cases retain their separate identities so that an order resolving all of the claims in one of the consolidated cases is immediately appealable as a final judgment under NRAP 3A(b)(1).

The district court order challenged in this appeal completely resolved the reentry complaint. Accordingly, the order is appealable under NRAP 3A(b)(1), and this appeal may proceed. Appellants shall have 60 days from the date of this opinion to file and serve the opening brief and appendix. Thereafter, briefing shall proceed in accordance with NRAP 31(a)(1). We caution the parties that failure to timely file briefs may result in the imposition of sanctions. NRAP 31(d).

Gibbons and Hardesty, JJ., concur.

BRANCH BANKING & TRUST COMPANY, A North Carolina Corporation, Appellant, *v.* DOUGLAS D. GERRARD, ESQ., Individually; and GERRARD & COX, a Nevada Professional Corporation, dba GERRARD COX & LARSEN, Respondents.

No. 73848

December 27, 2018 432 P.3d 736

Appeal from a district court order dismissing a legal malpractice complaint. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Affirmed.

[Rehearing denied January 22, 2019]

[En banc reconsideration denied March 6, 2019]

Albright Stoddard Warnick & Albright and *D. Chris Albright* and *G. Mark Albright*, Las Vegas, for Appellant.

Gordon & Rees Scully Mansukhani, LLP, and *Robert S. Larsen, Craig J. Mariam*, and *Wing Yan Wong*, Las Vegas, for Respondents.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

OPINION

By the Court, Pickering, J.:

This is an appeal from an order dismissing a litigation malpractice suit as time-barred. Nevada follows the rule that a litigation mal-

practice claim does not accrue, and the two-year statute of limitations in NRS 11.207(1) does not start to run, until the client's damages are no longer contingent on the outcome of an appeal. This case asks us to determine how this rule applies when, without seeking a stay of remittitur from this court, the client unsuccessfully petitions for a writ of certiorari from the United States Supreme Court. We hold that a litigation malpractice claim accrues upon the issuance of remittitur from this court and that, unless the remittitur is stayed, the filing of an unsuccessful petition for a writ of certiorari does not extend the statute of limitations. Because appellant filed its malpractice action more than two years after we issued the remittitur in the case involving the alleged malpractice, we affirm the district court's order dismissing this suit as time-barred.

I.

Appellant Branch Banking & Trust hired respondents Gerrard & Cox, d/b/a Gerrard Cox & Larsen and attorney Douglas Gerrard (collectively, Gerrard) to represent it in a lawsuit contesting the priority of deeds of trust on a piece of property. The district court entered judgment against Branch Banking, and a three-justice panel of this court affirmed. *R&S St. Rose Lenders, LLC v. Branch Banking & Tr. Co.*, Docket No. 56640 (Order of Affirmance, May 31, 2013). There followed timely petitions for rehearing, NRAP 40, and for en banc reconsideration, NRAP 40A, both of which were denied. *R&S St. Rose Lenders*, Docket No. 56640 (Order Denying Rehearing, Sept. 26, 2013; Order Denying En Banc Reconsideration, Feb. 21, 2014). This court issued its remittitur and closed the appeal on March 18, 2014. Branch Banking then filed a timely petition for a writ of certiorari with the United States Supreme Court, which the Supreme Court denied on October 6, 2014.

On October 5, 2016, Branch Banking filed the complaint underlying the current appeal against Gerrard, alleging legal malpractice in the property case. Gerrard moved to dismiss on the grounds the statute of limitations had expired. The district court agreed and entered an order dismissing the complaint for failure to state a claim upon which relief could be granted. Branch Banking appeals.

II.

A.

NRS 11.207(1) provides a two- or four-year statute of limitations for legal malpractice claims, running from the date the client discovers or should have discovered the claim (two years) or the date the client suffered damage (four years), whichever expires earlier. Our case law engrafts a "litigation malpractice tolling rule" onto NRS 11.207(1)'s two-year "discovery" rule. *See Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. 632, 642, 333

P.3d 229, 235 (2014). As its name suggests, the litigation malpractice tolling rule applies to malpractice committed by a lawyer while representing a client in a lawsuit. *See Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 552, 306 P.3d 406, 410 (2013) (holding that the litigation malpractice tolling rule does not apply to non-adversarial or transactional representation).

The litigation malpractice tolling rule holds that, in cases involving litigation malpractice, "the damages for a malpractice claim do not accrue until the underlying litigation is complete and, thus, a malpractice claim does not accrue and its statute of limitations does not begin to run during a pending appeal of an adverse ruling from the underlying litigation." *Brady, Vorwerck, Ryder & Caspino*, 130 Nev. at 638, 333 P.3d at 232. In effect, two events must occur before the two-year statute of limitations in NRS 11.207(1) starts to run on a litigation malpractice claim: first, the client must discover the malpractice; second, even after the malpractice is discovered, the period is tolled until the client suffers actual "damages," which Nevada law holds does not occur until the appeal, if any, from the adverse judgment is resolved. *See Hewitt v. Allen*, 118 Nev. 216, 221, 43 P.3d 345, 348 (2002) (holding that a client whose litigation counsel commits malpractice need not pursue a futile appeal to sue for malpractice but if the client does appeal "the malpractice [claim] does not accrue while an appeal from the adverse ruling is pending").

The parties agree that Branch Banking "discovered" the malpractice in time for NRS 11.207(1)'s two-year limitations period to apply. They disagree on when the appeal in the property case was resolved such that, under the litigation malpractice tolling rule, Branch Banking's "damages" accrued and the two-year limitations period started to run. Branch Banking maintains that its legal malpractice claim did not accrue, thereby tolling the statute of limitations, until the Supreme Court denied its writ petition on October 6, 2014. And, because it filed its legal malpractice complaint within two years of the Supreme Court's denial of the petition, on October 5, 2016, Branch Banking insists its complaint was timely. Gerrard counters that the statute of limitations began to run at the latest on March 18, 2014, when this court issued its remittitur in the property case, and that since more than two years elapsed from that date before Branch Banking filed its malpractice complaint, the district court correctly dismissed the complaint as time-barred.[1]

The facts are uncontested, so de novo review applies. *See Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013) (reviewing the dismissal of

[1]The district court mistakenly stated that the remittitur issued and the statute of limitations began to run on May 31, 2013. The date this court issued its remittitur was March 18, 2014. The mistake does not affect the analysis, since both dates occurred more than two years before Branch Banking filed its malpractice complaint.

a claim on statute of limitations grounds de novo when there were no facts in dispute). For the reasons expressed below, we hold that, upon issuance of the remittitur, the statute of limitations begins to run. Without a stay of the remittitur, the filing of a petition for discretionary review by the Supreme Court does not extend the tolling period afforded by the litigation malpractice tolling rule.

B.

In Nevada, an appeal concludes and appellate jurisdiction ends upon issuance of the remittitur from this court to the district court. *See* NRAP 41(a); *Dickerson v. State*, 114 Nev. 1084, 1087, 967 P.2d 1132, 1134 (1998) ("The purpose of a remittitur, aside from returning the record on appeal to the district court, is twofold: it divests this court of jurisdiction over the appeal and returns jurisdiction to the district court, and it formally informs the district court of this court's final resolution of the appeal."). A party seeking review of a Nevada appellate judgment by way of a petition for certiorari to the United States Supreme Court has 90 days to do so. *See* 28 U.S.C. § 2101(c) (1994). Under Rule 41(b)(3) of the Nevada Rules of Appellate Procedure, a "party may file a motion to stay the remittitur pending application to the Supreme Court of the United States for a writ of certiorari." Such "stay shall not exceed 120 days, unless the period is extended" by order or "notice from the clerk of the Supreme Court of the United States [is given] that the party who has obtained the stay has filed a petition for the writ in that court," in which event "the stay shall continue until final disposition by the Supreme Court." *Id.* But, absent a stay, the remittitur issues and jurisdiction returns to the district court 25 days after this court or the court of appeals enters its judgment. NRAP 41(a)(1); *Dickerson*, 114 Nev. at 1087, 967 P.2d at 1134.

Nevada's litigation malpractice tolling rule traces back to *Semenza v. Nevada Medical Liability Insurance Co.*, 104 Nev. 666, 765 P.2d 184 (1988). *Semenza* did not involve tolling; in *Semenza*, this court reversed and remanded a judgment awarding damages for litigation malpractice because the judgment giving rise to the malpractice claim had been later reversed on appeal. *Semenza* held that the malpractice suit had been filed prematurely and should have been held "in abeyance" or dismissed without prejudice pending resolution of the appeal from the adverse judgment. *Id.* at 668-69, 765 P.2d at 186. Going further, *Semenza* declaims that "this court will not countenance interlocutory-type actions for legal malpractice brought to trial while an appeal of the underlying case is still pending." *Id.* at 668, 765 P.2d at 186; *see also K.J.B., Inc. v. Drakulich*, 107 Nev. 367, 370, 811 P.2d 1305, 1306 (1991) (citing *Semenza* and holding that "the statute of limitations in NRS 11.207(1) does not commence to run against a cause of action for attorney malpractice

until the conclusion of the underlying litigation wherein the malpractice allegedly occurred").

