ZURICH AMERICAN INSURANCE COMPANY; AND AMERICAN GUARANTEE AND LIABILITY INSURANCE COMPANY, APPELLANTS, *v.* IRONSHORE SPECIALTY INSURANCE COMPANY, RESPONDENT.

No. 81428

October 28, 2021 497 P.3d 625

Certified questions under NRAP 5 concerning the allocation of burdens of proof for the applicability of an exception to an exclusion in an insurance policy. United States Court of Appeals for the Ninth Circuit; Marsha S. Berzon and Sandra S. Ikuta, Circuit Judges, and Ivan L.R. Lemelle, District Judge.

Questions answered.

Morales Fierro & Reeves and *William C. Reeves*, Las Vegas, for Appellants.

Morison & Prough, LLP, and *William Campbell Morison*, Walnut Creek, California, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, HERNDON, J.:

Two federal district courts issued conflicting decisions regarding whether, in Nevada, the insured or the insurer has the burden of proving that an exception to an exclusion of coverage provision applies. Those cases were appealed to the Ninth Circuit Court of Appeals, and that court certified the following questions to this court:

> Whether, under Nevada law, the burden of proving the applicability of an exception to an exclusion of coverage in an insurance policy falls on the insurer or the insured? Whichever party bears such a burden, may it rely on evidence extrinsic to the complaint to carry its burden, and if so, is it limited to extrinsic evidence available at the time the insured tendered the defense of the lawsuit to the insurer?

We conclude that the burden of proving the applicability of an exception to an exclusion for coverage in an insurance policy falls on the insured. We further conclude that the insured may rely on any extrinsic evidence that was available to the insurer at the time the insured tendered the defense to the insurer.

FACTS AND PROCEDURAL BACKGROUND

Throughout the 2000s, thousands of homes in Nevada were built by subcontractors under the direction of several development companies.[1] During that period, these subcontractors were insured by appellants Zurich American Insurance Company and American Guarantee and Liability Insurance Company (collectively, Zurich). After the work on the homes was completed, the subcontractors switched insurers, obtaining insurance from respondent Ironshore Specialty Insurance Company (Ironshore). Ironshore's policy insured the subcontractors against damages attributed to bodily injury or property damage that occurred during the new policy period. The policy provides that if the insured becomes legally obligated to pay damages because of bodily injury or property damage that qualifies under the policy, Ironshore will pay those sums. It further provides that Ironshore will have the right and duty to defend the insured if the suit seeks damages to which the policy applies. The policy applies only if the bodily injury or property damage is caused by an occurrence within the coverage territory and applicable policy period.

The Ironshore policy contains a "Continuous or Progressive Injury or Damage Exclusion" that modifies the insurance coverage provided under the policy. The exclusion provides that the policy does not apply to any existing bodily injury or property damage, except for "sudden and accidental" property damage:

> This insurance does not apply to any "bodily injury" or "property damage" . . . which first existed, or is alleged to have first existed, prior to the inception of this policy. "Property damage" from "your work[,]" . . . or the work of any additional insured, performed prior to policy inception will be deemed to have first existed prior to the policy inception, unless such "property damage" is sudden and accidental and takes place within the policy period.

Between 2010 and 2013, homeowners who had purchased homes within these development projects brought 14 construction defect lawsuits against the developers in Nevada state court, alleging the properties were damaged from construction defects.[2] The developers then sued the subcontractors as third-party defendants. The underlying lawsuits made no specific allegations describing when or how the property damage occurred. The subcontractors tendered

[1]These facts are drawn from the Ninth Circuit's order certifying these questions to this court. *See Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, No. 18-16937 (Order Certifying Question to the Nevada Supreme Court, July 2, 2020).

[2]Homeowners also sued a different subcontractor, RAMM Corp, in a fifteenth lawsuit. Zurich expressly waived any argument with regard to the district court's ruling in that suit, so it is not relevant to this case.

defense to Zurich, who agreed to defend them. Zurich sent tender letters to Ironshore requesting indemnification and defense. Ironshore investigated the claims and disclaimed coverage pursuant to the exclusion provision in its insurance policy, claiming that the property damage had occurred due to faulty work that predated the commencement of the policy. Zurich settled claims against the subcontractors and then, in *Nevada Zurich I*, sued Ironshore in federal court seeking contribution and indemnification for the defense and settlement costs, as well as a declaration that Ironshore had owed a duty to defend the subcontractors against the underlying lawsuits. *Assurance Co. of Am. v. Ironshore Specialty Ins. Co.* (*Nevada Zurich I*), No. 2:15-cv-00460-JAD-PAL, 2017 WL 3666298, at *1 (D. Nev. Aug. 24, 2017). Ironshore moved for summary judgment, arguing that it had no duty to defend because there was no potential for coverage under the terms of the policy. *Id.*

The federal district court granted summary judgment in favor of Ironshore.[3] *Id.* The court rejected the argument that the "sudden and accidental" exception to the exclusion of the coverage applied, reasoning that none of the complaints in the underlying lawsuits alleged that the damage occurred suddenly, and that without any evidence to support such an allegation, Zurich failed to carry its burden. *Id.* at *3. In issuing this holding, the court implicitly concluded that the *insured* has the burden of establishing that an exception to an exclusion applies.[4] *Id.* The court also assumed that Zurich could have introduced extrinsic evidence to satisfy its burden, but it did not directly address the question. *Id.*

Around the same time, another federal district court, in *Assurance Co. of America v. Ironshore Specialty Insurance Co.* (*Nevada Zurich II*), No. 2:13-cv-2191-GMN-CWH, 2015 WL 4579983 (D. Nev. July 29, 2015), reached a different conclusion in a substantially identical case.[5] The judge in that case concluded that Ironshore

[3]Because the district court granted summary judgment in favor of Ironshore and held that it did not owe a duty to defend, the district court did not address the narrower duty to indemnify. Thus, the appeal that precipitated the certified questions posed to this court does not directly implicate the duty to indemnify.

[4]This court has treated an insurance company seeking indemnification from another potentially liable insurance company in the same manner as the insured. *See United Nat'l Ins. Co. v. Frontier Ins. Co.,* 120 Nev. 678, 681-83, 99 P.3d 1153, 1155-56 (2004) (treating the insured and the participating insurer identically).

