross because it was not outside the scope of his specialized knowledge*

[Headnotes 19, 20]

> To testify as an expert witness under NRS 50.275, the witness must satisfy the following three requirements: (1) he or she must be qualified in an area of "scientific, technical or other specialized knowledge" (the qualification requirement); (2) his or her specialized knowledge must "assist the trier of fact to understand the evidence or to determine a fact in issue" (the assistance requirement); and (3) his or her testimony must be limited "to matters within the scope of [his or her specialized] knowledge" (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008). These requirements are analogous to the requirement in federal law that the expert testimony "rests on a reliable foundation," which is that "the knowledge underlying it has a reliable basis in the knowledge and experience of the relevant discipline." *Pyramid Techs., Inc. v. Hartford Cas. Ins. Co*., 752 F.3d 807, 813 (9th Cir. 2014) (internal quotation marks omitted).

At trial, Dr. Gross testified that he was a board-certified neurological surgeon with a fellowship in spinal biomechanics. He regularly treats patients with "neck and back problems, including injuries and other causes of disk problems, nerve problems, spinal cord problems." When patients are first referred to him, he asks about their past history and other medical issues that they have had. He then does a physical examination, where if the patient appears to have a neck condition, he tests the neck, head, arms, and hands and reviews films and tests that have been taken of the patient. Lastly, he uses the patient's past history and the results of the physical examination to "come up with the best diagnoses that match or correlate to all the

findings[,]" so that "the treatment recommendations . . . [are] proper and correct, [and] rely on the proper diagnosis."

Thus, Dr. Gross typically uses patient histories and physical examinations to reach a diagnosis and decide whether neurological surgery is the proper treatment for the patient's diagnosis. In doing so, Dr. Gross tests the neck, head, arms, and hands. It follows, that in order to rule out neurological surgery as a treatment, Dr. Gross must determine the cause of the patient's symptoms and whether they result from something not neurologically related. Therefore, we hold that Dr. Gross's opinion that Seastrand's prior symptoms were "unrelated to the neck and more likely related to the heart or anxiety or both" rested on the reliable foundation of the knowledge and experience of Dr. Gross's neurological surgery practice and was therefore within the scope of his specialized knowledge.

Dr. Gross's opinion was disclosed in a supplemental expert report

[Headnote 21]

Khoury argues that Dr. Gross was required to disclose his opinion that Seastrand's prior injuries were unrelated to the neck and more likely related to the heart or anxiety, or both, in an expert report but failed to do so.

NRCP 16.1(a)(2)(B) requires an expert's report to "contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions."

On September 29, 2012, Dr. Gross disclosed a supplemental report apparently made at least in part in response to disclosures by Khoury's expert witnesses. Khoury's experts had made disclosures of their opinions of Seastrand's past medical records, including records from a doctor's visit Seastrand made on October 27, 2008. In his supplemental report, Dr. Gross stated that he had reviewed the past medical records, including the records from an October 27, 2008, doctor's visit and summarized that the records revealed that Seastrand had been "having left chest wall pain associated with numbness and tingling bilaterally in both arms." Dr. Gross then stated, apparently quoting directly from Seastrand's medical records, that the doctor's assessment of Seastrand during that visit "was '[a]typical chest pain, numbness, and anxiety.'"

Later in the report, Dr. Gross directly addressed an opinion proffered by Dr. John Siegler, one of Khoury's experts, of Seastrand's October 27, 2008, visit. Dr. Siegler had opined that Seastrand's doctor visits in 2007, where she was seen for back pain flare-ups, and, in 2008, where she "was seen for numbness and tingling radiating to both arms and shooting pain into the left arm," indicated that she had a "documented history of cervical and lumbar pain." Dr. Gross

indicated that he disagreed with Dr. Siegler's opinion, stating that Dr. Siegler had "conveniently omit[ted] the fact that the records note that the episode of tingling to the upper extremities was related to chest pain and stress."

[Headnote 22]

By disagreeing with Dr. Siegler's opinion that Seastrand had a documented history of cervical and lumbar pain, Dr. Gross proffered an opinion that Seastrand's symptoms during her October 27, 2008, doctor's visit were unrelated to the neck. He also appeared to endorse the doctor's assessment of Seastrand during her October 27, 2008, visit that her symptoms were related to chest pain and stress, by chiding Dr. Siegler for "conveniently omit[ting] th[is] fact." Therefore, we hold that the district court did not abuse its discretion by allowing Dr. Gross to testify as to his opinion that Seastrand's prior injuries were unrelated to her neck.[4]

The district court did not abuse its discretion by excluding evidence of the amount Seastrand's medical providers received for the sale of her medical liens

[Headnotes 23, 24]

At trial, Khoury attempted to introduce evidence of the amount Seastrand's medical providers received for the sale of her medical liens to a third party. Khoury sought to admit the evidence to prove the reasonable amount of Seastrand's medical costs. The district court refused to admit the evidence, finding that under the collateral source rule, it was per se inadmissible. Khoury now argues that the district court abused its discretion.[5]

---

[4]Khoury also appears to argue that Dr. Gross's expert reports were not timely disclosed and should have been excluded on that basis. However, Khoury does not specifically argue that any particular report was made outside NRCP 16.1(a)(2)(C)'s time limitations. Rather, he merely sets forth NRCP 16.1(a)(2)(C)'s time limitations without stating which report was untimely under which time limit. We thus decline to consider his argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court "need not consider . . . claims" that are not "cogently argue[d]" or supported by "relevant authority").

[5]Khoury also argues that the district court erred by refusing to allow him to examine Seastrand's medical providers as to the reasonable value of Seastrand's medical care. However, this is a misrepresentation of the issue that was presented to and ruled upon by the district court. Khoury actually moved to limit Seastrand's presentation of past medical special damages at trial to amounts actually paid by or on behalf of Seastrand, *not* to examine Seastrand's treatment providers about the reasonable value of Seastrand's medical care. Because the arguments Khoury makes on this issue in his brief were not raised before the district court, Khoury has waived his right to make them 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.").

Evidence of the sale of Seastrand's medical liens is irrelevant to prove the reasonable value of Seastrand's medical costs

[Headnote 25]

Evidence of payments showing medical provider discounts, or write-downs, to third-party insurance providers "is irrelevant to a jury's determination of the reasonable value of the medical services and will likely lead to jury confusion." *Tri-Cty. Equip. & Leasing v. Klinke*, 128 Nev. 352, 360, 286 P.3d 593, 598 (2012) (GIBBONS, J., concurring). This is because "[t]he write-downs reflect a multitude of factors mostly relating to the relationship between the third party and the medical provider, and not necessarily relating to the reasonable value of the medical services." *Id*.

Here, assuming that Seastrand's medical providers sold her liens to a third party for less than their face value, they are functionally similar to a write-down made to a third-party insurer. In both instances the medical provider negotiates with a third party to receive less than what they charged a patient to provide medical care. Therefore, in line with the discussion of write-downs in the concurrence in *Tri-County Equipment & Leasing*, which is analogous to the present issue, we hold that evidence regarding the sale of medical liens is likewise irrelevant to a jury's determination of the reasonable value of medical services provided. Thus, the district court did not abuse its discretion by excluding such evidence.

The district court abused its discretion by excluding evidence of Seastrand's medical liens to establish bias

Khoury argues that the district court abused its discretion by excluding evidence of Seastrand's medical liens to prove bias on the part of Seastrand's treating physicians who testified at trial. Khoury contends that the district court incorrectly excluded that evidence under the collateral source rule.