The Supreme Court denied Branch Banking's petition for certiorari in the property case. But Branch Banking urges that, had the Supreme Court granted certiorari and reversed, its situation would be the same as the respondent's in *Semenza*. Citing *Semenza* and *K.J.B.*, Branch Banking presses us to extend the litigation malpractice tolling rule until the 90 days to petition for certiorari expires or, if a timely petition is filed, until the Supreme Court proceedings conclude. *Cf. Haase v. Abraham, Watkins, Nichols, Sorrels, Agosto & Friend, LLP*, 499 S.W.3d 169, 175 (Tex. Ct. App. 2016) (holding that the malpractice statute of limitations was tolled until the Supreme Court denied certiorari). Had Branch Banking sought and obtained a stay of the remittitur under NRAP 41(b)(3) while it petitioned the Supreme Court for a writ of certiorari, we could agree. But, in asking us to extend the tolling period without a stay of the remittitur, Branch Banking seeks a bridge too far.

Statutes of limitation "embody important public policy considerations in that they stimulate activity, punish negligence, and promote repose by giving security and stability to human affairs"; they "tend to promote the peace and welfare of society, safeguard against fraud and oppression, and compel the settlement of claims within a reasonable period after their origin and while the evidence remains fresh in the memory of the witnesses." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 19-20 (1990) (internal quotation marks omitted). Nevada is among a minority of jurisdictions that have a litigation malpractice tolling rule. *See* 3 Ronald E. Mallen, *Legal Malpractice* § 23:40 (2018) ("Although there is jurisdictional inconsistency, most courts have concluded that a cause of action for presently identifiable [legal malpractice] damages is not suspended or otherwise tolled pending an appeal or motion by the injured party."). The litigation tolling rule favors avoidance of unnecessary litigation but at the expense of delaying prompt resolution of claims. The litigation malpractice tolling rule ranks an appellant's chances of success on direct appeal as sufficiently strong to justify the delay cost involved. A party's chances of persuading the United States Supreme Court to accept certiorari are considerably less.

To function properly, statutes of limitation demand bright-line rules. *Joel Erik Thompson, Ltd. v. Holder*, 965 P.2d 82, 85 (Ariz. Ct. App. 1998). Requiring a party to seek and obtain a stay of remittitur under NRAP 41(b)(3) to extend the already generous tolling period afforded by our litigation malpractice tolling rule while the party petitions for certiorari avoids the delay and uncertainty that would otherwise arise in every case while parties wait out the 90-day period provided by federal law for petitioning for certiorari, 28 U.S.C. § 2101(c), and is fair. *See Glick v. Ballentine Produce, Inc.*, 397 F.2d 590, 594 (8th Cir. 1968) (finding "no support for the contention that

the filing of a petition for a writ of certiorari prevents the judgment of [the court of appeals] from becoming final until the Supreme Court acts upon the petition where no stay of mandate [remittitur] has been filed"); *Joel Erik Thompson*, 965 P.2d at 85 (holding that the issuance of the mandate, the equivalent to Nevada's remittitur, ends the tolling period provided by Arizona's litigation malpractice tolling rule); *Owens v. Hewell*, 474 S.E.2d 740, 742 (Ga. Ct. App. 1996) (holding that, without a stay of the mandate, the six-month period provided by Georgia's savings statute ran from the date the court of appeals decided the case, not the date the Supreme Court denied certiorari).

Tying the litigation malpractice tolling rule to the issuance of the remittitur not only avoids uncertainty and unnecessary delay, it also comports with other provisions of Nevada law. A defendant who appeals a judgment of conviction, for example, has one year after the Nevada appellate court issues its remittitur to file a petition for a writ of habeas corpus. NRS 34.726. A civil litigant who appeals a judgment and obtains an order granting a new trial has three years from the date the remittitur is filed in the district court to bring the case to trial. NRCP 41(e). And a party who loses before the court of appeals has the right to petition this court for discretionary review which petition, if timely filed, automatically stays issuance of the remittitur until this court resolves the petition. NRAP 41(b)(2); *see also* NRAP 41(b)(1) (similarly providing for an automatic stay of the remittitur on timely filing of a petition for rehearing or for en banc reconsideration).

III.

The issuance of the remittitur "provides a 'bright-line' event to count from; and in counting time, a bright-line rule serves all." *Joel Erik Thompson*, 965 P.2d at 85. Counting from the date the remittitur issued in the property case, more than two years elapsed before Branch Banking filed its malpractice complaint against Gerrard. The district court correctly dismissed the complaint under NRS 11.207(1). We therefore affirm.

Gibbons and Hardesty, JJ., concur.

AMMAR ASIMFARUQ HARRIS, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 69509

December 27, 2018 432 P.3d 207

Appeal from a judgment of conviction, pursuant to a jury verdict, of three counts of first-degree murder with the use of a deadly weapon; one count of attempted murder with the use of a deadly weapon; two counts of discharging a firearm at or into a structure, vehicle, aircraft or watercraft; and five counts of discharging a firearm out of a motor vehicle. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Affirmed.

Cherry, J., with whom Gibbons, J., agreed, dissented.

Robert L. Langford, Thomas A. Ericsson, and *Matthew J. Rashbrook*, Las Vegas, for Appellant.

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

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

Appellant Ammar Harris shot and killed a fellow motorist driving on the Las Vegas Strip. The motorist's car then careened down the Strip and struck a taxicab, killing both the driver and a passenger in a fiery explosion. At trial, the district court admitted photographs of the taxicab victims, including images of their bodies disfigured by the fire and subsequent autopsies. The main issue in this appeal is whether admission of the photographs amounted to an abuse of the district court's discretion. We conclude that it did. Photographs, even gruesome ones, may be properly admitted in a criminal case to show the cause of a victim's death, the nature of his injuries, and the like. But such photographs are still subject to the balancing test outlined in NRS 48.035(1), which requires a district court to exclude evidence when its probative value is substantially outweighed by the danger of unfair prejudice. Because the challenged photographs added little to the State's case, but created a significant risk of inflaming the jury, the district court should have excluded them. However, as the admission of the photographs was harmless, and none of Harris' other claims warrant relief, we affirm.

FACTS AND PROCEDURAL HISTORY

Harris spent the early morning hours of February 21, 2013, partying at a Las Vegas nightclub with his girlfriend, Yeni, and two other women. At roughly 3:30 a.m., Kenneth Cherry and Freddy Walters pulled up to the club in a Maserati. They left soon after, getting back in the Maserati only to loop around the valet and park again. Around the same time, Harris and the women left the club and headed to the valet to pick up his car. When they got there, Harris realized he had left his jacket back at the club and went to retrieve it. An argument broke out while he was gone, and Yeni saw a man waving around a gun. She went inside and told Harris about the incident. When he returned, he retrieved a gun from his glove compartment and told Yeni to use it if necessary. He then walked over to Cherry's Maserati, which drove away.

Harris and the women left shortly thereafter. As they were driving onto the Strip, Harris pulled up to Cherry's Maserati and cut it off. Harris told Yeni, who was in the passenger seat, to roll down her window and lean back. Yeni noticed the gun in his lap. Apparently foreseeing trouble, she told Harris that Cherry was not the right person. Harris ignored her. Through the window, he said something to Cherry like "What's up?" and Cherry responded with either "Do I know you?" or "I don't know you." Harris then shot Cherry, killing him almost instantly. Cherry died pressing on the gas pedal and the Maserati took off. Harris pulled ahead and kept shooting, striking Walters, Cherry's passenger. The Maserati collided with several vehicles before slamming into a taxicab at a speed of roughly 88 miles per hour. The taxicab burst into flames which engulfed the entire vehicle. The driver of the taxicab, Michael Bolden, and his passenger, Sandra Sutton, died from injuries they sustained in the crash and the fire.

The State charged Harris with the murders of Cherry, Bolden, and Sutton, and the attempted murder of Walters. The State sought the death penalty for each murder. At trial, the defense conceded that Harris shot Cherry, but argued he was not guilty of first-degree murder for two main reasons. First, Harris claimed he acted in self-defense. Pointing to surveillance videos which showed Cherry and Walters driving in and out of the valet several times and interacting with the man Yeni saw with the gun, he claimed that Cherry and Walters had been "hunting" him and he had to shoot first to protect himself. He argued that his drug and alcohol intoxication, and his prior experience of being shot, played into his belief that he had to shoot first. He also claimed that he could not commit a premeditated murder due to his intoxication.