[5]A motion for reconsideration of this decision was denied, and the Ninth Circuit deferred submission on it. *Nevada Zurich II*, No. 2:13-cv-2191-GMN-CWH, 2016 WL 1169449 (D. Nev. Mar. 22, 2016), *submission deferred sub nom. Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, No. 18-16857 (9th Cir. April 14, 2020). Of note, although the district court case that was ultimately appealed to the Ninth Circuit in the instant case, *Nevada Zurich I*, was filed later than *Nevada Zurich II*, the final judgment in *Nevada Zurich I* was ultimately entered first. Thus, the Ninth Circuit has assigned numerals accordingly. We use the same titles for the purpose of clarity.

owed a duty to defend because the underlying complaints "did not specify when the alleged property damage occurred and did not contain sufficient allegations from which to conclude that the damage was not sudden and accidental." *Id.* at *5. The *Nevada Zurich II* court concluded that Ironshore failed to satisfy its burden of proving that the exception to the exclusion did not apply, implicitly concluding that the *insurer* had the burden of proving the nonapplicability of the exception to the exclusion. *Id.* at *10. The *Nevada Zurich II* court also assumed that extrinsic evidence was admissible but did not address the issue directly.

In light of the outcome in *Nevada Zurich II*, Zurich in *Nevada Zurich I* filed a Federal Rule of Civil Procedure 60(b) motion seeking relief from the judgment in the original case. The motion was denied, and Zurich timely appealed. The Ninth Circuit certified these questions to this court and stayed Zurich's appeal pending this court's resolution of the certified questions. The Ninth Circuit also stayed Ironshore's appeal of *Nevada Zurich II* in a concurrently filed order. *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 962 F.3d 1189 (2020). We accepted the certified questions because we agree that they present issues of first impression in this state.

DISCUSSION

Standard of review

We only accept certification of "questions of law." NRAP 5. We decide those questions of law de novo, *see, e.g.*, *Nev. Dep't of Corr. v. York Claims Servs., Inc.*, 131 Nev. 199, 203, 348 P.3d 1010, 1013 (2015), in accordance with the purpose of a certified question, which is to clarify our state's law when "there is no controlling precedent," *see* NRAP 5(a). "[T]his court's review is limited to the facts provided by the certifying court, and we must answer the questions of law posed to us based on those facts." *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 953, 267 P.3d 786, 793 (2011).

The insured has the burden to prove the duty to defend

"In Nevada, insurance policies [are] treated like other contracts, and thus, legal principles applicable to contracts generally are applicable to insurance policies." *Century Sur. Co. v. Andrew*, 134 Nev. 819, 821, 432 P.3d 180, 183 (2018). When reading a provision of an insurance policy, the court's interpretation "must include reference to the entire policy[, which will] be read as a whole in order to give reasonable and harmonious meaning to the entire policy." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993). Under an insurance policy, the insurer owes two contractual duties to the insured: the duty to defend and the duty to indemnify. *Andrew*, 134 Nev. at 822, 432 P.3d at 183. Only the duty to defend is at issue in this case. *See supra* note 3.

The insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 687, 99 P.3d 1153, 1158 (2004) (quoting *Gray v. Zurich Ins. Co.*, 419 P.2d 168, 177 (Cal. 1966)). Conversely, "[t]here is no duty to defend where there is no *potential* for coverage." *United Nat'l*, 120 Nev. at 686, 99 P.3d at 1158 (internal quotations omitted). "If there is any doubt about whether the duty to defend arises, this doubt must be resolved in favor of the insured." *Id*. at 687, 99 P.3d at 1158. "However, the duty to defend is not absolute. A potential for coverage only exists when there is arguable or possible coverage." *Id.* (internal citations and quotations omitted). This court has yet to speak directly to the issue of whether the insurer or the insured has the burden of proving that the exception to an exclusion of coverage applies when determining the duty to defend.

Current trends place the burden of proof on the insured

"Courts in many jurisdictions have concluded that the insured bears the burden of proving the sudden and accidental exception" to an exclusion of coverage. Barry R. Ostrager & Thomas R. Newman, *Handbook on Insurance Coverage Disputes* § 23.02[d] (20th ed. 2020); *see also* Plitt, Maldonado, Rogers & Plitt, *Couch on Insurance* § 254:13 (3d ed. 2021) ("The trend clearly appears . . . to place the burden on insureds to prove that an exception to an exclusion applies to restore coverage.") (collecting cases). We refer to this approach as the majority rule. The minority rule, which places the burden on the insurer, has been outright rejected by state courts that have ruled subsequent to certain federal decisions predicting the state would adopt the minority rule; these states held that the federal decisions were incorrect in their predictions that they would adopt the minority approach and adopted the majority approach instead.[6]

Many courts that adopted the majority approach have reasoned that because the insured generally bears the initial burden of establishing a possibility of coverage, and the exception grants coverage where there otherwise would be none, the insured therefore bears the burden. For example, the Court of Appeals of Oregon stated that insurance policy provisions can generally be sorted into two categories, "provisions that grant coverage and provisions that limit or

[6]*See, e.g.*, *New Castle County v. Hartford Accident & Indem. Co.*, 933 F.2d 1162, 1182 (3d Cir. 1991) (predicting that the Delaware high court would impose burden on insurer), *and E.I. du Pont de Nemours & Co. v. Allstate Ins. Co.*, 693 A.2d 1059, 1061 (Del. 1997) (adopting the majority rule); *see also New York v. Blank*, 27 F.3d 783, 788-89 (2d Cir. 1994) (predicting that the New York high court would impose burden on insurer), *and Ment Bros. Iron Works Co. v. Interstate Fire & Cas. Co.*, 702 F.3d 118, 122 (2d Cir. 2012) (recognizing abrogation of *Blank* by *Northville Industries Co. v. National Union Fire Insurance Co. of Pittsburgh*, 679 N.E.2d 1044, 1048 (N.Y. 1997) (adopting approach that burden is on insured to establish exception to exclusion applies)).

exclude coverage. The exception at issue, which provides coverage that otherwise would not exist . . . , logically falls in the 'coverage' category—a category in which, under the common law, an insured has the burden of proof." *Employers Ins. of Wausau, a Mut. Co. v. Tektronix, Inc*., 156 P.3d 105, 120 (Or. Ct. App. 2007), *petition for review denied*, 169 P.3d 1268 (Or. 2007). *See also E.I. du Pont de Nemours v. Admiral Ins. Co.*, 711 A.2d 45, 53 (Del. 1995) (noting that the usual justification for putting the "burden on the insureds is the exception to the exclusion creates coverage where it would not otherwise exist. Because the burden is on the insureds to prove the claim falls within the scope of coverage, the insureds must prove coverage is revived through applying the exclusion's exception"); *Northville Indus. Co. v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 679 N.E.2d 1044, 1049 (N.Y. 1997) ("[s]hifting the burden to establish the exception conforms with an insured's general duty to establish coverage where it would otherwise not exist").