Evidence of the existence of medical liens to prove bias does not invoke the collateral source rule

[Headnotes 26, 27]

"The collateral source rule provides that if an injured party received some compensation for his injuries from a source wholly independent of the tortfeasor, such payment should not be deducted from the damages which the plaintiff would otherwise collect from the tortfeasor." *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996) (internal quotation marks omitted). This court has also created "a *per se* rule barring the admission of a collateral source of payment for an injury into evidence for *any purpose*." *Id*. at 90, 911 P.2d at 854 (second emphasis added). This is because of

the danger that "the jury will misuse the evidence to diminish the damage award." *Id*. at 91, 911 P.2d at 854. The question of whether evidence of a medical lien implicates the collateral source rule does not appear to have been considered before in Nevada.

"[A] medical lien refers to an oral or written promise to pay the medical provider from the plaintiff/patient's personal injury recovery." State Bar of Nev. Standing Comm'n on Ethics and Prof'l Responsibility, Formal Op. 31 (2005), *available at* http://nvbar.org/wp-content/uploads/Opinion-31-Client-Funds-Reissued_4-1-15.pdf (last visited May 9, 2016) (internal quotation marks omitted). Thus, a medical lien represents something that the plaintiff has personally paid for his or her treatment, not compensation that a third party has paid to the plaintiff. Therefore, we hold that evidence of the existence of medical liens to prove bias does not invoke the collateral source rule.[6]

The district court's error was harmless

[Headnotes 28, 29]

To be reversible, an error must be prejudicial and not harmless. NRCP 61. To demonstrate that an error is not harmless, a party "must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached." *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010).

Here, the probative value of the lien evidence is limited as to the issue of bias. The terms of Seastrand's medical liens indicate that she would owe the money to her medical providers whether or not she was successful in the lawsuit. Seastrand's medical providers were also paid for the time they spent preparing for trial and testifying in court, and Khoury was able to cross-examine the medical providers about any bias that resulted from these payments. In addition to the testimony of Khoury's two treatment providers, evidence was also presented by Seastrand's expert witnesses as to the causation of Seastrand's injuries. Lastly, Khoury has not presented any arguments or evidence to support a contention that the verdict in this case was close and that allowing him to use evidence of Seastrand's medical liens to establish bias in Seastrand's treatment providers would have resulted in a different verdict. Therefore, we hold that the district court's error was harmless.

---

[6]However, we caution that this holding may not be used as a "backdoor" by parties to question a treatment provider about whether and to what amount it would write-down the amount of the medical lien in the event that the plaintiff loses his or her lawsuit. Such evidence could be used by the jury to diminish the damage award and would thus invoke the collateral source rule.

The district court did not abuse its discretion by refusing to grant a new trial following Seastrand's use of the word "claim" during opening arguments

[Headnote 30]

Khoury argues that by using the word "claim" one time in her opening arguments, Seastrand improperly informed the jury that he had insurance coverage.

During opening arguments, Seastrand's attorney made the following statement in regard to a 1981 rollover auto accident in which Seastrand was involved:

> But you'll hear from [Seastrand] and she'll tell you, yeah, in that rollover I was the passenger and I wasn't hurt. I went to the ER and the ER physicians checked me out, and then I went to a holistic doctor one or two times and then I didn't have any problems. *I didn't make a claim.* I didn't do anything like that. I didn't have any issues with it.

(Emphasis added.) This is the only time that Seastrand mentioned the word "claim" during opening arguments.

Khoury bases his argument on a mistaken belief that the word "'[c]laim' is uniquely an insurance term." However, claim has many other meanings. *Black's Law Dictionary*, for instance, defines claim as, among other things, "[a] demand for money, property, or a legal remedy." *Claim*, *Black's Law Dictionary* (8th ed. 1999). While this *could* mean an insurance claim, in context it could just as easily mean a claim of relief in a court of law. Furthermore, Seastrand's use of the word claim was in regard to a 1981 car accident. Thus, even if the jury *did* believe Seastrand was talking about an insurance claim, it would only have indicated whether Seastrand or another party in the 1981 accident was insured, *not* whether Khoury was insured in the current case. Therefore, we hold that the district court did not abuse its discretion by refusing to grant Khoury's motion for a mistrial.

The district court abused its discretion by awarding costs to Seastrand without stating a basis for its decision

[Headnote 31]

NRS 18.005, which defines recoverable costs, allows the recovery of "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, *unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee*." NRS 18.005(5) (emphasis added); *see also Gilman v. State, Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 272-

73, 89 P.3d 1000, 1006 (2004) (observing that a district court has discretion to award more than $1,500 for an expert witness's fees). When a district court awards expert fees in excess of $1,500 per expert, it must state the basis for its decision. *Frazier v. Drake*, 131 Nev. 632, 651, 357 P.3d 365, 378 (Ct. App. 2015).

[Headnote 32]

The district court awarded $42,750 as expert witness fees for Seastrand's five expert witnesses. It did not state a basis for its award. Khoury argues that because the district court awarded expert witness fees that exceed $1,500 per witness, the district court abused its discretion under NRS 18.005(5). However, Khoury ignores the second half of NRS 18.005(5), which allows the district court to award a greater fee per expert witness if it determines that the higher fee was necessary. Nonetheless, because the district court awarded expert fees in excess of $1,500 without stating a basis for its decision, we hold that the district court abused its discretion.[7]

CONCLUSION

While it is permissible for a party to use a specific award amount in questioning jurors regarding their biases towards large verdict amounts, it is the duty of the district court to keep the questioning within reasonable limits. Here, Seastrand's voir dire did not reach the level of reversible error on the basis of jury indoctrination. Furthermore, although the district court abused its discretion by dismissing jurors for cause whose statements, when taken as a whole, indicated that they could apply the law and the instructions of the court in deciding the verdict, this was harmless error. Accordingly, the district court was within its discretion in denying Khoury's motions for a mistrial and new trial on the grounds related to the voir dire.

Next, the district court did not abuse its discretion by allowing testimony from Dr. Muir because his opinions were formed during the course of his treatment of Seastrand. The district court also did not abuse its discretion by admitting the testimony of Dr. Gross because his testimony was within the scope of his specialized knowledge and was disclosed in a supplemental expert report. It also did not abuse its discretion by excluding evidence of the amount that

[7]Khoury also makes a one-sentence argument that because trial preparation costs and costs for copies of medical records are not specifically listed as recoverable under NRS 18.005, they are a routine part of normal legal overhead, and the district court abused its discretion by awarding them. Because Khoury provides no further analysis or authority for his argument, we decline to consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Seastrand's medical liens were sold for because it was irrelevant to the issue of the reasonable value of her medical care. However, it did abuse its discretion by excluding evidence of the existence of Seastrand's medical liens for the purpose of establishing bias in the testimony of her medical providers. Nonetheless, this error was harmless. Therefore, we hold that the new trial motion was properly denied. Lastly, the district court did not abuse its discretion by refusing to declare a mistrial due to Seastrand's use of the word "claim" in opening arguments because it did not improperly inform the jury that Khoury was insured.

However, the district court did abuse its discretion by awarding costs to Seastrand without stating a basis for its decision. Therefore, we affirm in part, reverse in part, and remand to the district court for further proceedings regarding costs.

HARDESTY, DOUGLAS, CHERRY, and GIBBONS, JJ., concur.