The State responded to Harris' self-defense claim by arguing that neither the video, nor any testimony, indicated that Cherry or Walters acted in a threatening manner. The State also pointed out that

they left the club *before* Harris, which undermined his claim that they were hunting him. Finally, the State argued that even if Harris consumed alcohol or drugs before the shooting, he was not so intoxicated that he was unable to form the intent necessary to be guilty of first-degree murder. The jury found Harris guilty of three counts of first-degree murder with the use of a deadly weapon, one count of attempted murder with the use of a deadly weapon, and other felonies. After a penalty hearing, the jury found beyond a reasonable doubt that ten aggravating circumstances applied to each murder, and no juror found any mitigating circumstances. The jury imposed a sentence of death for each murder. This appeal followed.

DISCUSSION

Admission of gruesome photographs

The main issue presented in this appeal is whether the district court abused its discretion when it admitted photographs of the victims who died in the cab. Before addressing this issue in more detail, we must first address Harris' assertion that we should not give deference to the district court's decision because it did not identify specific reasons for admitting the photographs and therefore we can only speculate as to the basis for its decision. Given the state of the record, we do not agree. Harris sought to exclude the photographs before trial. The district court agreed that the photographs were "quite disturbing" and asked the State why they were necessary. The State then went through each photograph, one by one, and explained why each was necessary; broadly, the State argued that the photographs showed the manner in which the victims were found, the extent of their injuries, and the cause of their deaths. Harris responded that none of these issues were in dispute, and he affirmatively stated that he would not endeavor to put them in dispute. The district court later admitted the photographs. Under these circumstances, we can fairly infer that the district court credited the State's arguments for admitting the photographs over Harris' arguments to the contrary. We therefore review for an abuse of discretion. *See, e.g.*, *West v. State*, 119 Nev. 410, 420, 75 P.3d 808, 815 (2003) (reviewing a district court's decision to admit photographic evidence for an abuse of discretion).

The district court abused its discretion

Citing NRS 48.035(1), Harris argues that the photographs were so unnecessarily graphic that they risked outraging the jury, and that potential for unfair prejudice substantially outweighed any probative value the photographs otherwise had. The State responds that this court has routinely upheld the admission of such photographs when used to show the nature of a victim's injuries and the manner of their infliction, or when they otherwise assist the jury in ascer-

taining the truth of a matter at issue. And, the State argues, the photographs were particularly necessary here because not only did it have to prove that Harris killed Cherry, it had to prove that he was responsible for the more attenuated deaths of the victims in the taxicab. *See Doyle v. State*, 116 Nev. 148, 161, 995 P.2d 465, 473 (2000) (holding that a defendant puts all elements of an offense at issue by pleading not guilty).

The State is correct that photographs of a victim's injuries tend to be highly probative and thus are frequently deemed admissible in criminal cases despite their graphic content. *See, e.g.*, *Browne v. State*, 113 Nev. 305, 314, 933 P.2d 187, 192 (1997); *see also* 1 Christopher B. Mueller & Laird C. Kirkpatrick, Federal Evidence § 4:18 (4th ed. 2018) ("Photographs have long been used in criminal cases to put before juries the image of dead victims . . . [to] show cause of death, identity of the victim, position of the body, the nature and relationship of the wounds, and the appearance of the scene."). But while that is generally true, it does not mean such photographs are *always* admissible, regardless of the facts and circumstances of a given case. Nevada law does not categorically admit or exclude such photographs; rather, like all evidence a party seeks to introduce, they are subject to the balancing test set out in NRS 48.035(1), which precludes the admission of evidence when its probative value is substantially outweighed by the danger of unfair prejudice. NRS 48.035 requires the district court to act as a gatekeeper by assessing the need for the evidence on a case-by-case basis and excluding it when the benefit it adds is substantially outweighed by the unfair harm it might cause.

While the record suggests that the district court adopted the State's reasoning for the admission of each photograph, the record does not evidence a meaningful weighing of the potential for unfair prejudice against each photograph's probative value, which leads us to conclude that the district court did not properly fulfill its role as gatekeeper in this case. *See Hall v. Commonwealth*, 468 S.W.3d 814, 827 (Ky. 2015) (observing under similar facts that "[t]his is the prototypical case where [the equivalent of NRS 48.035] required the trial judge to comb through and exclude many of the offered photographs; it required the judge to recognize and safeguard against the enormous risk that emotional reactions to the inflammatory photos would obstruct the jury's careful judgment and improperly influence its decision"). The photographs at issue are shocking. In full color and high-resolution, they show the terrible aftermath of the taxicab's explosion and the further mutilation caused by the victims' autopsies. They include images of charred limbs and burned flesh, dissected tracheas and chest cavities ripped open, and the desecrated bodies of human beings who clearly died a horrific death. Their graphic nature could easily inflame the passions of a reasonable juror, consciously or subconsciously tempting him or her to eval-

uate the evidence based on emotion rather than reason—the very definition of unfair prejudice. *See Old Chief v. United States*, 519 U.S. 172, 180 (1997) (explaining that, in the criminal context, the term " 'unfair prejudice' . . . speaks to the capacity of some concededly relevant evidence to lure the factfinder into declaring guilt on a ground different from proof specific to the offense charged"); *see also State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (recognizing that evidence can be unfairly prejudicial when it appeals to "the emotional and sympathetic tendencies of a jury" (internal quotation marks omitted)).

In contrast, the photographs' probative value was unquestionably minimal under the circumstances. The term " 'probative value' sums up the positive benefits of evidence the trial judge should weigh against the potential harms listed in [NRS 48.035(1)]." 22A Charles Alan Wright et al., Federal Practice & Procedure § 5214.1 (2d ed. 2018). It turns on "the actual need for the evidence in light of the issues at trial and the other evidence available to the State." *State v. Jones*, 450 S.W.3d 866, 894-95 (Tenn. 2014). This was not a scenario where the State needed the photographs to prove a fact important to the case. *See, e.g.*, *Robins v. State*, 106 Nev. 611, 623, 798 P.2d 558, 566 (1990) (upholding the admission of gruesome photographs where they showed a pattern of significant physical abuse supporting the intent required for murder); *Doyle*, 116 Nev. at 160, 995 P.2d at 473 (upholding the admission of gruesome photographs which showed that shoe impressions left on the victim's body were consistent with those in the killer's possession). Indeed, there was not even a remote suggestion that the victims died by means other than the impact and explosion. *See Olds v. State*, 786 S.E.2d 633, 641 (Ga. 2016) (" 'The more strongly an issue is contested, the greater the justification for admitting other act evidence bearing on the point.' " (quoting Mueller & Kirkpatrick, *supra*, § 4.21)). And the State had abundant, far less inflammatory evidence in its arsenal to satisfy its burden of proof on the elements and to support the testimony of the relevant witnesses, including a video of the Maserati striking the taxicab. *See Hall*, 468 S.W.3d at 824 ("When there is already overwhelming evidence tending to prove a particular fact, any additional evidence introduced to prove the same fact necessarily has lower probative worth, regardless of how much persuasive force it might otherwise have by itself."). Moreover, Harris conceded that he would not dispute the victims' causes of death or that his actions proximately resulted in those deaths. This concession alone did not render the photographs inadmissible, *see Doyle*, 116 Nev. at 161, 995 P.2d at 473, but when their probative value was already low, and the risk of unfair prejudice unduly high, it was a relevant factor for the district court to consider, *see United States v. Ford*, 839 F.3d 94, 109 (1st Cir. 2016); *see also Old Chief*, 519 U.S. at 186 (explaining that a defendant's concession may be considered when assessing probative value).

The purpose of this decision is not to retreat from the general principle that, despite gruesomeness, photographs of a victim's injuries are typically admissible in a criminal case. We also recognize that the State is usually entitled to present its case in the manner it believes will be most effective. *See Old Chief*, 519 U.S. at 188 ("[T]he prosecution may fairly seek to place its evidence before the jurors, as much to tell a story of guiltiness as to support an inference of guilt, to convince the jurors that a guilty verdict would be morally reasonable as much as to point to the discrete elements of a defendant's legal fault."). Had the district court more meaningfully culled the photographs or otherwise limited their use, our analysis might be different. *See, e.g.*, *Ybarra v. State*, 100 Nev. 167, 172, 679 P.2d 797, 800 (1984) (observing that the district court reduced the inflammatory potential of a photograph by reducing its size). The same might be true if the Maserati struck a hearse instead of a taxicab, raising even the slightest possibility that the occupants were dead at the time of the crash. But we reject the notion that the jurors in this case had to see multiple color photographs of the victims' charred bodies splayed across an autopsy table to appreciate the medical examiner's testimony that they were alive when the Maserati struck the taxicab. And we do so mindful that no one was suggesting otherwise and there was a wealth of less inflammatory evidence available to establish that point. We therefore hold that the photographs' probative value was substantially outweighed by the danger of unfair prejudice and the district court abused its discretion by admitting them.[1] *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

The admission of the photographs was harmless

Having concluded that the district court abused its discretion, we turn to whether the error was harmless.[2] For nonconstitutional errors like this one, reversal is only warranted if the error " 'had substantial

[1]Our decision relates only to the guilt phase. To the extent Harris challenges the admission of the photographs in the penalty phase, he fails to demonstrate an abuse of discretion. *See* NRS 175.552(3) ("During the [penalty] hearing, evidence may be presented concerning aggravating and mitigating circumstances relative to the offense, defendant or victim and on any other matter which the court deems relevant to the sentence, whether or not the evidence is ordinarily admissible."); *see generally People v. Henriquez*, 406 P.3d 748, 776-77 (Cal. 2017) (upholding the admission of gruesome photographs in the penalty phase of a murder trial when the photographs demonstrated the real-world consequences of the defendant's actions).