In *Aydin Corp. v. First State Insurance Co*., the Supreme Court of California considered a "sudden and accidental" exception in a duty to indemnify case. 959 P.2d 1213, 1217-18 (Cal. 1998). In contemplating whether the insured or the insurer bore the burden of proving the applicability of the exception, the California Supreme Court noted that it was "guided by the familiar principle that the provision of an insurance policy, like the provisions of any other contract, must be construed in the context of the policy as a whole." *Id*. at 1217. It concluded that "[r]ead in the context of" the broad exclusionary language in the policy, "the 'sudden and accidental' exception serves to 'reinstate coverage' where it would otherwise not exist." *Id*. Accordingly, it determined that because the insured bears the initial burden of establishing coverage under an insurance policy, it follows that the insured must also prove that the exception affords coverage after an exclusion is triggered. *Id*. at 1218 (citing *St. Paul Fire & Marine Ins. v. Warwick Dyeing*, 26 F.3d 1195, 1200 (1st Cir. 1994)).[7]

Nevada law provides that an insurance policy should be read according to general contract principles. *Andrew*, 134 Nev. at 821,

[7]This court recognizes that *Aydin* expressly refused to address the allocation of burdens in duty-to-defend cases. 959 P.2d at 1219 n.6. That said, *Aydin*'s reasoning has been applied to subsequent duty-to-defend cases. *See McMillin Cos. v. Am. Safety Indem. Co.*, 183 Cal. Rptr. 3d 26, 39 n.23 (Ct. App. 2015); *Saarman Constr., Ltd. v. Ironshore Specialty Ins. Co*., 230 F. Supp. 3d 1068, 1075-76 (N.D. Cal. 2017). We believe that *Aydin*'s reasoning is convincing, yet only to the extent that it explains why the burden of proof should be on the insured when dealing with an exception to a policy exclusion; we do not derive guidance from *Aydin* as to the weight of such a burden. Thus, while we hold that the insured carries the burden of proof, we emphasize again that the extent of the insured's burden is only to prove that there is a *potential* for coverage according to the exception to the exclusion under the policy; not that the exception *does* apply, which would only be required if the insured was seeking to prove that the duty to indemnify was owed.

432 P.3d at 183. Furthermore, Nevada law requires that the insured establish coverage under an insurance policy, whether claiming a duty to indemnify or a duty to defend. *Nat'l Auto. & Cas. Ins. Co. v. Havas*, 75 Nev. 301, 303, 339 P.2d 767, 768 (1959) (recognizing that the insured has the initial burden of proving that there is "a loss apparently within the terms of the policy"); *see also Turk v. TIG Ins. Co.*, 616 F. Supp. 2d 1044, 1050 (D. Nev. 2009) (recognizing that the insured bore "the initial burden of establishing the potential for coverage under the [insurance policies]"). We hold that the majority rule, which places the burden on the insured to, in essence, re-establish coverage where it would not otherwise exist, accords with these principles.[8]

The majority approach also is in accordance with basic tenets of evidence law in Nevada. In *Rivera v. Philip Morris, Inc.*, this court noted that the term "burden of proof" describes both the "burden of production" and the "burden of persuasion." 125 Nev. 185, 190-91, 209 P.3d 271, 274-75 (2009). "The party that carries the burden of production must establish a prima facie case." *Id.* at 190-91, 209 P.3d at 274. "The burden of persuasion rests with one party throughout the case and determines which party must produce sufficient evidence to convince a judge that a fact has been established." *Id.* at 191, 209 P.3d at 275 (internal quotations omitted). In Nevada, the burdens of production and persuasion rest with the insured, who has the initial burden of proving that the claim falls within policy coverage. *Nat'l Auto.*, 75 Nev. at 303, 339 P.2d at 768; *Turk*, 616 F. Supp. 2d at 1050. The assignment of the burden of proof to the insured to prove that the claim potentially falls within the exception to the exclusion, which in effect re-establishes coverage, is in alignment with these principles as well.

Therefore, this court adopts the majority rule regarding burdens of proof for exceptions to an exclusion and concludes that the burden is on the insured, not the insurer, to prove the potential that an exception to an exclusion applies when determining whether the insurer owes a duty to defend. This court recognizes that although the majority of states have adopted this approach, some of them have adopted it specifically in the context of determining the duty to indemnify, *see, e.g.*, *Aydin*, 959 P.2d at 1217-18, which is narrower than the duty to defend. *United Nat'l*, 120 Nev. at 686, 99 P.3d at 1158. Indeed, the duty to defend arises when there is a *potential* for coverage, *id.* at 687, 99 P.3d at 1158, whereas the duty to indemnify arises when the insured's activity and the resulting damage

[8]While Zurich contends this court must adopt the minority rule because a Florida federal court, applying Nevada law and considering similar facts in regard to the same insurance policy language, applied the minority rule, we conclude that case is not persuasive. *See KB Home Jacksonville LLC v. Liberty Mut. Fire Ins. Co.*, No. 3:18-cv-371-J-34MCR, 2019 WL 4228602, at *9 (M.D. Fla. Sept. 5, 2019), *appeal dismissed*, No. 19-13987-GG, 2020 WL 6053276 (11th Cir. June 11, 2020).

actually fall within the policy's coverage, *id.* at 686, 99 P.3d at 1158. We recognize that the burden is on the insured to prove the duty to indemnify, as well as the duty to defend, but emphasize that it is not this court's intention to erode the duty to defend by heightening the insured's burden of proof. This court reiterates that the weight of proof needed to fulfill the burden of proving a duty to defend is lighter than the duty to indemnify—only the *potential* for coverage must be proven.