PICKERING, J., concurring:

While I concur in the result, I do not join the majority's internally contradictory analysis of the medical provider lien sale evidence. To be clear, Seastrand was uninsured, which gave her doctors lien rights against her eventual recovery from Khoury. The evidence the district court excluded was that one or more of Seastrand's doctors sold his lien rights to a third party, presumably at a discount. Such a sale—assuming evidence of it had been proffered (it was not)—did not result in a discount to Seastrand. After the sale, Seastrand remained liable for the full amount the lien secured. Her liability just ran to the third party to whom the doctor sold the lien instead of to the doctor. Thus, this case does not present the medical provider discount, or write-down, issue between doctor and patient (or doctor and patient's insurer or benefit provider) that has divided courts elsewhere. *See, e.g.*, *Howell v. Hamilton Meats & Provisions, Inc.*, 257 P.3d 1130, 1138, 1142-43, 1146 (Cal. 2011) (holding that a "plaintiff could recover as damages for her past medical expenses no more than her medical providers had accepted as payment in full from plaintiff and PacifiCare, her insurer," since costs must be incurred or paid by a plaintiff or her insurer to be recoverable as damages) (citing *Restatement (Second) of Torts* § 911 (1979)). It also does not implicate the collateral source rule discussed in *Howell* since Seastrand, being uninsured and fully liable, had no collateral source to which to look for payment of her medical expenses.

As five members of the court held in *Tri-County Equipment & Leasing v. Klinke*, 128 Nev. 352, 357-58 n.6, 286 P.3d 593, 596 n.6 (2012) (5-2), whether evidence of pre-negotiated provider discounts is admissible because it sets the outside limit of the special damages

a plaintiff has incurred or paid, or excludable under the collateral source rule, is a legal issue that is sufficiently nuanced and important that it should be left "for a case that [actually] requires its determination." Two justices, writing separately in *Tri-County*, would have reached and resolved the provider discount issue, rejecting *Howell*. *Id.* at 358-61, 286 P.3d at 597-99 (GIBBONS and CHERRY, JJ., concurring). Inexplicably, today's majority quotes language from the two-justice *Tri-County* minority on the issue the *Tri-County* majority declined to reach. *See ante* 538. But this case has even less to do with the provider-discount/collateral-source-rule issue in *Howell* than *Tri-County*, for two reasons. First, as the majority acknowledges, *ante* 539, "The terms of Seastrand's medical liens indicate that she would owe the money to her medical providers whether or not she was successful in the lawsuit." With no provider discount *to the plaintiff or her insurer*, no question arises as to whether the amounts billed by the provider were "incurred or paid," removing much of the rationale for the rule announced in *Howell*. Second, Seastrand had no insurance. With no insurance and no provider-to-patient discounts, the collateral source rule, on which the two-justice *Tri-County* concurrence relied to reject *Howell*, does not apply, as today's majority also recognizes. *See ante* 539 ("a medical lien represents something that the plaintiff has personally paid for his or her treatment, not compensation that a third party has paid to the plaintiff.").

Given all this, it is not clear to me why the majority feels it necessary to address the relevance of provider discounts or write-downs. The price a third party pays to buy a lien from a doctor depends more on the third party's assessment of the plaintiff's chances in the litigation, including the strength of the plaintiff's claim and the solvency of the defendant, than the reasonable value of the doctor's services, and as such has so little probative value and so much potential for distraction as to be excludable as irrelevant. I would resolve the relevance issue on this basis, rather than confuse our law with what is, in this case, dictum drawn from a minority opinion not joined by a majority of the justices on this court.

For these reasons, while I join the remainder of today's opinion, I do not join and concur only in the result as to the medical lien sale evidence.

HUMBOLDT GENERAL HOSPITAL; AND SHARON MCINTYRE, M.D., PETITIONERS, *v.* THE SIXTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF HUMBOLDT; AND THE HONORABLE MICHAEL MONTERO, DISTRICT JUDGE, RESPONDENTS, AND KELLI BARRETT, REAL PARTY IN INTEREST.

No. 65562

July 28, 2016 376 P.3d 167

Original petition for a writ of mandamus challenging a district court order denying a motion to dismiss.

Patient brought action against hospital and physician, alleging battery based on alleged lack of informed consent. The district court denied defendant's motion to dismiss, which was based on patient's failure to file medical expert affidavit. Defendants petitioned for writ of mandamus. The supreme court, HARDESTY, J., held that: (1) consideration of merits of petition for writ of mandamus challenging denial of motion to dismiss was warranted; and (2) on an issue of first impression, battery claim based on alleged lack of informed consent was medical malpractice claim that required medical expert affidavit.

Petition granted.

Pollara Law Group and *Dominique A. Pollara*, Sacramento, California, for Petitioners.

David Allen & Associates and *David Allen*, Reno, for Real Party in Interest.

1. MANDAMUS.

   Consideration of merits of petition for writ of mandamus challenging denial of motion to dismiss was warranted in battery action based on alleged lack of informed consent to medical procedure, where there was no factual dispute regarding the issue presented, case presented important issue of law regarding right to pursue battery claim in medical malpractice action, issue presented was one of first impression, and issue was likely to recur.

2. MANDAMUS.

   Normally, the supreme court will not entertain a petition for a writ of mandamus challenging the denial of a motion to dismiss.

3. MANDAMUS.

   The supreme court may entertain a petition for a writ of mandamus challenging the denial of a motion to dismiss when: (1) no factual dispute exists, and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification, and considerations of sound judicial economy and administration militate in favor of granting the petition.

4. MANDAMUS.

   The supreme court may consider a petition for a writ of mandamus that present matters of first impression that may be dispositive in the particular case.

5. Health.
   Complaint raised the scope of informed consent for the medical procedure but did not allege a complete lack of consent, and therefore, battery claim based on alleged lack of informed consent constituted medical malpractice claim that required patient to file medical expert affidavit, when patient alleged that she generally had consented to an intrauterine device (IUD) procedure, but not to an IUD that lacked Food and Drug Administration (FDA) approval. NRS 41A.071.
6. Appeal and Error.
   The supreme court reviews legal questions de novo.
7. Health.
   Under the professional medical standard, a physician must decide whether the information is material and should be disclosed to the patient; this standard imparts a duty upon the physician to disclose information that a reasonable practitioner in the same field of practice would disclose, and the professional standard must be determined in a medical malpractice action by expert testimony regarding the custom and practice of the particular field of medical practice.
8. Assault and Battery.
   A battery is an intentional and offensive touching of a person who has not consented to the touching.
9. Assault and Battery; Health.
   A physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used.
10. Assault and Battery; Health.
    When a patient gives permission to perform one type of treatment and a doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present to support a battery claim.
11. Assault and Battery; Health.
    Expert opinion as to the standard of care is not required in a battery count based on a lack of informed consent, in which the patient must merely prove failure to give informed consent and a mere touching absent consent.
12. Assault and Battery; Health.
    When a plaintiff claims not to have consented at all to the treatment or procedure performed by a physician or hospital, such an allegation constitutes a battery claim and thus does not invoke medical expert affidavit requirement for medical malpractice claims. NRS 41A.071.

Before the Court En Banc.

OPINION

By the Court, Hardesty, J.:

NRS 41A.071 requires that a medical expert affidavit be filed with "medical malpractice" claims.[1] Real party in interest Kelli Barrett filed a complaint without an expert affidavit against petitioners Humboldt General Hospital and Sharon McIntyre, M.D., that included a battery claim based on an alleged lack of informed consent.

[1]The Legislature amended NRS 41A.071 during the 2015 legislative session. 2015 Nev. Stat., ch. 439, § 6, at 2527. Any discussion in this opinion related to this statute refers to the 2002 version of the statute in effect at the time real party in interest filed her complaint.

In this case, we determine whether a battery claim against a medical provider based on an allegation of lack of informed consent is subject to the NRS 41A.071 medical expert affidavit requirement.

We conclude that allegations raising the scope of informed consent rather than the absence of consent to a medical procedure, even when pleaded as a battery action, constitute medical malpractice claims requiring a medical expert affidavit. Accordingly, because Barrett's complaint raises the scope of informed consent for the medical procedure, but does not allege a complete lack of consent, Humboldt and Dr. McIntyre's motion to dismiss Barrett's battery claim should have been granted. We thus grant the petition.