[2]Although the State did not adequately brief whether the error was harmless, *see* NRAP 28(b), we decline to treat this as a concession of error. *See* NRS 178.598 (recognizing that this court shall not grant relief based on harmless errors). We caution the State that our decision might have been different in a closer case.

and injurious effect or influence in determining the jury's verdict.'" *Knipes v. State*, 124 Nev. 927, 935, 192 P.3d 1178, 1183 (2008) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)). Applying that inquiry, we conclude that the improper admission of the photographs was undoubtedly harmless. Almost all of the relevant events, from the moment Harris left the club to the moment the taxicab exploded, were captured on video, and eyewitness testimony filled in any gaps. That evidence conclusively showed that Harris shot and killed Cherry without any viable justification, meaning he was also responsible for killing Sutton and Bolden. Harris' assertions of self-defense and voluntary intoxication were weak, and they were undermined by his actions after the shooting, which were entirely inconsistent with the actions of a person who had acted lawfully. *See United States v. Hasting*, 461 U.S. 499, 512 (1983) (finding an error to be harmless "[i]n the face of [the] overwhelming evidence of guilt and the inconsistency of the scanty evidence tendered by the defendants"); *Delaware v. Van Arsdall*, 475 U.S. 673, 684 (1986) (considering the strength of the State's case when assessing harmlessness). Thus, while the photographs carried an undue risk of inflaming the jurors' emotions, and that risk substantially outweighed the photographs' minimal probative value, we do not believe it had a substantial influence over the jurors' evaluation of the evidence, particularly when they could see the relevant events unfold for themselves. In addition, the district court tempered the photographs' inflammatory effect by warning jurors about their content ahead of time and admonishing the courtroom audience not to react when they were displayed. Considering all of this, and in light of the overwhelming evidence supporting the verdict, we conclude that no relief is warranted. *See Kotteakos*, 328 U.S. at 764 ("If, when all is said and done, the conviction is sure that the error did not influence the jury, or had but very slight effect, the verdict and the judgment should stand.").

Other assertions of error

Harris raises several other assertions of error in this appeal. Although we conclude that none of them warrant relief, we briefly discuss each one.

First, he claims that his right to a fair trial was violated when his trial was broadcast on television and reported on by the media. He fails, however, to provide adequate citation to the record supporting this assertion. He does not demonstrate that media coverage of his trial was unduly pervasive nor does he meaningfully discuss relevant considerations for determining whether media coverage deprived him of a fair trial. *See Skilling v. United States*, 561 U.S. 358, 382-84 (2010) (identifying factors such as (1) the size and characteristics of the community, (2) whether the news stories contained a confession or blatantly prejudicial information, (3) the amount of

time between the crime and the media coverage, and (4) whether the jury's verdict undermined a presumption of bias). He therefore fails to demonstrate that relief is warranted on this claim.

Second, he argues that the district court should have given the instruction he requested regarding voluntary intoxication. *See Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) (reviewing a district court's refusal to give a jury instruction for an abuse of discretion). However, he fails to adequately explain why the instruction he proffered should have been given. Moreover, the jury was instructed that his drug and alcohol intoxication could be considered in determining his intent, and he does not explain why this instruction was insufficient.

Third, he argues that he is entitled to a new trial because the verdict form did not allow the jury to find him guilty of voluntary manslaughter, even though the jury had been instructed that it could find him guilty of the offense. Although the verdict form was incomplete, we conclude that no relief is warranted under the circumstances. The jury was instructed to first consider whether Harris was guilty of first-degree murder, and to consider lesser offenses only if it could not agree or acquitted him of the greater offense. The jury was also properly instructed on the necessary elements of voluntary manslaughter. Because the jury was otherwise properly instructed and overwhelming evidence supports the jury's conclusion that Harris was guilty of first-degree murder, we conclude that the failure to give a complete verdict form was harmless. *See McNamara v. State*, 132 Nev. 606, 621, 377 P.3d 106, 116 (2016) (holding that the failure to include a lesser offense on a verdict form is harmless where the jury is otherwise properly instructed and the evidence supporting the verdict is overwhelming). We also note that if the jury believed Harris was not guilty of first-degree murder, it could have found him guilty of second-degree murder, further reducing any concern that he was harmed by the failure to give a verdict form on voluntary manslaughter. *Cf. Beck v. Alabama*, 447 U.S. 625, 637 (1980) (discussing the dangers of failing to instruct on a lesser included offense in capital case).

Fourth, Harris argues that the prosecutor committed misconduct in the penalty phase by (1) arguing that Harris would not feel remorse in prison and (2) arguing that a life sentence for each victim would mean Harris would not be separately punished for killing three people. We are not convinced that the prosecutor committed misconduct when he argued that Harris would not feel remorse in prison, but regardless, Harris did not object to the statement and fails to demonstrate plain error. *See Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008) (holding that a defendant who fails to object to prosecutorial misconduct must demonstrate plain error affecting his substantial rights). To the extent the prosecutor im-

properly argued that a death sentence was necessary because there were multiple victims, no relief is warranted because the district court sustained Harris' objection to the argument, and although the prosecutor briefly continued it, the jury knew it had been deemed improper and there is no indication that it had a substantial effect on the sentences.

Fifth, Harris asserts that he should not be eligible for a death sentence for the murders of Bolden and Sutton because he did not intend to kill them. His arguments are not well-developed, and he fails to convince us that our decision in *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), applies to the circumstances of this case, or that permitting death-eligibility for murders based on transferred intent does not narrow the class of death-eligible defendants. *See generally Tison v. Arizona*, 481 U.S. 137, 158 (1987) (recognizing that the United States Constitution allows defendants to be death-eligible for murders they did not intend where a defendant was a major participant in a felony and acted with reckless indifference to human life).

Sixth, Harris asserts that the district court should have granted his motion to compel the State to produce data and statistics regarding the death penalty. He does not provide relevant authority supporting his position that he had a right to the information requested, and he does not establish that he could not get the information from other sources. Moreover, his assertion that this court needs the requested information to conduct its mandatory review of the death sentences pursuant to NRS 177.055(2) is meritless.

Finally, Harris asserts that cumulative error deprived him of due process. We disagree because whether considering them individually or together, the errors we have identified were unquestionably harmless. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (assessing cumulative error by considering whether the issue of guilt is close, the quantity and character of the error, and the gravity of the crime charged). This case involved multiple murders and other serious offenses. The question of whether Harris was guilty of those offenses was not a close one, as the jury clearly determined that the evidence supported the State's theory of the case over Harris'. Moreover, we have only identified two errors, and neither were egregious under the circumstances. Thus, we conclude that no relief is warranted on Harris' other claims or under a cumulative-error analysis.[3]

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[3]Harris also argues that the death penalty is cruel and unusual under the United States Constitution, U.S. Const. amend. VIII, and cruel under the Nevada Constitution, Nev. Const. art. 1, § 6. He recognizes that this court has rejected this argument, but explains he is preserving it for federal review and to give this court an opportunity to reconsider its prior holdings. We decline to do so.

Mandatory review of Harris' death sentences

NRS 177.055(2) requires this court to determine whether the evidence supports the aggravating circumstances; whether the verdict of death was imposed under the influence of passion, prejudice, or any arbitrary factor; and whether the death sentences are excessive considering this defendant and the crime. Having considered the factors outlined in the statute, we conclude that no relief is warranted. The evidence supports the finding of each aggravating circumstance, most of which were conclusively established by the jury's guilt-phase verdicts. We further conclude that the death sentences are not excessive, nor were they imposed under the influence of passion, prejudice, or any arbitrary factor. *See Dennis v. State*, 116 Nev. 1075, 1085, 13 P.3d 434, 440 (2000) (explaining that this court considers whether death sentences are excessive by asking whether the crime and defendant are of the class or kind that warrants the imposition of death). The record shows that Harris made a cold, calculated decision to kill Cherry for reasons that are not entirely clear, resulting in the deaths of two innocent bystanders who died trapped in a blazing inferno. The aggravating circumstances, both statutory and nonstatutory, were compelling, and the jury did not find any mitigating circumstances. Accordingly, we affirm.