The insured may use extrinsic facts available to the insurer at the time of tender to prove the insurer had a duty to defend

An insurer "bears a duty to defend its insured whenever it ascertains facts which give rise to the potential of liability under the policy." *United Nat'l*, 120 Nev. at 687, 99 P.3d at 1158 (quoting *Gray*, 419 P.2d at 177). Thus, under Nevada law, an insured may present such extrinsic facts to the insurer, and rely upon them, in order to argue that the insurer owes a duty to defend as within an exception to an exclusion. *Id.*

That said, Nevada law is silent as to what particular extrinsic facts an insured may use to fulfill its burden. Neighboring California has held that "[a]n insurer's duty to defend must be analyzed and determined on the basis of any *potential* liability arising from facts available to the insurer from the complaint or other sources available to it at the time of the tender of defense." *Waller v. Truck Ins. Exch., Inc.*, 900 P.2d 619, 632 (Cal. 1995) (quoting *CNA Cas. of Cal. v. Seaboard Sur. Co.*, 222 Cal. Rptr. 276, 278-79 (Ct. App. 1986)). We have already recognized that "as a general rule, an insurer's duty to defend is triggered whenever the potential for indemnification arises, and it continues until this potential for indemnification ceases." *Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 412, 254 P.3d 617, 621 (2011). There is a potential for indemnification, and therefore a duty to defend is owed, whenever "the allegations in the third party's complaint show that there is arguable or possible coverage," or when the insurer "ascertains facts which give rise to the potential of liability under the policy."[9] *Nautilus Ins. Co. v. Access Med.,*

[9]In *United National*, we wrote that an insurer has a duty to defend "whenever it ascertains facts which give rise to the potential of liability under the policy." 120 Nev. at 687, 99 P.3d at 1158 (citing *Gray*, 419 P.2d at 177). We also wrote that "[d]etermining whether an insurer owes a duty to defend is achieved by comparing the allegations of the complaint with the terms of the policy." *Id.* (citing *Hecla Min. Co. v. N.H. Ins. Co.*, 811 P.2d 1083, 1089-90 (Colo. 1991)). We note that *Hecla Mining* was stating that the *insurer* should not be allowed to "evad[e] coverage by filing a declaratory judgment action when the complaint against the insured is framed in terms of liability coverage contemplated by the insurance policy." 811 P.2d at 1090. Thus, we take this opportunity to clarify that the insured, but not the insurer, is allowed to introduce extrinsic evidence at the duty-to-defend stage. *See Andrew*, 134 Nev. at 822 n.4, 432 P.3d at 184 n.4 ("[A]s a general rule, facts outside of the complaint cannot justify an insurer's

LLC, 137 Nev. 96, 99-100, 482 P.3d 683, 687-88 (2021) (internal quotations omitted). Since the duty to defend must be determined at the outset of litigation based upon the complaint and any other facts available to the insurer, we hold that the insured may use extrinsic facts that were available to the insurer at the time it tendered its defense to prove there was a potential for coverage under the policy and, therefore, a duty to defend.

CONCLUSION

We answer the certified questions as follows: (1) the burden of proving the exception to an exclusion is on the insured, not the insurer; and (2) in fulfilling its burden to prove the exception to an exclusion applies, the insured may utilize any extrinsic facts that were available to the insurer at the time the insured tendered defense to the insurer.

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

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refusal to defend its insured."); *Woo v. Fireman's Fund Ins. Co.*, 164 P.3d 454, 459 (Wash. 2007) ("The insurer may not rely on facts extrinsic to the complaint to deny the duty to defend—it may do so only to trigger the duty.").

PANORAMA TOWERS CONDOMINIUM UNIT OWNERS' ASSOCIATION, a Nevada Nonprofit Corporation, Appellant, *v.* LAURENT HALLIER, an Individual; PANORAMA TOWERS I, LLC, a Nevada Limited Liability Company; PANORAMA TOWERS I MEZZ, LLC, a Nevada Limited Liability Company; and M.J. DEAN CONSTRUCTION, INC., a Nevada Corporation, Respondents.

No. 80615

November 10, 2021 498 P.3d 222

Appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), in a construction defect action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Vacated and remanded.

[Rehearing denied May 18, 2022]

Kemp Jones, LLP, and *Michael J. Gayan* and *Joshua D. Carlson*, Las Vegas; *Lynch & Associates Law Group* and *Francis I. Lynch*, Henderson; *Williams & Gumbiner, LLP*, and *Scott A. Williams*, San Rafael, California, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Bremer Whyte Brown & O'Meara LLP* and *Peter C. Brown, Jeffrey W. Saab*, and *Devin R. Gifford*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Herndon, J.:

Appellant Panorama Towers Condominium Unit Owners' Association filed a construction defect claim against respondents (collectively, the Builders), which the district court concluded was time-barred under the NRS 11.202 statute of repose. The Association filed two motions to alter or amend the court's resulting summary judgment. Before the district court considered the second motion, the Legislature amended the statute of repose to extend the filing deadline and specified that the amendment was retroactive. The amended statute also became effective before the district court considered the second motion. Nevertheless, the district court denied the Association's motion to alter or amend the judgment. We conclude that, in accordance with our opinion in *Dekker/Perich/*

[1]The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter.

Sabatini Ltd. v. Eighth Judicial District Court, 137 Nev. 525, 495 P.3d 519 (2021), because the amended statute of repose was retroactive and, under that statute of repose, the Association's construction defect claim was timely, the district court erred in denying the motion.

FACTS

The Builders constructed the Panorama Towers in Las Vegas, including 616 units across two high-rise condominium buildings. Substantial completion of each tower corresponded with the date of its respective certificate of occupancy, which issued on January 16, 2008, and March 31, 2008.[2] The Association filed an initial construction defect action against the Builders in 2009, and the parties settled that action in June 2011, but the settlement agreement applied only to known defects at that time.

The Association sent the relevant underlying NRS 40.645 notice of construction defect to the Builders on February 24, 2016. In addition to other defects, the notice asserted that all of the residential units' window assemblies were defective.[3] The notice alleged that the defect permits water to enter the assemblies, causing corrosion to the metal parts and components of the wall and floor assemblies, which creates an unreasonable risk of structural degradation and injury to person and property.

NRS Chapter 40 requires builders to have certain opportunities to investigate and repair construction defects and requires parties to mediate the construction defect claims before an action can be filed. *See* NRS 40.647; NRS 40.648; NRS 40.652; NRS 40.670; NRS 40.680. The prelitigation construction defect proceedings, including mediation, were completed on September 26, 2016. Two days later, the Builders filed an action against the Association seeking declaratory relief and damages, asserting that the previous settlement agreement precluded the underlying construction defect claims and the NRS Chapter 40 notice was insufficient. On March 1, 2017, the Association filed its answer and counterclaim asserting its construction defect causes of action, roughly nine years after substantial completion of the towers.

The Builders moved for summary judgment, arguing that the Association's construction defect claim was time-barred under the

[2]To the extent the Association challenges the substantial completion dates, the Association has waived this argument on appeal by not raising it in its opening brief. *See Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (providing that issues raised for the first time in a reply brief are waived).