FACTS AND PROCEDURAL HISTORY

Barrett had an intrauterine device (IUD) surgically implanted by Dr. McIntyre at Humboldt General Hospital. Approximately one year later, Barrett received a letter from Humboldt stating that the IUD was not approved by the Federal Drug Administration (FDA). Her IUD was not FDA approved because it was shipped from Finland to a Canadian pharmacy rather than to a location in the United States. However, the implanted IUD was identical to FDA-approved IUDs and was manufactured at the same plant in Finland.

Barrett filed a complaint without a supporting medical expert affidavit alleging negligence and battery claims against Dr. McIntyre and Humboldt. In her negligence claim, Barrett alleged that Dr. McIntyre and Humboldt "had a duty to provide [her] with care, treatment, medications and medical devices consistent with state and federal law." And, in her battery claim, Barrett alleged that Dr. McIntyre and Humboldt "knew or reasonably should have known that . . . Barrett did not consent to the implantation in [her] body of said IUD which lacked FDA approval."

Dr. McIntyre and Humboldt moved to dismiss Barrett's complaint based on NRS 41A.071's requirement that an expert affidavit be filed with medical malpractice actions. The district court granted the motion to dismiss the negligence claim, finding that an expert affidavit was required, but denied the motion as to the battery claim, finding that "it does not appear beyond a doubt that" Barrett needed to include an affidavit with her battery claim. Dr. McIntyre and Humboldt then petitioned this court for a writ of mandamus directing the district court to dismiss Barrett's battery complaint under NRS 41A.071.

DISCUSSION

Whether a claim under the informed consent doctrine must be pleaded as a tort action for negligence, rather than as one for battery, is an issue of first impression in Nevada. Because Barrett generally consented to the procedure performed, and the operative facts im-

plicate the scope of informed consent, we conclude that Barrett's battery claim is actually a medical malpractice claim requiring a medical expert affidavit under NRS 41A.071.

Writ of mandamus

[Headnotes 1-4]

"Normally, this court will not entertain a writ petition challenging the denial of a motion to dismiss," *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010), but we may do so when "(1) no factual dispute exists and the district court is obligated to dismiss an action pursuant to clear authority under a statute or rule; or (2) an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition," *State v. Eighth Judicial Dist. Court*, 118 Nev. 140, 147, 42 P.3d 233, 238 (2002). Furthermore, this court may consider writ petitions that present matters of first impression that may be dispositive in the particular case. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013).

Here, there is no factual dispute regarding the absence of an expert medical affidavit filed with the complaint. Further, this case presents an important issue of law concerning the right to pursue a battery claim in a medical malpractice action that implicates the scope of informed consent. Because this issue is likely to recur, as evidenced by other writ petitions filed with this court seeking similar relief, and may be dispositive of the pending case, we exercise our discretion to entertain the merits of this writ petition.

Expert affidavit requirement in medical malpractice claims

[Headnotes 5, 6]

The issues raised in this case present purely legal questions, primarily regarding statutory construction, so we conduct a de novo review. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). "If 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 an affidavit." NRS 41A.071;[2]

[2]Many statutes in NRS Chapter 41A were amended during the 2015 legislative session. *See* 2015 Nev. Stat., ch. 439, §§ 1-13, at 2526-29. NRS 41A.071 now states, in pertinent part: "If an action for *professional negligence* is filed in the district court, the district court shall dismiss the action, without prejudice, if the action is filed without an affidavit." (Emphasis added.) NRS 41A.015 defines "[p]rofessional negligence" as "the failure of a provider of health care, in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances by similarly trained and experienced providers of health care." The amended language does not apply here because the amendments became effective after the district court entered its order in this matter, and our reference to the statutes in this section are to those in effect at the

see also Washoe Med. Ctr. v. Second Judicial Dist. Court, 122 Nev. 1298, 1306, 148 P.3d 790, 795 (2006) ("We conclude that when a plaintiff has failed to meet NRS 41A.071's expert affidavit requirement, the complaint is void ab initio and must be dismissed, without prejudice, and no amendment to cure an NRS 41A.071 defect is allowed."). NRS 41A.009 (1985) defines "[m]edical malpractice" as "the failure of a physician [or] hospital . . . in rendering services, to use the reasonable care, skill or knowledge ordinarily used under similar circumstances."

Initially, we examine whether informed consent issues generally constitute medical malpractice, such that NRS 41A.071 requires a medical expert affidavit to be filed with a complaint. Next, we consider whether a battery claim can be maintained when the claim arises out of a lack of consent.

Issues of informed consent typically constitute medical malpractice claims

NRS Chapter 41A governs medical malpractice actions in Nevada. Within that statutory scheme, NRS 41A.110 establishes when informed consent is conclusively given by a patient. As applicable here, a licensed physician has conclusively obtained a patient's consent for a medical procedure if a physician has explained in general terms, without specific details, the procedure to be conducted. NRS 41A.110.

[Headnote 7]

Furthermore, this court has previously recognized that informed consent is generally a matter of medical malpractice. In *Bronneke v. Rutherford*, while considering what standard of care governs chiropractic informed consent cases, we concluded that "the professional standard, requiring expert testimony as to the customary disclosure practice, applies to chiropractors." 120 Nev. 230, 238, 89 P.3d 40, 46 (2004). Under the professional medical standard, "the physician must decide whether the information is material and should be disclosed to the patient." *Id.* at 233, 89 P.3d at 43. This standard imparts a duty upon the physician to "disclose information that a reasonable practitioner in the same field of practice would disclose . . . [, and] the professional standard must be determined by expert testimony regarding the custom and practice of the particular field of medical practice." *Smith v. Cotter*, 107 Nev. 267, 272, 810 P.2d 1204, 1207 (1991). As a result, we concluded that "the failure to obtain a pa-

---

time of the cause of action. *See* 2015 Nev. Stat., ch. 439, § 13, at 2529. However, we note that the Legislature repealed NRS 41A.009's definition of "medical malpractice" and moved much of the operative language to the "professional negligence" definition stated above. *See* NRS 41A.009 (1985); NRS 41A.015 (2015); 2015 Nev. Stat., ch. 439, §§ 6, 12, at 2527, 2529.

tient's informed consent is a malpractice issue." 120 Nev. at 238, 89 P.3d at 446.

Bronneke conforms to the general rule in the United States: "a claim under the informed consent doctrine must be pled as a tort action for negligence, rather than as one for battery or assault." *Mole v. Jutton*, 846 A.2d 1035, 1042 (Md. 2004); *see also Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972) (adopting the majority position that "appears to be towards categorizing [the] failure to obtain informed consent as negligence"); *Dries v. Gregor*, 424 N.Y.S.2d 561, 564 (App. Div. 1980) ("We believe that medical treatment beyond the scope of a patient's consent should not be considered as an intentional tort or species of assault and battery . . . .").[3]

Informed consent claims usually require a medical expert affidavit, but claims that a treatment or procedure completely lacked patient consent do not

Barrett argues that insertion of the non-FDA approved IUD without her consent constitutes a true battery claim that does not require an expert medical affidavit. In *Bronneke*, we suggested that a battery claim may not exist when a question of informed consent is presented. 120 Nev. at 234-35, 89 P.3d at 43 (concluding that because the patient impliedly consented to the treatment, allowing "an eleventh-hour amendment to the complaint to add a battery claim" would be futile). However, we recognize that when consent to a treatment or procedure is completely lacking, the justifications supporting a medical expert affidavit are diminished.