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

Cherry, J., with whom Gibbons, J., agrees, dissenting:

The majority correctly concludes that multiple errors plagued Ammar Harris' trial. Yet, once again, this court affirms by summarily concluding that the verdict was untainted despite the accumulation of errors. In my view, the improper admission of the photographs and the failure to include the offense of voluntary manslaughter on the verdict form warrant reversal when considered together under a cumulative-error analysis. This court has identified three relevant factors for evaluating a claim of cumulative error: (1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged. *Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008). The third factor is often misconstrued; it refers not to a sliding scale of justice where different crimes warrant different levels of judicial protection, but from a recognition that death is different and capital cases warrant particularly close appellate scrutiny. *See, e.g.*, *Garner v. State*, 78 Nev. 366, 375, 374 P.2d 525, 530 (1962).

Applying the heightened level of scrutiny that our caselaw requires, I am convinced that the errors identified by the majority cannot be deemed harmless. First, take the majority's discussion regarding the improper admission of the photographs. Although the majority correctly concludes that the graphic content of the photo-

graphs might have caused reasonable jurors to react so emotionally that they could not neutrally evaluate the evidence, the majority somehow concludes that the jurors in this case *probably* set their emotions aside and considered the evidence dispassionately. My concern with this analysis is that it seems to consider how appellate court judges would have responded to such photographs instead of jurors. Studies have repeatedly shown that mock jurors presented with gruesome photographs are significantly more likely to render guilty verdicts than jurors who are not. Susan A. Bandes & Jessica M. Salerno, *Emotion, Proof and Prejudice: The Cognitive Science of Gruesome Photos and Victim Impact Statements*, 46 Ariz. St. L.J. 1003, 1026 (2014). These studies also show that jurors who view gruesome photographs frequently attribute a higher level of criminal intent to a defendant than he actually possessed. *Id*. at 1026-27. The generally accepted theory is that seeing photographs of a victim's body horrifically disfigured outrages the jury, and the jury takes its outrage out on the defendant. *Id*. at 1026. Given what we know about how jurors tend to respond to such photographs—not just from the results of scientific studies, but from common sense and experience—I do not believe this court can say with confidence that admission of the photographs did not influence the way the jurors interpreted the evidence of Harris' intent, which was the key issue at trial.

I have the same concern with the majority's discussion of the incomplete verdict form. With any luck, jurors understood their instructions down to the letter and started deliberations by considering whether Harris was guilty of first-degree murder, never even noticing that the verdict form was incomplete. But we have no way of knowing whether that is the case. And while our system of justice could not function if reviewing courts did not accept the general premise that jurors follow their instructions, it would be full of empty promises if we do not remain open to the possibility that sometimes they do not. *See generally Krulewitch v. United States*, 336 U.S. 440, 453 (1949) ("The naive assumption that prejudicial effects can be overcome by instructions to the jury, all practicing lawyers know to be unmitigated fiction." (Jackson, J., concurring) (internal citation omitted)). This is a death penalty case, and death is different. *Gregg v. Georgia*, 428 U.S. 153, 188 (1976). In a case like the one presented, where significant errors occurred that might have influenced the verdict, any doubt should cut in favor of the defendant rather than the State. Because I cannot say with "fair assurance" that the cumulative effect of the errors in this case was harmless, *Kotteakos v. United States*, 328 U.S. 750, 765 (1946), I respectfully dissent.

ALBERT H. CAPANNA, M.D., Appellant/Cross-Respondent,
v. BEAU R. ORTH, Respondent/Cross-Appellant.

No. 69935

ALBERT H. CAPANNA, M.D., Appellant, *v*.
BEAU R. ORTH, Respondent.

No. 70227

December 27, 2018 432 P.3d 726

Consolidated appeals and cross-appeal from final judgment after a jury verdict and post-judgment orders in a medical malpractice suit. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Appeals affirmed; cross-appeal dismissed.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Lauria, Tokunaga, Gates & Linn, LLP*, and *Anthony D. Lauria*, Las Vegas, for Appellant/Cross-Respondent.

Eglet Prince and *Dennis M. Prince* and *Kevin T. Strong*, Las Vegas; *Danielle Tarmu*, Las Vegas, for Respondent/Cross-Appellant.

Catherine M. O'Mara, Reno, for Amicus Curiae Nevada State Medical Association.

Erin G. Sutton, Chicago, Illinois, for Amicus Curiae American Medical Association.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Stiglich, J.:

Dr. Albert Capanna operated on Beau Orth to repair a disc herniation. Unfortunately, Capanna entered the wrong disc resulting in severe damage that necessitated additional surgery. Orth filed a complaint against Capanna, alleging medical malpractice and negligence. The jury found that Capanna's negligence caused Orth harm and, accordingly, awarded Orth a significant judgment against Capanna.

Capanna does not dispute his negligence in this appeal. Rather, he argues that the trial was unfair due to various rulings by the district

[1]The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of this matter.

court and attorney misconduct in closing argument. Capanna also disputes the district court's award of attorney fees and costs. On cross-appeal, Orth challenges the constitutionality of NRS 42.021. For the reasons set forth below, we affirm the judgment on the jury verdict and the district court's orders awarding attorney fees and costs. Lastly, we conclude that Orth lacks standing for his cross-appeal and dismiss the same.

BACKGROUND

Orth was a student-athlete with a scholarship to play football for the University of Nevada, Las Vegas. When he developed low back and leg pain, he was referred to Dr. Capanna. An MRI showed that Orth was suffering from a bulging disc between his fifth lumbar and first sacral vertebrae (L5-S1). Capanna recommended surgery to resolve the disc issue at that level and, according to Orth, told him that he would likely be able to return to playing football within weeks of the planned surgery. In September 2010, Capanna operated on Orth, intending to perform an L5-S1 microdiscectomy to repair the disc herniation.

Following the surgery, Orth's pain increased dramatically to the point where he could barely walk, with pain he described as the worst imaginable. Due to the severity of his symptoms, Orth sought a second opinion from Dr. Andrew Cash. Dr. Cash noted that Orth appeared "crippled" and that he had "a disability of 94 percent." Dr. Cash reviewed a post-operative MRI and was surprised to see that the L4-5 disc had been operated on and not the L5-S1 disc.[2] Dr. Cash believed Orth still required surgery on the L5-S1 disc, as had been intended, but that Orth also required additional surgery on the L4-5 disc to address Orth's severe symptoms.

Orth sued Capanna. After an 11-day trial, the jury found that Capanna was negligent in his care and treatment of Orth and that his negligence was the legal cause of Orth's injuries. The jury awarded Orth $136,300.49 in past medical expenses; $350,000 in future medical expenses; $1,800,000 in past pain, suffering, disability, and loss of enjoyment of life; and $2,000,000 in future pain, suffering, disability, and loss of enjoyment of life. Pursuant to NRS 41A.035, the district court reduced the noneconomic damages to $350,000. Additionally, the district court partially granted Orth's motion for attorney fees, pursuant to NRS 18.010(2)(b), after finding that Capanna maintained his liability defense without reasonable grounds. Lastly, the district court awarded costs to Orth, including $69,975.95 for expert witness fees.

[2]Capanna later admitted to his belief that he entered the L4-5 disc during Orth's surgery.

DISCUSSION

On appeal, Capanna asserts that Orth's counsel committed misconduct during closing argument by advocating for jury nullification and by making golden rule arguments. Capanna also challenges the district court's restrictions on his cross-examination of an expert witness and its admission of two doctors' opinions as to future medical care and expenses. Lastly, Capanna claims that the district court abused its discretion in awarding attorney fees and costs following trial. On cross-appeal, Orth asks this court to consider the constitutionality of NRS 42.021.

Attorney misconduct

Capanna seeks a new trial based on attorney misconduct during closing argument.[3] Namely, Capanna argues that Orth's counsel committed misconduct by advocating jury nullification and by making golden rule arguments, tactics we have denounced.