[3]The notice also addressed other defects, but the district court dismissed the claims pertaining to those defects because the notice was insufficient to demonstrate the defects without extrapolation, and the Association does not challenge the dismissal of those defects' claims in this appeal.

statute of repose in NRS 11.202(1) (2015) because it was not filed within six years of the substantial completion of each tower. *See* 2015 Nev. Stat., ch. 2, § 17, at 17. The district court concluded that because the Association filed its NRS Chapter 40 notice on the last day of the six-year statute of repose, when considering the grace period provided for in the 2015 amendment to NRS 11.202(1), the NRS Chapter 40 notice tolled that statute of repose.[4] The court also concluded, however, that the NRS Chapter 40 notice tolled the statute of repose only until 30 days after the prelitigation proceedings were completed, and because the Association did not file its answer and counterclaim during those 30 days, the Association's construction defect claim was time-barred. Thus, the district court granted the Builders' motion for summary judgment and dismissed the Association's construction defect claim on May 23, 2019.

Thereafter, on June 3, 2019, the Governor signed into law Assembly Bill (A.B.) 421, which amended NRS 11.202's statute of repose from six years to ten years. 2019 Nev. Stat., ch. 361, at 2257 & § 7, 2262. The Association filed a motion to alter or amend the court's order dismissing the construction defect claim in light of A.B. 421. The Builders opposed the motion and requested the district court certify its order dismissing the construction defect claim as final under NRCP 54(b). The district court denied the motion to alter or amend its order, concluding that A.B. 421 did not become effective until October 1, 2019. The district court also granted the Builders' motion for NRCP 54(b) certification.

On September 9, 2019, the Association filed its second motion to alter or amend the judgment based on A.B. 421. Although filed before October 1, 2019, when A.B. 421 became effective, the hearing on the motion did not occur until after that date. On January 14, 2020, the district court denied the Association's motion, concluding the court had properly determined the claim was time-barred based on the effective law at the time.

DISCUSSION

An NRCP 59(e) motion to alter or amend a judgment may be appropriate to correct "manifest errors of law or fact," address "newly discovered or previously unavailable evidence," "prevent manifest injustice," or address a "change in controlling law." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 582, 245 P.3d 1190, 1193 (2010) (internal quotation marks omitted). We review an order denying an NRCP 59(e) motion for an abuse of discretion. *Id.* at 589, 245 P.3d at 1197.

The 2015 version of NRS 11.202(1) precluded construction defect actions from being filed more than six years after the substantial

[4]The district court reached this conclusion before our opinion in *Byrne v. Sunridge Builders, Inc.*, 136 Nev. 604, 475 P.3d 38 (2020), clarified that an NRS Chapter 40 notice cannot toll the statute of repose.

completion of an improvement. A.B. 421 changed the repose period in NRS 11.202(1) from six years to ten years.[5] 2019 Nev. Stat., ch. 361, § 7, at 2262. A.B. 421 also provided that "[t]he period of limitations on actions set forth in NRS 11.202, as amended by section 7 of this act, apply retroactively to actions in which the substantial completion of the improvement to the real property occurred before October 1, 2019." *Id.* at § 11, at 2268.

While A.B. 421 was signed into law on June 3, 2019, the amendment of the statute of repose did not become effective until October 1, 2019. NRS 218D.330(1) provides that "[e]ach law and joint resolution passed by the Legislature becomes effective on October 1 following its passage, unless the law or joint resolution specifically prescribes a different effective date." A.B. 421 did not prescribe a different effective date for the amendment to the statute of repose. Further, even though the amendment to the statute of repose was explicitly applicable retroactively, a retroactive-application provision does not alter a bill's effective date. Thus, the amended statute of repose in A.B. 421 became effective on October 1, 2019, and was not retroactive until that date.

Accordingly, at the time the district court considered the Association's second motion to alter or amend the judgment, there had been a change in controlling law since the entry of the judgment. Instead of considering this change in controlling law, the district court determined that alteration or amendment of the judgment was unnecessary because the court had properly concluded that the Association's claim was time-barred under the applicable law at the time the judgment was entered. The district court failed to consider the fact that the amended statute of repose was retroactive, which changed the applicable law not only at the time the court considered the motion, but also at the time the judgment was entered. *In re Estate of Thomas*, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000) ("The general rule is that statutes are prospective only, unless it clearly, strongly, and imperatively appears from the act itself that the legislature intended the statute to be retrospective in its operation."); 2019 Nev. Stat., ch. 361, § 11, at 2268 (providing that the change to the statute of repose applies retroactively). Because A.B. 421's statute of repose was retroactive, the Legislature intended it to apply to construction defect actions pending as of October 1, 2019. *See Dekker/Perich/Sabatini Ltd.*, 137 Nev. at 529, 495 P.3d at 523 (explaining that the Legislature intended NRS 11.202's amended

[5]NRS 11.202(1) is a statute of repose because it precludes actions after a certain amount of time, regardless of injury. *See Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 364 n.1, 325 P.3d 1276, 1279 n.1 (2014) (explaining that "[a] statute of repose bar[s] causes of action after a certain period of time, regardless of whether damage or an injury has been discovered, whereas, a statute of limitations forecloses suit after a fixed period of time following the occurrence or discovery of an injury" (second alteration in original) (internal citations and quotations omitted)).

statute of repose to apply retroactively to projects completed before October 1, 2019, "to relieve prejudice to Nevada landowners who were unaware of property damage that did not manifest within the six-year repose period"). As soon as A.B. 421 became law on October 1, 2019, all construction defect actions filed within ten years of substantial completion of the project were no longer time-barred. *See id.* Because the Association's construction defect action was filed within nine years of the substantial completion of each of the towers, the action was no longer time-barred. Accordingly, the district court abused its discretion in denying the Association's second motion to alter or amend the judgment.

CONCLUSION

A.B. 421 became effective on October 1, 2019. As of that date, the statute of repose for filing construction defect claims was ten years from substantial completion of the project. Further, that change in the law applied retroactively. Because the district court did not consider the retroactive change in the controlling law when denying the Association's second motion to alter or amend the judgment, we conclude the district court abused its discretion in denying that motion. Accordingly, as the court should have granted the Association's second motion to alter or amend the judgment, we vacate the district court's summary judgment and remand this matter for proceedings consistent with this opinion.[6]

Hardesty, C.J., and Parraguirre, Stiglich, Cadish, and Pickering, JJ., concur.

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[6]In light of this opinion, we need not reach the other arguments raised by the parties on appeal.

OSBALDO CHAPARRO, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 81352

November 10, 2021 497 P.3d 1187

Appeal from a judgment of conviction, pursuant to a jury verdict, of sexual assault, battery with the intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Second Judicial District Court, Washoe County; Egan K. Walker, Judge.