[Headnotes 8-10]

"A battery is an intentional and offensive touching of a person who has not consented to the touching," and "[i]t is well settled that a physician who performs a medical procedure without the patient's consent commits a battery irrespective of the skill or care used." *Conte v. Girard Orthopaedic Surgeons Med. Grp. Inc.*, 132 Cal. Rptr. 2d 855, 859 (Ct. App. 2003). Courts typically only allow consent issues to proceed as battery claims in "those circumstances when a doctor performs an operation to which the patient has not consented. When the patient gives permission to perform one type

[3]There is a minority position where "[t]he earliest cases treated this as a matter of vitiating the consent, so that there was liability for battery." *Cobbs v. Grant*, 502 P.2d 1, 8 (Cal. 1972) (internal quotations omitted). However, courts subsequently "began to . . . recognize[ ] that this was really a matter of the standard of professional conduct" and that "the action . . . is in reality one for negligence in failing to conform to the proper standard." *Id.* (third alteration in original). Some jurisdictions still maintain this distinction. *See, e.g.*, *Montgomery v. Bazaz-Sehgal*, 798 A.2d 742, 748 (Pa. 2002) ("[T]his Court has made clear on repeated occasions over a period of several decades that a claim based upon a lack of informed consent involves a battery . . . .").

of treatment and the doctor performs another, the requisite element of deliberate intent to deviate from the consent given is present." *Cobbs*, 502 P.2d at 8; *see also Rice v. Brakel*, 310 P.3d 16, 19 (Ariz. Ct. App. 2013) (same); *Shuler v. Garrett*, 743 F.3d 170, 173 (6th Cir. 2014) (noting that in Tennessee "the threshold question in an informed consent case is whether the patient's lack of information negated her consent, the question in a medical battery case is much simpler: Did the patient consent at all?"); *Brzoska v. Olson*, 668 A.2d 1355, 1366 (Del. 1995) ("[T]he tort of battery is properly limited in the medical/dental setting to those circumstances in which a health care provider performs a procedure to which the patient has not consented."); *Mole v. Jutton*, 846 A.2d 1035, 1042 (Md. 2004) ("[A] claim under the informed consent doctrine must be pled as a tort action for negligence, rather than as one for battery or assault.").

[Headnote 11]

The distinction between informed consent and battery claims is based on the concept that a doctor may show, in informed consent cases, "that the disclosure he omitted to make was not required within his medical community. However, expert opinion as to [the] standard [of care] is not required in a battery count, in which the patient must merely prove failure to give informed consent and a mere touching absent consent." *Cobbs*, 502 P.2d at 8; *see also Bronneke*, 120 Nev. at 238, 89 P.3d at 45-46 (stating that expert opinions are necessary in informed consent and medical malpractice cases because juries, "as general laypersons, would not know the customary practice in the profession"). Thus, when consent is so lacking that a trier of fact may find that "the requisite element of deliberate intent [for battery] . . . is present," *id.*, the justification for an affidavit is diminished because an expert's opinion setting forth the standard of care and a good-faith basis for the action is unnecessary. *Zohar*, 130 Nev. at 738, 334 P.3d at 405 ("NRS 41A.071's affidavit requirement was implemented to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." (internal quotations omitted)).

[Headnote 12]

Accordingly, where a plaintiff claims not to have consented at all to the treatment or procedure performed by a physician or hospital, we conclude that such an allegation constitutes a battery claim and thus does not invoke NRS 41A.071's medical expert affidavit requirement. However, consistent with conclusively obtaining a patient's consent under NRS 41A.110, where general consent is provided for a particular treatment or procedure, and a question arises

regarding whether the scope of that consent was exceeded, an expert medical affidavit is necessary. *See Cobbs*, 502 P.2d at 8.

Barrett's complaint

Barrett's complaint does not allege that the IUD procedure completely lacked her consent. Instead, she alleges in her battery claim that she generally consented to the procedure but not to an IUD that lacked FDA approval. *See Brzoska*, 668 A.2d at 1366 ("A patient's consent is not vitiated, however, when the patient is touched in exactly the way he or she consented."). As a result, her battery allegation presents a question that requires an expert's opinion regarding the standard of care and the scope of consent with respect to the use of an IUD device supplied by the same manufacturer but shipped in a way that lacked FDA approval. Accordingly, we conclude that Barrett's battery claim is actually a medical malpractice claim governed by NRS Chapter 41A. Therefore, the district court erred by denying Humboldt's and Dr. McIntyre's motion to dismiss Barrett's battery claim because a medical expert affidavit was not filed with the claim. *See Washoe Med. Ctr.*, 122 Nev. at 1306, 148 P.3d at 795.

CONCLUSION

For the reasons set forth above, we grant Humboldt's and Dr. McIntyre's petition for extraordinary relief as to Barrett's battery claim and direct the clerk of this court to issue a writ of mandamus instructing the district court to set aside its earlier order, and grant Humboldt's and Dr. McIntyre's motion to dismiss in its entirety.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

STEVE DELL MCNEILL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 66697

July 28, 2016 375 P.3d 1022

Appeal from a judgment of conviction, pursuant to a jury verdict, of violation of conditions of lifetime supervision. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Defendant, a convicted sex offender, was convicted in the district court of violating conditions of lifetime supervision. Defendant appealed. The supreme court, DOUGLAS, J., held that: (1) statutory

provision that governed the release of a sex offender did not delegate authority to the State Board of Parole Commissioners to impose additional conditions of supervision that were not enumerated in the statute, and (2) defendant did not violate the law when he failed to comply with conditions imposed by the Board that were not expressly set forth in the statute.

Reversed and remanded.

Philip J. Kohn, Public Defender, and *Howard Brooks* and *Sharon G. Dickinson*, Deputy Public Defenders, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Jonathan J. Cooper*, Deputy District Attorney, Clark County, for Respondent.

1. Pardon and Parole.
   Statutory provision that governed the release of a sex offender did not delegate authority to the State Board of Parole Commissioners to impose additional conditions of supervision that were not enumerated in the statute. NRS 213.1243.
2. Criminal Law.
   Questions of statutory interpretation are reviewed de novo.
3. Statutes.
   When interpreting statutes, the supreme court gives effect to legislative intent.
4. Statutes.
   When interpreting statutes, the starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent.
5. Statutes.
   When interpreting a statute, the supreme court does not presume that the Legislature has done something absurd.
6. Constitutional Law.
   The Legislature may not delegate its power to legislate. Const. art. 3, § 1.
7. Constitutional Law.
   Although the Legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend.
8. Constitutional Law.
   The Legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency; in doing so, the Legislature vests the agency with mere fact-finding authority and not the authority to legislate, and the agency is only authorized to determine the facts that will make the statute effective.
9. Constitutional Law.
   An agency's fact-finding authority will be upheld as constitutional so long as suitable standards are established by the Legislature for the agen-

cy's use of its power; these standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized.

10. Constitutional Law.
Sufficient legislative standards are required in order to assure that an agency vested with fact-finding authority will neither act capriciously nor arbitrarily.

11. Pardon and Parole.
Convicted sex offender, who was on lifetime supervision, did not violate the law when he failed to comply with conditions imposed by the State Board of Parole Commissioners; the imposed conditions were unlawful in that they were not expressly set forth in the statute governing the release of a sex offender. NRS 213.1243.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this appeal, we consider whether the State Board of Parole Commissioners may impose conditions not enumerated in NRS 213.1243 on a sex offender subject to lifetime supervision. We conclude that the plain language of NRS 213.1243 does not grant the Board authority to impose additional conditions. We further conclude that this omission was intentional because the Legislature may not delegate its power to legislate. We therefore reverse the district court's judgment of conviction based on violations of conditions of lifetime supervision not enumerated in NRS 213.1243.

BACKGROUND

Appellant Steve McNeill is a convicted sex offender on lifetime supervision. According to McNeill's lifetime supervision agreement, he was required to pay certain fees, submit to a urinalysis, meet a curfew, and maintain full-time employment, among other things.