We have reviewed the comments that Capanna says advocated for jury nullification and, when viewed in context, conclude that counsel merely argued the role of the jury in the deliberative process. Jury nullification is the "knowing and deliberate rejection of the evidence or refusal to apply the law either because the jury wants to send a message about some social issue . . . or because the result dictated by law is contrary to the jury's sense of justice, morality, or fairness." *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982-83 (2008) (quoting *jury nullification*, *Black's Law Dictionary* (8th ed. 2004)). To the extent there were statements asking the jury to send a message, we have held that "such arguments are not prohib-

[3]Capanna also argues that Orth's counsel violated an order precluding reference to medical malpractice insurance and repeatedly raised the issue during jury selection. Capanna moved for a mistrial based on these comments, which was denied. We have reviewed the challenged comments and conclude that the district court did not abuse its discretion by denying Capanna's motion for a new trial because the record reflects that a potential juror raised the issue during jury selection in response to an innocuous question and that Orth's counsel asked potential jurors if they could follow the law. *See Romo v. Keplinger*, 115 Nev. 94, 96, 978 P.2d 964, 966 (1999) ("The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." (internal quotation marks omitted)).

On appeal, Capanna further alleges that Orth's counsel continued to violate the order during closing argument; Capanna did not object to these statements. We conclude counsel's closing argument did not amount to irreparable and fundamental error warranting relief for unobjected-to attorney misconduct. *See Lioce v. Cohen*, 124 Nev. 1, 19, 174 P.3d 970, 982 (2008) (setting forth the applicable standard of review for unobjected-to attorney misconduct). The record demonstrates that counsel simply encouraged jurors to pay attention to the jury instructions.

ited so long as the attorney is not asking the jury to ignore the evidence." *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 269, 396 P.3d 783, 790 (2017). Here, it is clear that counsel did not implore the jury to disregard the evidence. *See Lioce*, 124 Nev. at 20, 174 P.3d at 982 ("Whether an attorney's comments are misconduct is a question of law, which we review de novo . . . ."). As we concluded in *Pizarro-Ortega*, counsel asked the jury to arrive at its decision "*based on the evidence*." 133 Nev. at 269, 396 P.3d at 790. Therefore, counsel did not improperly advocate for jury nullification.

We do, however, conclude that counsel improperly made golden rule arguments. During closing argument, Orth's counsel argued "[w]ho would volunteer—what reasonable person would volunteer to—give up their hopes and dreams and suffer a lifetime—." After Capanna objected and the district court disagreed, Orth's counsel continued:

> And what reasonable person would give up their hopes, their dreams and agree to suffer a lifetime of pain, discomfort and limitation for money? Would it be a million dollars—if I give you a million dollars today, but I give you a 65-year-old man's spine, you won't be able to finish playing your college career, you're going to have discomfort and as you get older, it's going to get worse with time, you're going to need future surgeries, who would do that? Who would sign up for something like that?
>
> . . . .
>
> But when someone else puts you in a situation where you've lost out on your opportunity to enjoy the prime of your life, that now you suffer chronic pain and that it's going to get worse with time—when you have to listen to that, that it's going to get—my condition's going to get worse with time, it'll never improve.

Whereas Capanna focuses on the number of times the word "you" was used, we focus on the context in which the challenged comments arose. Counsel walked a fine line, artfully wording his argument as a hypothetical at times, but ultimately his argument asked the jurors to consider how they would feel if they were faced with the same challenges as Orth due to Capanna's negligence. Put simply, counsel's argument veered from hypothetical to Orth's exact scenario. That argument, asking the jurors to consider what it would be like if they were in Orth's situation, is precisely the type of argument we have prohibited as golden rule argument. *Lioce*, 124 Nev. at 22, 174 P.3d at 984 (an argument that "ask[s] jurors to place themselves in the position of one of the parties" is a golden rule argument).

Despite this improper argument, we conclude that an admonition by the district court would not have affected the jury's verdict and that Capanna's substantial rights were not affected by the misconduct. *See id*. at 18, 174 P.3d at 981 (providing that "[w]hen a party objects to purported attorney misconduct but the district court overrules the objection[,]" the court must consider "whether an admonition to the jury would likely have affected the verdict" and "whether a party's substantial rights were affected by the court's failure to sustain the objection and admonish the jury"). The evidence, including Capanna's own testimony, established that Capanna entered the wrong disc during surgery. Orth, a 20-year-old student-athlete, ultimately had surgery at two different disc levels (versus the one-level surgery that was supposed to be performed by Capanna) and, consequently, is likely to require future surgery. Orth was unable to resume collegiate athletics and continues to experience pain despite remedial treatment and therapy. The verdict and award of damages do not evince a jury controlled by emotions and sympathies but rather a thoughtful contemplation of the evidence presented. Of note, the jury did not award Orth all requested future medical expenses. Accordingly, we decline to reverse the judgment based on this misconduct.

Restrictions on cross-examination

Capanna argues that the district court improperly limited his cross-examination of Dr. Cash, specifically with regard to Dr. Cash's relationship with Orth's counsel. This court has held that a "district court has discretion to limit the scope of cross-examination . . . [but] that the district court's discretion to curtail cross-examination is more limited if the purpose of cross-examination is to expose bias." *Crawford v. State*, 121 Nev. 744, 758, 121 P.3d 582, 591 (2005); *see also Robinson v. G.G.C., Inc.*, 107 Nev. 135, 143, 808 P.2d 522, 527 (1991) (extending to the realm of civil proceedings the criminal-law principle that exposure of a witness's bias or motivation is proper subject for cross-examination). In so holding, we have recognized the importance of exposing relationships so that the jury may "judge for themselves the witness's credibility in light of the relationship between the parties, the witness's motive for testifying, or any matter which would tend to influence the testimony given by a witness." *Robinson*, 107 Nev. at 143, 808 P.2d at 527 (internal quotation marks omitted). One such relationship that might influence an expert witness's testimony is the "business arrangement between the witness, the hiring attorney and the client." *Id*. The jury therefore has a right to consider that relationship "when determining the credibility of [expert] wit-

nesses and the weight to give their testimony." *Id*. Even so, the district court "retain[s] wide latitude to restrict cross-examination to explore potential bias based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness'[s] safety, or interrogation that is repetitive or only marginally relevant." *Leonard v. State*, 117 Nev. 53, 72, 17 P.3d 397, 409 (2001) (internal quotation marks omitted).

During deposition, Dr. Cash stated that he had worked with Orth's counsel, or counsel's firm, approximately three to four dozen times. Before trial, Orth moved to preclude Capanna from referring to Dr. Cash's work with Orth's counsel on unrelated cases, and the district court granted the motion in part. Recognizing the potential for bias, the district court allowed Capanna to ask Dr. Cash about his history of testifying for plaintiffs and defendants and whether he had worked with Orth's counsel before. The district court only precluded Capanna from eliciting the number of times Dr. Cash had worked with Orth's counsel or counsel's firm, finding that information irrelevant. At trial, Dr. Cash testified as to his work as an expert with Orth's counsel, on behalf of plaintiffs and defendants, as well as to his payments for time and testimony.

There is no question that Dr. Cash's testimony was a critical part of Orth's case. Dr. Cash was not only Orth's treating physician, performing the second surgery, but he was also designated an expert witness for trial. The district court recognized the importance of allowing Capanna to explore Dr. Cash's possible bias but restricted Capanna's cross-examination by disallowing questions *as to the number of times* Dr. Cash had worked with counsel or counsel's firm. However, the district court's ruling did not preclude Capanna from exposing possible bias between Dr. Cash and Orth's counsel, as Capanna was free to ask other questions to develop the same information.[4] That Capanna's cross-examination of Dr. Cash as to possible bias was not extensive does not demonstrate that the district court's ruling was a severe limitation on his cross-examination. The record reveals that Capanna failed to explore the vast areas available to develop bias that were not covered by the district court's ruling. Instead, we conclude this minor restriction by the district court did not curtail Capanna's ability to explore Dr. Cash's potential bias and was a proper exercise of the district court's discretion.

Future medical care and expenses

Capanna argues the district court erred in allowing two doctors—Dr. Cash and Dr. Kevin Yoo—to opine about Orth's future medical

[4]For example, the district court's ruling did not preclude Capanna from asking Dr. Cash what percentage of his practice was devoted to work as an expert witness or what percentage of his income came from reimbursement from Orth's counsel or counsel's firm.

care and expenses because their related reports and disclosures were untimely.[5] Capanna claims that Orth improperly supplemented his designation of expert witnesses in May 2015 with new opinions and information that were available long before the disclosure. Capanna asserts that there was no good cause for the late disclosures and therefore the related opinions should have been excluded at trial in August 2015. Capanna alleges prejudice in that he was deprived of a meaningful opportunity to conduct discovery and thorough depositions of the two doctors.