Affirmed.

John L. Arrascada, Public Defender, and *Kathryn Reynolds*, Deputy Public Defender, Washoe County, for Appellant.

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

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

It is well settled that a defendant has the right to be present at all critical stages of a criminal proceeding, including the sentencing hearing. In this opinion, we consider whether the defendant's right to be present was violated when the sentencing hearing was conducted by simultaneous audiovisual transmission over the Zoom videoconferencing platform due to administrative orders issued by the district court forbidding in-person hearings because of the COVID-19 pandemic. Appellant Osbaldo Chaparro was convicted after a jury trial in February 2020. His sentencing hearing took place in May 2020. All contemporary readers of this opinion will instantly understand the import of those dates: the onset of the COVID-19 pandemic in March 2020 impacted nearly every area of life. The criminal justice system was no exception. While his trial occurred in person and in court, Chaparro was sentenced in a hearing conducted over Zoom. Because we conclude that Chaparro's sentencing hearing was fair and just considering the surrounding circumstances, he is not entitled to relief on this claim.

We also consider several challenges related to Chaparro's trial. We conclude that the district court properly admitted evidence of Chaparro's previous conviction for battery with intent to commit sexual assault. We further conclude that the district court did not err in limiting inquiry into Chaparro's prior conviction that the court

had determined would be admitted as evidence, as a party may not pre-try its case with the jury during voir dire. Nevertheless, we direct that district courts should not categorically limit questions about jurors' views concerning whether a defendant has prior convictions. And we recognize that inconclusive DNA evidence may be relevant and admissible where permitted by the rules of evidence, as here. Accordingly, we affirm.

BACKGROUND

In December 2016, L.L. and a friend stayed at a hotel in downtown Reno. In the early morning hours of December 17, L.L. was walking alone towards the Harrah's casino when Chaparro grabbed her. Chaparro groped L.L.'s buttocks and breasts, reached under her dress and inside her tights, and digitally penetrated her. L.L. struggled and yelled that she would call 9-1-1. Chaparro responded, "[W]ho are they going to believe, me or you?" When L.L.'s friend approached, Chaparro hurried off. L.L. reported the assault and underwent a sexual assault exam that same morning. Harrah's security system captured the incident along with footage.

The State charged Chaparro with sexual assault, battery with the intent to commit sexual assault upon a victim age 16 or older, and open or gross lewdness. Before trial, the State moved to admit evidence of Chaparro's 2011 conviction for battery with the intent to commit sexual assault. In that instance, Chaparro groped and accosted P.J. in the parking lot of the Nugget Casino Resort. Chaparro opposed the motion, arguing the evidence was unfairly prejudicial, but the district court granted the State's motion and allowed P.J. to testify at trial. At trial, Chaparro did not dispute that he was in the security footage or that he had committed open or gross lewdness. Rather, Chaparro argued that he neither penetrated L.L. nor intended to do so and was therefore innocent of sexual assault and battery with the intent to commit sexual assault upon a victim age 16 or older.

The jury convicted Chaparro of all charges on February 14, 2020. In March 2020, the COVID-19 crisis prompted courts across the country to consider alternatives to in-person hearings. The Second Judicial District Court originally hoped to proceed with in-person appearances for "essential case types and hearings," including criminal sentencings. *See In re Second Judicial District Court's Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-02 (Mar. 16, 2020).[1] But it soon ordered *all* hearings to "be conducted by alternative means to in-person hearings." *See In re Second Judicial District Court's Response to Coronavirus Disease (COVID-19)*, Administrative Order 2020-02(A) (Apr. 9, 2020). Chaparro's sentencing hearing was held on May 20, 2020,

[1]The Second Judicial District Court's COVID-19 orders are available at https://www.washoecourts.com/main/covid19response.

over Zoom. Chaparro joined the hearing from a jail courtroom and was able to communicate confidentially with counsel via a headset, as well as see and hear the other participants. The other participants could likewise see and hear Chaparro. Members of the public who chose to watch, including Chaparro's friends and family, could also see and hear Chaparro, the attorneys, and the judge, but they could not themselves be seen or heard by Chaparro. Chaparro objected to the use of Zoom instead of an in-person hearing, stating that he would like to be able to see his supporters, but the district court overruled the objection and proceeded with the hearing. The district court sentenced Chaparro to an aggregate sentence of life with parole eligibility after 12 years. This appeal follows.

DISCUSSION

Chaparro's due process challenge to the sentencing hearing over Zoom

We begin at the end, with Chaparro's sentencing hearing. Chaparro argues that the district court's decision that the hearing proceed over Zoom violated his due process right to be present.[2] Chaparro argued he did not think it was "fair . . . that I have to do something by video and audio/visual because of a pandemic. That's not my fault. . . . [T]his isn't what, you know, it should be like." The district court overruled Chaparro's objection, stating—

> I intend to proceed to sentencing today, because I cannot predict with any reasonable certainty when in the future we can conduct an in-person sentencing.
>
> And, in fact, it is more valuable to have resolution in your case for purposes of vesting jurisdiction for purposes of an appeal that I know you want to take, for example, for finality for the victims in this case and for a variety of reasons. It makes no sense to continue this to a date uncertain in the future, which we cannot predict. . . .
>
> [U]nder the circumstances, it is the best option available.

"A criminal defendant has the right under the Confrontation Clause of the Sixth Amendment and the Due Process Clauses of the Fifth and Fourteenth Amendments to be present at every stage of the trial." *Collins v. State*, 133 Nev. 717, 719, 405 P.3d 657, 661 (2017);

[2]Chaparro also raises a violation of his confrontation rights. He raises this claim for the first time on appeal, and we accordingly decline to consider it. *See Rippo v. State*, 113 Nev. 1239, 1260, 946 P.2d 1017, 1030 (1997) (declining to consider appellate claim where objection was not made below). Insofar as Chaparro invokes *Lipsitz v. State*, that decision is distinguishable, as it concerned whether a *witness* could testify remotely *at trial*. *See* 135 Nev. 131, 442 P.3d 138 (2019); *cf. Summers v. State*, 122 Nev. 1326, 1333, 148 P.3d 778, 783 (2006) (concluding that right to confrontation does not apply in capital sentencing proceedings).

see also United States v. Gagnon, 470 U.S. 522, 526 (1985); *Illinois v. Allen*, 397 U.S. 337, 338 (1970); NRS 178.388(1). A sentencing hearing is a critical stage of the proceedings, *see Cunningham v. State*, 94 Nev. 128, 130, 575 P.2d 936, 938 (1978), and thus a defendant has the right to be present for sentencing. The right to be present is not absolute, however. *Gallego v. State*, 117 Nev. 348, 367, 23 P.3d 227, 240 (2001), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 263 P.3d 235 (2011). "[T]he presence of a defendant is a condition of due process to the extent that a fair and just hearing would be thwarted by his absence, and to that extent only." *Gagnon*, 470 U.S. at 526 (alteration in original) (quotation marks omitted); *see also Kirksey v. State*, 112 Nev. 980, 1000, 923 P.2d 1102, 1115 (1996) ("The due process aspect has been recognized only to the extent that a fair and just hearing would be thwarted by the defendant's absence.").