After five years of lifetime supervision, McNeill was reassigned to Ashley Mangan, a parole and probation officer in the sex offender unit. McNeill reported to Mangan at the Division of Parole and Probation for the first time in March 2013. Mangan established a curfew for McNeill, requiring that he be present near the intersection of two specified streets referred to as his "residence" between 5 p.m. and 5 a.m.[1]

According to Mangan, she was unable to locate McNeill at his residence when she went to visit McNeill to confirm that he was in compliance with his curfew. Thus, when McNeill reported to Man-

[1]McNeill was homeless. Thus, the intersection of two streets was established as his "residence."

gan in April, Mangan requested that McNeill draw a map of where he was sleeping. McNeill complied and requested an extended curfew. Mangan established a later curfew, requiring that McNeill be at his residence by 8 p.m. rather than 5 p.m. McNeill also revealed that he had not been attending counseling. Mangan requested that he reenroll.

When McNeill reported in May, he provided different cross streets for his residence and drew Mangan a more detailed map of where he was sleeping.

Mangan did not meet with McNeill in June because McNeill was assigned to another officer for supervision. However, McNeill was assigned to Mangan again in July. According to Mangan, when she contacted McNeill to inform him that she would be supervising him again, he hung up on her.

When McNeill went to meet with Mangan later in July, Mangan arrested McNeill for noncompliance. According to Mangan, McNeill failed to attend counseling, make curfew, pay fees, and maintain employment. The State declined to proceed with charges.

In August, upon McNeill's arrival, Mangan requested that he submit to a urinalysis. McNeill refused. Mangan then took McNeill to meet with her supervisor, who was unable to persuade McNeill to comply. McNeill affirmed that he would not submit to urinalyses, had no plans to abide by a curfew, and would sleep where he chose.

Thereafter, Mangan attempted to contact McNeill in person near the identified intersection and by phone, but was unsuccessful. McNeill did not report thereafter. Instead, he sent a cease and desist letter stating that the Division of Parole and Probation had no authority over him and advising that it should discontinue contacting him.

The State filed a criminal complaint in March 2014, charging McNeill with violation of conditions of lifetime supervision (count 1) and prohibited acts by a sex offender (count 2). The State alleged that McNeill violated conditions of lifetime supervision by refusing to submit to a urinalysis, failing to report, failing to obtain residence approval, failing to cooperate with his supervising officer, failing to maintain full-time employment, failing to abide by a curfew, and being terminated from his sex offender counseling.

After a three-day trial, McNeill requested a directed verdict on both charges. The district court dismissed count two, but the jury found McNeill guilty on count one. The district court also denied McNeill's subsequent motion for an arrest of judgment, determining that the Board of Parole Commissioners had authority through the language of NRS 213.1243 to establish conditions of lifetime supervision not enumerated in the statute. This appeal followed.

DISCUSSION

[Headnote 1]

On appeal, McNeill contends that NRS 213.1243 does not delegate authority to the Board to impose additional lifetime supervision conditions that are not enumerated in the statute. Thus, McNeill argues that he did not violate NRS 213.1243, even if he violated the additional conditions imposed by the Board. In contrast, the State argues that the Board may establish additional conditions not specifically enumerated in NRS 213.1243 when supervising a sex offender on lifetime supervision.

[Headnotes 2-4]

"[W]e review questions of statutory interpretation de novo." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). When interpreting statutes, we give effect to legislative intent. *Id.* "The starting point for determining legislative intent is the statute's plain meaning; when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *Id.* (internal quotations omitted).

We conclude that the plain language of NRS 213.1243 does not delegate authority to the Board to impose additional conditions not enumerated. NRS 213.1243(1) provides that "[t]he Board shall establish by regulation a program of lifetime supervision of sex offenders" and that the program must provide for supervision by officers in the Division of Parole and Probation. The conditions of lifetime supervision are explicitly set forth in the statute.[2] For example, NRS 213.1243(3) provides that a sex offender's residence must be approved by a supervising officer, and a sex offender must keep the Division aware of his or her current address. Subsection 4 of NRS 213.1243 further provides that, as a condition of lifetime supervision, a Tier 3 sex offender must stay 500 feet away from certain enumerated places. There are additional residence, stay-away, and monitoring conditions for a Tier 3 sex offender convicted of certain sexual offenses involving a child under the age of 14 years. NRS 213.1243(5). The program of lifetime supervision must also include a no-contact condition. NRS 213.1243(10). A violation of any condition imposed is a Category B felony that may be "punished by imprisonment in the state prison for a minimum term of not less than 1 year and a maximum term of not more than 6 years, and may be further punished by a fine of not more than $5,000." NRS 213.1243(8). What is not included in NRS 213.1243 is any sugges-

[2]The Board is not required to impose the conditions set forth in subsections 3, 4, and 5 of the statute if the Board finds and states in writing that extraordinary circumstances are present. *See* NRS 213.1243(9).

tion that additional conditions may be imposed, and without an explicit grant of authority, we presume the omission to be deliberate. *Sheriff v. Andrews*, 128 Nev. 544, 547-48, 286 P.3d 262, 264 (2012) (concluding that because NRS 212.093(1) does not specifically prohibit county jail inmates from possessing cell phones, the plain and unambiguous language did not proscribe the conduct).

[Headnotes 5, 6]

Our assumption of purposeful omission is especially appropriate in conjunction with the consideration that we do not presume that the Legislature has done something absurd. *Eller Media Co. v. City of Reno*, 118 Nev. 767, 770, 59 P.3d 437, 439 (2002) ("[S]tatutes should always be construed so as to avoid absurd or unreasonable results."). Without a doubt, the Legislature may not delegate its power to legislate. *Sheriff v. Luqman*, 101 Nev. 149, 153, 697 P.2d 107, 110 (1985); *see also* Nev. Const. art. 3, § 1; *Panama Refining Co. v. Ryan*, 293 U.S. 388, 421 (1935) (similarly noting that legislative power is vested in Congress). And because a violation of a condition of lifetime supervision is a new crime, *see* NRS 213.1243(8), if the statute is read to mean, as the State suggests, that the Board may create additional conditions, then the Board would effectively have authority to create law. Because we presume that the Legislature is aware that it may not delegate the power to legislate pursuant to the separation of powers, we presume that it acted in accordance.

[Headnotes 7-10]

The State argues that the Legislature may appropriately delegate authority to administrative agencies to facilitate the practical execution of laws it enacts without violating the separation of powers. It is well settled that "[a]lthough the legislature may not delegate its power to legislate, it may delegate the power to determine the facts or state of things upon which the law makes its own operations depend." *Luqman*, 101 Nev. at 153, 697 P.2d at 110.

> Thus, the legislature can make the application or operation of a statute complete within itself dependent upon the existence of certain facts or conditions, the ascertainment of which is left to the administrative agency. *Telford v. Gainesville*, 65 S.E.2d 246 (Ga. 1951). In doing so the legislature vests the agency with mere fact finding authority and not the authority to legislate. *Ex rel. Ginocchio v. Shaughnessy*, [47 Nev. 129, 217 P. 581 (1923)]. The agency is only authorized to determine the facts which will make the statute effective. *Montoya v. O'Toole*, 610 P.2d 190 (N.M. 1980); *State v. King*, 257 N.W.2d 693 (Minn. 1977); *People v. Uriel*, 255 N.W.2d 788 (Mich. Ct. App. 1977); *State v. Kellogg*, 568 P.2d 514 (Idaho 1977); *see generally* 1

> Am.Jur.2d *Administrative Law*, § 123 (1962). Such authority will be upheld as constitutional so long as suitable standards are established by the legislature for the agency's use of its power. These standards must be sufficient to guide the agency with respect to the purpose of the law and the power authorized. *Egan v. Sheriff*, [88 Nev. 611, 503 P.2d 16 (1972)]; *No. Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 429 P.2d 66 (1967). Sufficient legislative standards are required in order to assure that the agency will neither act capriciously nor arbitrarily. *See United States v. Pastor*, 557 F.2d 930 (2d Cir. 1977).