This court reviews a district court's decision regarding the admissibility of expert testimony for an abuse of discretion. *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1046, 881 P.2d 638, 640 (1994). Pursuant to NRCP 16.1(a)(2), both parties were required to disclose the identity of anyone they intended to call as an expert witness at trial and to provide a written report prepared and signed by that witness. And we clarified in *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 434, 335 P.3d 183, 189-90 (2014), when a treating physician must provide an expert report. Additionally, a party is required pursuant to NRCP 16.1(a)(1)(C) to make an initial disclosure regarding the computation of the damages claimed, including future medical expenses. *See Pizarro-Ortega*, 133 Nev. at 264-66, 396 P.3d at 786-87. "A party is under a duty to supplement at appropriate intervals its disclosures under Rule 16.1(a) . . . if the party learns that in some material respect the information disclosed is incomplete or incorrect and if the additional or corrective information has not otherwise been made known . . . ." NRCP 26(e)(1). If a party fails to comply with the disclosure requirements of NRCP 16.1 or NRCP 26(e)(1), the party cannot use any witness or information not so disclosed unless the party shows a substantial justification for the failure to disclose or unless the failure is harmless. NRCP 37(c)(1); *see also* NRCP 16.1(e)(3)(B).

The issue before us is not whether Dr. Cash and Dr. Yoo were required to prepare reports, as both parties agree that the doctors prepared such reports. Nor is the issue whether Orth was required to disclose a dollar-figure computation for his claim for future medical expenses, as both parties agree that such an amount was provided. Rather, the issue is whether the district court abused its discretion when it allowed the doctors to testify as to their opinions as to future medical care and as to the future-medical-expenses computation when Capanna claims the information was not initially disclosed and was untimely supplemented.

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[5]On appeal, Capanna also complains about the late disclosure of another doctor's, Dr. Anthony Ruggeroli's, opinions as to future treatment and expenses. However, Capanna concedes that Dr. Ruggeroli did not testify at trial, and Orth did not request future medical expenses related to Dr. Ruggeroli's opinions. Accordingly, Capanna was not harmed by the district court's ruling in this respect. NRCP 61.

At a hearing on Capanna's countermotion to exclude the testimony, the district court noted that the disclosures were made within the discovery deadlines, albeit late in the discovery process. The district court also noted the changing nature of medical treatment in general as well as the possibility of collecting more information with each doctor's visit. The district court recognized that Capanna was on notice of Orth's request for future damages and discussed Capanna's ability to review and prepare for challenges to the future care amounts. It also stated that it understood "why the disclosures were being made at the time they were being made by [Orth]." The district court carefully considered the timeliness of Orth's disclosures and found that Orth satisfied his duty to supplement the disclosures "at appropriate intervals." NRCP 26(e)(1). To the extent Orth's disclosures could be viewed as not complying with the NRCP, the district court's remarks demonstrate its belief that Capanna was not harmed by the timetable of Orth's disclosures. *See* NRCP 37(c)(1). Based on the record before us, we are unable to discern an abuse of discretion by the district court in allowing this testimony. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) ("An abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances.").

Attorney fees and costs

Capanna challenges both the award of attorney fees and costs following trial. The district court's decision to award attorney fees is within its discretion and "will not be disturbed on appeal absent a manifest abuse of discretion." *Bobby Berosini, Ltd. v. People for the Ethical Treatment of Animals*, 114 Nev. 1348, 1353-54, 971 P.2d 383, 386 (1998). And the decision to award costs is also "within the sound discretion of the [district] court." *Id*. at 1352, 971 P.2d at 385.

NRS 18.010(2)(b) allows the district court to award attorney fees to a prevailing party "when the court finds that the claim, counterclaim . . . or defense of the opposing party was brought or maintained without reasonable ground or to harass the prevailing party." "The court shall liberally construe the provisions of [NRS 18.010(2)(b)] in favor of awarding attorney's fees in all appropriate situations," and "[i]t is the intent of the Legislature that the court award attorney's fees pursuant to [NRS 18.010(2)(b)] . . . in all appropriate situations to punish for and deter frivolous or vexatious claims and defenses." *Id*. "For purposes of NRS 18.010(2)(b), a claim is frivolous or groundless if there is no credible evidence to support it." *Rodriguez v. Primadonna Co.*, 125 Nev. 578, 588, 216 P.3d 793, 800 (2009).

In granting Orth's motion for attorney fees, the district court determined that the defense as to liability was maintained without reasonable ground:

> The presentation of evidence on Defendant's liability, which it should be noted included evidence and opinions from some of Defendant's own experts, was overwhelming. It could not only be characterized as clearly exceeding the civil burden of proof standard but, arguably, the totality of evidence showing that the original surgery was performed at the wrong level of the spine would meet a "beyond a reasonable doubt" standard.

In contrast, the district court acknowledged that Capanna's defense as to damages was made and maintained with reasonable grounds. Accordingly, the court only awarded attorney fees it estimated were incurred during the liability portion of the trial, 80 percent of the total fees.

Capanna argues the district court used the wrong standard for determining whether his liability defense was maintained without reasonable grounds, as the district court found evidence of his liability "overwhelming" but did not find there was no credible evidence to support his defense. While the district court may not have explicitly used the words "no credible evidence," the district court's order, which included the observation that some evidence of Capanna's liability came from his own experts, clearly evinces its belief that there was no credible evidence. Given the record supporting the district court's assessment of the evidence establishing Capanna's liability and the Legislature's mandate that the district court liberally construe the statute in favor of awarding attorney fees, we find no abuse of discretion in the district court's decision to award Orth's attorney fees reasonably incurred during the liability portion of the trial.[6]

Regarding the award of costs, NRS 18.005(5) defines costs in relevant part as "[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." Capanna argues that the district court's decision to grant fees for Dr. Yoo and Dr. Cash in excess of $1,500 was not supported by an express and careful analysis of the necessity for the statutory deviation. We disagree. The district court found that both doctors were necessary to Orth's case and that the requested fees were justified and reasonable based upon the doctors'

[6]Capanna suggests that the district court lacked authority to separately consider the presentation of evidence for his liability defense and for his damages defense in determining whether there was any credible evidence. We disagree, as this court has instructed district courts to "allocate . . . attorney's fees between the grounded and groundless claims." *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 563 (1993), *superseded by statute as stated in In re DISH Network Derivative Litig.*, 133 Nev. 438, 451, 401 P.3d 1081, 1093 (2017).

roles in the litigation. While the district court could have elaborated on its analysis of the doctors' necessity, *see Frazier v. Drake*, 131 Nev. 632, 650, 357 P.3d 365, 377 (Ct. App. 2015) (directing district courts to support the decision to award excessive expert witness fees with "an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees" and listing various factors), we find no abuse of discretion by the district court in its granting of expert fees for Dr. Yoo and Dr. Cash in excess of the statutory amount.

Cross-appeal

Before trial, Orth asked the district court to declare NRS 42.021 unconstitutional. The district court denied the motion. On appeal, Orth raises the same request, claiming the statute, which allows defendants in medical malpractice cases to introduce evidence of collateral payments the plaintiff received from third parties, violates the equal protection clauses of the United States and Nevada Constitutions and is unconstitutionally vague. We decline to consider his argument because he is not an aggrieved party and therefore lacks standing to appeal from the final judgment. *See Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Judicial Dist. Court*, 122 Nev. 230, 239-40, 130 P.3d 182, 189 (2006) ("Under NRAP 3A(a), . . . only aggrieved parties may appeal [and] [a] party is aggrieved . . . when either a personal right or right of property is adversely and substantially affected by a district court's ruling." (internal quotation marks omitted)). While Capanna introduced collateral source evidence at trial, the jury awarded Orth the entirety of his requested past medical expenses. Therefore, the collateral source evidence did not diminish Orth's recovery and did not affect any personal or property right. And as Orth lacks standing to appeal, and "[w]e do not have constitutional permission to render advisory opinions," *City of N. Las Vegas v. Cluff*, 85 Nev. 200, 201, 452 P.2d 461, 462 (1969) (citing Nev. Const. art. 6, § 4), we dismiss the cross-appeal.

In accordance with the foregoing analyses, we affirm the judgment on the jury verdict and the post-judgment orders related to attorney fees and costs.

Douglas, C.J., and Cherry, Gibbons, Pickering, and Hardesty, JJ., concur.

IRWIN GONOR, Deceased; THE ESTATE OF IRWIN GONOR; and ROBERT WOMBLE, Special Administrator, Appellants, *v.* RICHARD J. DALE; KELLY MAYER; RICK'S RESTORATIONS, INC.; KIKI T'S LLC; MAKING HISTORY LLC; and BOOKIN' IT LLC, Respondents.

No. 72949

December 27, 2018 432 P.3d 723

Appeal from a district court order dismissing a tort action. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

[Rehearing denied February 26, 2019]

Ryan Alexander, Chtd., and *Ryan E. Alexander*, Las Vegas, for Appellants.