We thus consider whether Chaparro's hearing was fair and just despite its unorthodoxy and conclude that the sentencing hearing was appropriate considering the circumstances. Chaparro was able to be heard, to be seen, to confidentially communicate with counsel, and to speak on the record. *Cf. People v. Lindsey*, 772 N.E.2d 1268, 1276-79 (Ill. 2002) (holding the due process right to be present was not violated where defendant participated in critical stages of arraignment and jury waiver by audiovisual transmission and "was able to interact with the court with relative ease," and noting similar holdings by other state supreme courts). Faced with an administrative order prohibiting in-person hearings, the district court balanced Chaparro's right to be sentenced without unreasonable delay, *cf.* NRS 176.015(1), his desire to appeal the conviction, and the risk of furthering the spread of a contagious disease with his right to be present at the hearing and the prospect of an indefinite delay. *See Bonilla v. State*, 141 N.Y.S.3d 289, 291 (Ct. Cl. 2021) (recognizing the Hobson's choice foisted on courts by the pandemic between exposing the public to a dangerous disease and delaying court proceedings and praising virtual proceedings as a safe way to provide access to courts during the crisis). Chaparro does not allege that he was prevented from presenting argument or evidence on his behalf because of the way in which the hearing was conducted. We note that the fairness and justness of a given proceeding cannot be divorced from the circumstances in which the proceeding takes place, and acknowledge the realities of this moment in assessing the district court's decision to conduct the sentencing hearing over Zoom. *See Snyder v. Massachusetts*, 291 U.S. 97, 116 (1934) ("Due process of law requires that the proceedings shall be fair, but fairness is a relative, not an absolute, concept. It is fairness with reference to particular conditions or particular results."). Given the limited possibilities created by unprecedented emergency

circumstances, we conclude that a fair and just hearing was not thwarted by Chaparro's absence from the courtroom.[3]

The district court did not abuse its discretion in admitting testimony regarding the prior assault and conviction

We turn now from the sentencing hearing to the trial. Chaparro argues that the district court abused its discretion in admitting victim testimony regarding his 2011 conviction for battery with the intent to commit sexual assault. The victim in that battery, P.J., testified at this trial that Chaparro approached her in the parking lot of a casino. She testified that Chaparro shoved her into her own car, grabbed her breast, and laid on top of her such that she could feel his erection, all while saying "relax and let it happen." Chaparro left when she yelled and struggled.

"NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense." *Franks v. State*, 135 Nev. 1, 4, 432 P.3d 752, 755 (2019). And each count charged against Chaparro was a "sexual offense" under NRS 48.045(3) and NRS 179D.097, as was the conviction in the 2011 case. This court reviews a district court's decision to admit evidence "for an abuse of discretion or manifest error." *Thomas v. State*, 122 Nev. 1361, 1370, 148 P.3d 727, 734 (2006). In determining whether to admit a prior sexual offense pursuant to NRS 48.045(3), the district court must (1) make a preliminary finding that the prior sexual offense is relevant, and (2) find "that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred." *Franks*, 135 Nev. at 5, 432 P.3d at 756. Finally, the district court should evaluate whether the probative value of the evidence is substantially outweighed by the danger of unfair prejudice by considering

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 6, 432 P.3d at 756-57 (quoting *United States v. LeMay*, 260 F.3d 1018, 1028 (9th Cir. 2001) (quotation marks omitted)).

[3]Chaparro also argues that he had a right to the in-person presence of friends and family, but he does not provide supporting authority for the expansion of the right to be present to third parties, and we therefore decline to consider this claim. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Similarly, Chaparro makes a single reference to his right to a hearing open to the public, *see United States v. Rivera*, 682 F.3d 1223, 1225 (9th Cir. 2012) (noting that the right to a public trial extends to sentencing), but he does not accompany this reference with supporting authority or cogent argument, and we decline to consider the claim. *See Maresca*, 103 Nev. at 673, 748 P.2d at 6.

Chaparro does not dispute that his previous sexual offense was relevant or that a jury could find by a preponderance of the evidence that the offense occurred. Instead, he argues that evidence of the previous sexual offense was not necessary to the State's case and that the district court erred in evaluating whether the probative value of his previous sexual offense was outweighed by the danger of unfair prejudice. We disagree. Initially, we note that the factors for evaluating whether the probative value is substantially outweighed by the danger of unfair prejudice are not elements to be met before evidence is admissible but considerations for the district court to weigh. Turning to the district court's evaluation of the factors, the court noted the similarities in the previous assault and the assault of L.L.—both occurred near casinos, when the women were alone, and Chaparro talked to both women during the attacks. The assaults occurred approximately five years apart, and nothing in the record shows intervening circumstances affecting the balance of the previous crime's probative value and the risk of prejudice. While the State had other evidence of Chaparro's guilt, including the security footage and Chaparro's concession to the open or gross lewdness charge, the previous conviction for battery with the intent to commit sexual assault was "simply . . . helpful or *practically necessary*" to show Chaparro's intent in assaulting L.L. and his propensity to commit the crime. *Franks*, 135 Nev. at 7, 432 P.3d at 757 (quotation marks omitted). Accordingly, we conclude the district court did not abuse its discretion in admitting this evidence at trial.

The district court did not err in limiting voir dire

By the time of voir dire, Chaparro was aware that the district court would allow trial testimony by P.J. regarding the 2011 battery with intent to commit sexual assault. Chaparro argues that he was improperly barred from asking prospective jurors questions regarding the effect evidence of that conviction might have on their deliberation in this case.

This matter was discussed in camera. The district court noted Chaparro's objection and barred his proposed questioning on the previous conviction. The court determined that such questions would "pre-try facts of [the] case" and that propensity evidence is significant enough that it "would be unnecessarily volatile with this or any other jury" "to ring the bell of Mr. Chaparro's conviction for battery to commit sexual assault when he stands accused of the same thing." Chaparro argued that a fair trial required ensuring that the empaneled jury be able to deliberate only on the facts of this offense, despite knowing of his prior conviction for the same offense.