Id. at 153-54, 697 P.2d at 110.

The State likens the case at bar to *Luqman*. In *Luqman*, the Clark County Sheriff's Department appealed from orders granting pretrial habeas corpus relief to individuals detained for violating Nevada's controlled substance act. *Id.* at 151, 697 P.2d at 108. One of the issues raised was whether an amendment to the Uniform Controlled Substances Act unconstitutionally delegated the legislative power to define the elements of a crime to the state board of pharmacy. *Id.* We determined that the delegation of authority was not unconstitutional because the board was merely acting as a fact-finder. *Id.* at 154, 697 P.2d at 110-11. We explained that "the act retained both the general and specific guidelines listing various factors which are to be taken into account by the pharmacy board when scheduling drugs as well as delineating the requirements by which a drug is classified in an appropriate schedule." *Id.*

This case is distinguishable from *Luqman*. In enacting NRS 213.1243, the Legislature did not explicitly provide the Board the authority to create additional conditions. And even assuming that the Legislature had intended to do so, that delegation of power would fail because the Legislature has not provided guidelines informing the Board how, when, or under what circumstances, it may create additional conditions. *See id*.

Despite the missing language and potential problems concerning the delegation of authority if read alternatively, the district court found justification for its conclusion that the Board may establish additional conditions in the language of NRS 213.1243(8): "[A] sex offender who commits a violation of a *condition imposed on him or her pursuant to the program of lifetime supervision* is guilty of a category B felony." (Emphasis added.) Presumably, then, the district court reasoned that if the Legislature did not intend to permit the Board to add conditions, then it would have more narrowly provided in subsection 8 "a condition imposed . . . *pursuant to NRS 213.1243*," rather than "a condition imposed . . . *pursuant to the program of lifetime supervision*." We conclude that, although

the Legislature could have more narrowly tailored the language, "a condition imposed . . . pursuant to the program of lifetime supervision" necessarily encompasses only the conditions enumerated by the Legislature in NRS 213.1243. Thus, it cannot be concluded from a plain reading that the Legislature extended authority to the Board to create additional conditions, rather than for the Board to create a program including the conditions enumerated in NRS 213.1243 to be carried out by the Division's officers.

[Headnote 11]

Because the Board has no authority to impose conditions not enumerated in NRS 213.1243, the nonenumerated conditions the Board imposed on McNeill were unlawful, and McNeill did not violate the law when he failed to comply. It is not, however, clear which condition(s) the jury found McNeill violated: refusing to submit to a urinalysis, failing to report, failing to have his residence approved, failing to cooperate with his supervising officer, failing to maintain full-time employment, failing to abide by a curfew, *and/or* being terminated from his sex offender counseling. Only one of these purported violations is enumerated in NRS 213.1243: failure to have a residence approved. *See* NRS 213.1243(3). And it cannot be concluded that the jury found that McNeill failed to have his residence approved because the charging document and jury instructions allowed the jury to find him guilty based on *one or more* of the identified violations.

Because the Board-imposed conditions were unlawful, and any Board violations cannot be separated from any NRS 213.1243 violations, we reverse the judgment of conviction and remand for a new trial on the violation of failure to have a residence approved.[3]

PARRAGUIRRE, C.J., and HARDESTY, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

---

[3]In light of this ruling, we need not address McNeill's remaining arguments on appeal.

NATIONSTAR MORTGAGE, LLC; AND THE BANK OF NEW YORK MELLON, FKA THE BANK OF NEW YORK AS TRUSTEE FOR THE HOLDERS OF THE CERTIFICATES, FIRST HORIZON MORTGAGE PASS-THROUGH CERTIFICATES SERIES PHAMS 2005-AA5, BY FIRST HORIZON HOME LOANS, A DIVISION OF FIRST TENNESSEE BANK NATIONAL MASTER SERVICER, IN ITS CAPACITY AS AGENT FOR THE TRUSTEE UNDER THE POOLING AND SERVICING AGREEMENT, APPELLANTS, *v.* CATHERINE RODRIGUEZ, RESPONDENT.

No. 66761

July 28, 2016 375 P.3d 1027

Appeal from a district court order granting a petition for judicial review of a foreclosure mediation. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Mortgagor petitioned for judicial review of decision of mediator after discovering mortgage servicer had presented an uncertified, inaccurate copy of the note at mediation. The district court excused the untimeliness of the petition and sanctioned servicer. The servicer appealed. The supreme court, HARDESTY, J., held that provision of Nevada's Foreclosure Mediation Rules, providing that petitions for judicial review "shall" be filed within 30 days of date that the party to mediation received the mediator's statement, is unambiguous and the 30-day period unyielding.

Reversed.

Kravitz, Schnitzer & Johnson, Chtd., and *Gary E. Schnitzer* and *Tyler J. Watson*, Las Vegas; *Akerman, LLP*, and *Melanie D. Morgan*, Las Vegas, for Appellants.

Connaghan Newberry Law Firm and *Tara D. Newberry*, Las Vegas; *Legal Aid Center of Southern Nevada, Inc.*, and *Venicia G. Considine*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews court rules de novo.
2. STATUTES.
   When the language in a statutory provision is clear and unambiguous, the supreme court gives effect to that meaning and will not consider outside sources beyond that statute.
3. ALTERNATIVE DISPUTE RESOLUTION.
   Provision of Nevada's Foreclosure Mediation Rules, providing that petitions for judicial review "shall" be filed within 30 days of date that the party to mediation received the mediator's statement, is unambiguous and the 30-day period unyielding, even if a party discovers fraud months after the mediation.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Nevada's Foreclosure Mediation Rules (FMRs) provide that a party may file a petition for judicial review following mediation, provided that the petition is filed within 30 days of receiving the mediator's statement. In this appeal, we must determine whether the filing of such a petition can be permitted beyond the 30-day time period when a party discovers fraud months after the mediation. We conclude that it cannot. Accordingly, we determine that the district court lacked jurisdiction to consider the petition for judicial review and reverse the district court's order.

FACTS AND PROCEDURAL HISTORY

Respondent Catherine Rodriguez received a loan from First Horizon to purchase a home secured by a deed of trust. Mortgage Electronic Registration Systems, Inc., a nominee beneficiary, later recorded a notice of default, and the Bank of New York Mellon (BONY) was assigned the deed of trust. Rodriguez elected for foreclosure mediation, the first of which took place in July 2010. MetLife Home Loans (MetLife) attended the mediation as an agent of BONY. MetLife made an offer at the mediation, which Rodriguez did not accept. A second, unsuccessful mediation took place in December 2010.

Appellant Nationstar Mortgage, LLC, began servicing Rodriguez's account in August 2011, meaning that it did not own the loan but could foreclose on it, if necessary. A third, unsuccessful mediation occurred on October 6, 2011, between Nationstar, as the agent of BONY, and Rodriguez. Unknown to Rodriguez, Nationstar presented an uncertified, inaccurate copy of the note at the mediation. The note mistakenly contained a stamp endorsing the note to Nationstar.