Morris Sullivan & Lemkul, LLP, and *Christopher A. Turtzo*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Douglas, C.J.:

In this appeal, we address whether the deceased party's actual date of death, or the suggestion of death filed on the record, triggers the 90-day time limitation prescribed in NRCP 25(a)(1) under which a motion to substitute the proper party in place of the deceased party must be filed in order to preclude dismissal. We hold that the latter triggers the 90-day limitation period. In this case, the plaintiff's attorney in the underlying proceeding filed two motions seeking to substitute for the deceased plaintiff after the defendant filed the suggestion of death on the record. Although both motions were filed within the 90-day period, the motions failed to identify the proper party for substitution under NRS 41.100. Accordingly, we affirm the district court's order dismissing the underlying complaint.

FACTS AND PROCEDURAL HISTORY

Irwin Gonor initiated the underlying intentional interference of contractual relations action against respondents Richard J. Dale; Kelly Mayer; Rick's Restorations, Inc.; Kiki T's LLC; Making History LLC; and Bookin' It LLC. During the pendency of the suit, Gonor passed away on June 2, 2016. Shortly after Gonor's death, Gonor's attorney[1] engaged in settlement negotiations with respon-

[1]"Gonor's attorney" is used here to identify the attorney who had been retained by Gonor to defend the underlying action.

dents, at the direction of Gonor's mother and sole heir, Shirley Hoffner. The parties reached an agreement, and respondents forwarded a proposed settlement agreement to Gonor's attorney, which was returned to respondents with Hoffner's signature. Respondents first learned of Gonor's passing after questioning Hoffner's signature on the agreement.

On October 26, 2016, respondents filed a suggestion of death with the district court and served it on Gonor's attorney. On November 19, 2016, Gonor's attorney filed a motion to amend the complaint, which sought to designate Hoffner as plaintiff on the basis that she was Gonor's sole heir, or in the alternative, to allow an additional 120 days under NRCP 6(b) to open the estate of Irwin Gonor. Respondents filed an opposition and a countermotion to dismiss the case as untimely pursuant to NRCP 25(a)(1), and for failure to identify the proper party for substitution under NRS 41.100. After a hearing, the district court denied the motion to amend and granted respondents' motion to dismiss, finding that Gonor's attorney had not filed a motion to substitute within 90 days of Gonor's actual date of death.

On January 24, 2017, Gonor's attorney filed a second motion to amend the complaint, requesting to substitute appellant, the estate of Irvin Gonor, as plaintiff. On February 27, 2017, the probate court appointed appellant Robert Womble as special administrator for Gonor's estate. At a hearing held on March 28, 2017, the district court noted that it considered the second motion to amend to be a motion for reconsideration. The district court denied the second motion to amend and dismissed the case with prejudice. This appeal followed.

DISCUSSION

Standard of review

This appeal requires statutory interpretation of NRCP 25 and NRS 41.100, which are questions of law that we review de novo. *See J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010). This court has repeatedly stated that we will not look beyond a rule's plain language when it is clear on its face. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

The suggestion of death filed on the record by service triggers the 90-day time period under NRCP 25

Appellants contend that the district court erred in concluding that Gonor's date of death triggered the 90-day period; rather, the 90-day period was not triggered until the suggestion of death was filed on the record. We agree.

Pursuant to NRCP 25(a)(1),

> [i]f a party dies and the claim is not thereby extinguished, the court may order substitution of the proper parties. The motion for substitution may be made by any party or by the successors or representatives of the deceased party and, together with the notice of hearing, *shall be served on the parties as provided in Rule 5 and upon persons not parties in the manner provided in Rule 4 for the service of a summons. Unless the motion for substitution is made not later than 90 days after the death is suggested upon the record by service of a statement of the fact of the death as provided herein for the service of the motion*, the action shall be dismissed as to the deceased party.

(Emphasis added.) A plain reading of NRCP 25(a)(1) mandates that the suggestion of death be filed on the record in order to trigger the 90-day period. *Moseley v. Eighth Judicial Dist. Cour*t, 124 Nev. 654, 659, 188 P.3d 1136, 1140 (2008) ("[G]enerally, once a suggestion of death has been filed in the district court, a motion for substitution must be made within 90 days of the date the death was suggested on the record.").

In addition, a plain reading of NRCP 25(a)(1) requires that the suggestion of death also be served on parties and/or nonparties before the 90-day period is triggered. In regards to nonparties, this court has already clarified that there is a difference between situations where a suggestion of death emanating from the deceased party fails to identify a successor or personal representative as opposed to situations where a plaintiff dies and the defendant files the suggestion of death. *Moseley*, 124 Nev. at 660-61, 188 P.3d at 1141. In the latter situation, we stated that "a suggestion of a plaintiff's death filed by a defendant is generally sufficient to trigger the 90-day limitation period within which . . . the deceased party's successor or personal representative are required to move for substitution." *Id.* at 657, 188 P.3d at 1139. The rationale behind this is that "requiring a defendant to speculatively identify a successor or personal representative for a deceased plaintiff incorrectly shifts the burden of locating a successor or personal representative to the defending party." *Id.* at 661, 188 P.3d at 1141.

NRCP 25(a)(1) is nearly identical to its federal counterpart, FRCP 25(a)(1), and federal courts have plainly interpreted the rule in a similar fashion. *See, e.g.*, *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994). Upon a party's death, FRCP 25(a)(1) also provides that "the motion for substitution is made not later than 90 days after the death is suggested upon the record . . . , [otherwise] the action shall be dismissed as to the deceased party." The *Barlow* court recognized that "[a]lthough Rule 25(a)(1) could be clearer," the 90-day period is triggered by two affirmative actions: (1) "a party must formally suggest the death of the party upon the record," and (2) "the suggest-

ing party must serve other parties and nonparty successors or representatives of the deceased with a suggestion of death." 39 F.3d at 233.

Here, the 90-day time period commenced once the defendants filed the suggestion of death upon the record and served it on Gonor's attorney on October 26, 2016. Gonor's attorney then filed two motions to amend—the first on November 19, 2016, and the second on January 24, 2017—both of which sought to substitute a plaintiff for the deceased Gonor. While Gonor's attorney filed the motions before the expiration of the 90-day limitation, the issue remains as to whether the motions to amend sought to substitute the proper party under NRS 41.100.

A survival action may be maintained by or against the decedent's executor or special administrator under NRS 41.100

Appellants contend that the motions to amend identified the proper party under NRS 41.100. Conversely, respondents argue that the motions to amend failed to indicate the proper party under NRS 41.100. We concur with respondents.

NRCP 25(a)(1) provides, "the court may order substitution of the proper parties." Pursuant to NRS 41.100(1), a survival action can be maintained by or against the decedent's executor or special administrator. *See also Jones v. Las Vegas Metro. Police Dep't*, 873 F.3d 1123, 1128 (9th Cir. 2017) (providing that "Nevada authorizes survival actions by the executor or administrator of the decedent's estate" (internal quotation marks and citation omitted)); *Morrison v. Quest Diagnostics Inc.*, 139 F. Supp. 3d 1182, 1185-86 (D. Nev. 2015) (noting the same). An "executor" is defined as "a person nominated in a will and appointed by the court to execute the provisions of the will and administer the estate of the decedent." NRS 132.130. An "administrator" is defined as "a person not designated in a will who is appointed by the court to administer an estate." NRS 132.040. Thus, the proper party who may take the place of the deceased party within the meaning of NRCP 25(a)(1) includes either an individual named in the will of the deceased party and appointed by the court to administer the estate or an individual appointed by the court to do the same.

In this case, the motions to amend failed to identify the proper party. Gonor died intestate, thus the proper party would be a special administrator appointed by the court. The first motion sought to substitute Gonor's sole heir, his mother, as a plaintiff, and also admitted that a special administrator had not yet been appointed. The second motion sought to substitute the estate of Irvin Gonor. Problematically, an estate is not a proper party; rather, the administrator of the estate must be named in the complaint. *See Jones*, 873 F.3d at 1128. And, it was not until after the 90-day period expired that a special

administrator was appointed for Gonor's estate.[2] Accordingly, appellants did not timely seek to substitute the proper party under NRS 41.100(1).

CONCLUSION

In sum, the district court improperly held that the motions to amend were untimely based on Gonor's actual date of death. Nonetheless, the district court's dismissal was proper because appellants failed to timely move to substitute the proper party. Thus, we affirm the district court's holding as it reached the right result, albeit for the wrong reason. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010).

Cherry, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

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[2]The 90-day period to file a motion to substitute a proper party under NRCP 25 may be extended under NRCP 6(b)(2) if excusable neglect is shown. *Moseley*, 124 Nev. at 665, 188 P.3d at 1144. Because appellants neglected to address this argument on appeal, we need not consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (this court need not consider claims that are not cogently argued or supported by relevant authority). In addition, appellants raised, but failed to cogently argue, that a motion to substitute the proper party should relate back to the date of the original complaint pursuant to NRCP 15(c).