Thereafter, Rodriguez received a foreclosure notice, and BONY filed a complaint for judicial foreclosure. During a hearing held on a motion for summary judgment on June 18, 2013, BONY presented the original copy of the note containing an endorsement in blank—as opposed to the endorsement to Nationstar. Upon learning that the note presented at the October 6, 2011, mediation was inaccurate, Rodriguez filed a petition for judicial review of the October 6, 2011, mediation on July 22, 2013, against Nationstar and BONY (collectively, Nationstar). The district court excused the untimeliness of the petition based on good cause, and after an evidentiary hearing, found that the note's certification was false and that Nationstar knew

of the falsity. As a result, the district court sanctioned Nationstar $100,000. This appeal followed.

DISCUSSION

[Headnote 1]

Nationstar argues that Rodriguez did not file her petition for judicial review in a timely manner as required by FMR 21(2),[1] so the district court lacked jurisdiction. We review court rules de novo. *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011).

FMR 21(2) provides that petitions for judicial review "shall be filed within 30 days of the date that the party to mediation received the Mediator's Statement." We have previously determined that the "[u]se of the word 'shall' in . . . the FMRs indicates a duty . . . and . . . 'shall' is mandatory unless the statute demands a different construction to carry out the clear intent of the [L]egislature." *Pasillas*, 127 Nev. at 467, 255 P.3d at 1285 (internal quotation marks omitted). We have also previously determined that "the FMRs necessitate strict compliance." *Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011); *see Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 664, 310 P.3d 569, 572 (2013) (reaffirming that the FMRs' timing-related provisions require strict compliance).

[Headnotes 2, 3]

"When the language in a provision is clear and unambiguous, this court gives 'effect to that meaning and will not consider outside sources beyond that statute.'" *City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 272, 236 P.3d 10, 16 (2010) (quoting *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010)). Because FMR 21(2) is not susceptible to more than one understanding, we conclude that FMR 21(2) is unambiguous and the 30-day period is unyielding.

Rodriguez argues that this court should read a discovery component into FMR 21(2).[2] We disagree. This court has never applied a

[1]The FMRs have been revised several times. In this opinion, we use the FMRs as amended on February 16, 2011, because this version applied at the time of the pertinent mediation—the subject of the petition for judicial review. *See In re Adoption of Rules for Foreclosure Mediation*, ADKT No. 435 (Order Amending Foreclosure Mediation Rules, February 16, 2011); *see also Leyva v. Nat'l Default Servicing Corp.*, 127 Nev. 470, 473 n.2, 255 P.3d 1275, 1277 n.2 (2011); *Comm'n on Ethics v. Hardy*, 125 Nev. 285, 288 n.1, 212 P.3d 1098, 1101 n.1 (2009); *Marquis & Aurbach v. Eighth Judicial Dist. Court*, 122 Nev. 1147, 1150 n.1, 146 P.3d 1130, 1132 n.1 (2006).

[2]Rodriguez attempts to liken FMR 21(2) to a fraud claim. While fraud claims contain a discovery component, *see* NRS 11.190(3)(d) ("[A]n action for relief on the ground of fraud or mistake . . . shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake."),

discovery rule to any type of petition for judicial review. *See Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) ("[S]trict compliance with the statutory requirements for [judicial] review is a precondition to jurisdiction . . . , and [n]oncompliance with the requirements is grounds for dismissal." (second alteration in original) (internal quotation marks omitted)); *Mikohn Gaming v. Espinosa*, 122 Nev. 593, 598, 137 P.3d 1150, 1154 (2006) ("[T]he time limitation [for petitions for judicial review] is jurisdictional, [so] a district court is divested of jurisdiction if the petition is not timely filed."); *Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 24, 769 P.2d 66, 68 (1989) (holding that the filing deadline for a petition for judicial review cannot be tolled). This pronouncement appears to be generally accepted. *See, e.g.*, *Brazoria Cty., Tex. v. Equal Emp't Opportunity Comm'n*, 391 F.3d 685, 688 (5th Cir. 2004) ("Th[e] period [to file a petition for review] is jurisdictional and cannot be judicially altered or expanded." (internal quotation marks omitted)); *Burlington N., Inc. v. Nw. Steel & Wire Co.*, 794 F.2d 1242, 1247 (7th Cir. 1986) (noting the "filing period [for a petition for judicial review] is jurisdictional and a court has no discretion to alter or enlarge it"); *Horne v. Idaho State Univ.*, 69 P.3d 120, 123 (Idaho 2003) ("The filing of a petition for judicial review within the time permitted by statute is jurisdictional."); *Nudell v. Forest Pres. Dist. of Cook Cty.*, 799 N.E.2d 260, 267-68 (Ill. 2003) ("[T]he requirement that a complaint for administrative review be filed within the specified time limit is jurisdictional."); 2 Am. Jur. 2d *Administrative Law* § 507 (2014) ("The filing of a petition for judicial review of an administrative decision within the time permitted by statute is mandatory and jurisdictional, and the failure to seek judicial review of an administrative ruling within the time prescribed by statute makes such an appeal ineffective for any purpose." (footnotes omitted)); 3 Charles H. Koch, Jr., *Administrative Law and Practice* § 8:24 (3d ed. 2010) ("Specific filing deadlines are often created by individual statutes. Statutory deadline[s] are jurisdictional and cannot be altered or expanded by the court. . . . Failure to meet these deadlines constitutes a bar to action filed after that date.").

Rodriguez's petition for judicial review is not an action for relief on the basis of fraud. *See Palludan v. Bergin*, 78 Nev. 441, 443, 375 P.2d 544, 545 (1962) (noting that NRS 11.190(3)(d) "relates to actions which have their inception in fraud"). The foundation for Rodriguez's petition for judicial review is abuse of the foreclosure mediation process, so NRS 11.190(3)(d) is not applicable.

We take this opportunity to note that we do not sanction any fraud that occurred at the mediation. Rather, we point out that Rodriguez's allegations of fraud would have been more appropriately addressed through filing a fraud complaint, conducting discovery, and receiving a jury trial. A petition for judicial review is not meant as an avenue to bring original claims.

Further, we note that even if FMR 21(2) contained a discovery component, Rodriguez still missed the 30-day deadline. Rodriguez discovered the note's fraudulence on June 18, 2013, but she did not file her petition for judicial review until July 22, 2013, 34 days later.

Accordingly, for the reasons set forth above, we conclude that the district court lacked jurisdiction to consider Rodriguez's petition for judicial review, which was filed more than 20 months after the mediator's statement was mailed to the parties,[3] and we reverse the district court's order.[4]

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, SAITTA, GIBBONS, and PICKERING, JJ., concur.

---

[3]Rodriguez cites to *Chemiakin v. Yefimov*, 932 F.2d 124, 126 (2d Cir. 1991), and *Willy v. Coastal Corp.*, 915 F.2d 965, 967 (5th Cir. 1990), for her contention that the district court was permitted to impose sanctions against Nationstar and BONY without jurisdiction. *Chemiakin* and *Willy* are based on Federal Rule of Civil Procedure 11(c)(1), which provides that a court may impose a sanction for the failure to certify that a motion or pleading is not frivolous. The sanctions authorized by FRCP 11(c)(1) are separate and distinct from the merits of the case, *see Willy*, 915 F.2d at 967, whereas FMR 21(1)'s sanctions stem directly from the foreclosure mediation process and are tied to the merits of the petition. *See* NRS 107.086(6) (stating that a district court can sanction a party if they do not attend the mediation, did not participate in good faith, or do not bring the required documents). Because the sanctions imposed by FRCP 11(c)(1) and FMR 21(1) are dissimilar, Rodriguez's argument lacks merit.

[4]Nationstar also argues that the district court erred in considering evidence outside the scope of the foreclosure mediation, erred in determining that Nationstar participated in the foreclosure mediation in bad faith, and violated Nationstar's due process rights by awarding what amounted to punitive damages. Based on our determination that the district court lacked jurisdiction to consider the petition for judicial review, these arguments are moot.