NRS 175.031 provides that "[t]he court shall conduct the initial examination of prospective jurors, and defendant or the defendant's attorney and the district attorney are entitled to supplement the

examination by such further inquiry as the court deems proper. Any supplemental examination must not be unreasonably restricted." Voir dire serves to determine whether jurors "can and will, in accordance with their oath, render to the defendant and the state a fair and impartial trial on the facts allowed to be presented to them by the court." *Oliver v. State*, 85 Nev. 418, 422, 456 P.2d 431, 434 (1969). Both the scope and method of voir dire are within the district court's discretion, *Salazar v. State*, 107 Nev. 982, 985, 823 P.2d 273, 274 (1991), and we review for an abuse of discretion or a showing that the defendant was prejudiced, *Leonard v. State*, 117 Nev. 53, 64, 17 P.3d 397, 404 (2001).

We conclude that the district court appropriately limited Chaparro from inquiring into specific evidence that would be presented at trial. *See Witter v. State*, 112 Nev. 908, 915, 921 P.2d 886, 892 (1996) (concluding that parties may not ask jurors about hypothetical facts that would reveal whether a potential juror would find the defendant guilty because such a question goes "beyond determining whether a potential juror would be able to apply the law to the facts of the case"), *abrogated on other grounds by Nunnery*, 127 Nev. 749, 263 P.3d 235. As noted by the district court here, that Chaparro was previously convicted of the same offense he stood accused of had significant potential to influence the jury. This posed a serious risk of causing jurors to prejudge the facts of the case.[4] *See Browning v. State*, 124 Nev. 517, 531 n.32, 188 P.3d 60, 70 n.32 (2008) (impliedly recognizing that it is error to ask a potential juror to prejudge the merits of a case); 58 Am. Jur. 3d *Proof of Facts* § 21 (2021 Supp.) (observing that it is universally recognized that voir dire may not be used to pre-try the case). In doing so, this line of questioning risked depriving Chaparro of an impartial jury. *See People v. Carasi*, 190 P.3d 616, 632 (Cal. 2008) (observing that voir dire seeks to uncover jurors' views in the abstract to ensure that they consider the facts with an open mind and that this aim is undermined by overly specific questions that expose the facts of the case). Rather, Chaparro could have protected his interest in ensuring that jurors apply the law to the facts of the case by voir dire questions regarding a potential juror's perspective on defendants with prior convictions, without specifically inquiring into his own previous conviction. The district court did not categorically obstruct inquiry into the general issue of potential jurors' views on defendants with previous convictions and thus did not err here. *See id.* at 632-33 (recognizing that district courts err in categorically limiting inquiry into case-specific issues). Accordingly, we conclude that Chaparro has not shown that the district court abused its discretion or that he was prejudiced.

[4]This risk is exacerbated by the fact that this "evidence" would be received by the jury during voir dire without context or instruction from the court as to its proper use.

The district court did not abuse its discretion in allowing testimony on inconclusive DNA evidence

The pair of tights L.L. wore during the incident were examined for DNA evidence. The results were inconclusive, showing a mixture of DNA for which no person could be excluded. Chaparro argues that the district court abused its discretion in admitting the evidence because the results were inconclusive and could not have any effect on the probability that he digitally penetrated L.L.

Again, when reviewing a district court's decision to admit evidence, this court reviews "for an abuse of discretion or manifest error." *Thomas*, 122 Nev. at 1370, 148 P.3d at 734. Evidence that is relevant is generally admissible. NRS 48.025(1). Relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." NRS 48.015. Whether inconclusive DNA evidence is relevant is a question of first impression for this court.[5]

Other courts considering this question have concluded that such "evidence may be independently relevant to show that police conducted a thorough investigation." *People v. Marks*, 374 P.3d 518, 524 (Colo. App. 2015); *accord Commonwealth v. Cavitt*, 953 N.E.2d 216, 231 (Mass. 2011) (providing that when the thoroughness of an investigation is challenged, "DNA test results, even those that are inconclusive, [are] relevant and probative to establishing the integrity and adequacy of the police investigation"). We find this conclusion balances the interests relevant to this question nicely. Inconclusive results may be of minimal probative value to a defendant's guilt or innocence, but they may be relevant to show the jury the thoroughness of the steps taken by law enforcement in order to investigate the victim's account.[6]

Independent from the relevance of showing a thorough investigation, inconclusive evidence may be relevant to the State's presentation of a complete story regarding a particular piece of evidence.[7] In *Old Chief v. United States*, 519 U.S. 172, 188-89 (1997), Justice Souter eloquently described this dynamic:

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[5]Chaparro points us to *Valentine v. State*, 135 Nev. 463, 472, 454 P.3d 709, 718 (2019), the only instance where this court has addressed inconclusive DNA evidence. However, that matter involved an entirely different question. In *Valentine*, we found prosecutorial misconduct when the State encouraged jurors to look at an inconclusive DNA report and "[m]ake your own determination" as to what they, as untrained laypersons, believed it proved. *Id.* (emphasis omitted). But we did not address the admissibility of that evidence in the first place.

[6]We note that this determination does not alter our holdings on course-of-investigation evidence. *See, e.g.*, *Collins*, 133 Nev. at 726, 405 P.3d at 666 ("Course-of-investigation testimony does not give carte blanche to the introduction of unconfronted hearsay, or evidence concerning matters irrelevant to guilt or innocence." (citations omitted)).

[7]Our determination in this regard does not affect our previous holdings regarding the "complete story of the crime" doctrine. *See, e.g.*, *Bellon v. State*,

> [T]here lies the need for evidence in all its particularity to satisfy the jurors' expectations about what proper proof should be. Some such demands they bring with them to the courthouse, assuming, for example, that a charge of using a firearm to commit an offense will be proven by introducing a gun in evidence. A prosecutor who fails to produce one, or some good reason for his failure, has something to be concerned about. . . . The use of witnesses to describe a train of events naturally related can raise the prospect of learning about every ingredient of that natural sequence the same way. If suddenly the prosecution presents some occurrence in the series differently, as by announcing a stipulation or admission, the effect may be like saying, "never mind what's behind the door," and jurors may well wonder what they are being kept from knowing.

This concern is greater today than when Justice Souter wrote for the Court in 1997, due to the so-called "CSI effect." *See generally* Clifford S. Fishman & Anne T. McKenna, 7 *Jones on Evidence* § 60:46(a) (7th ed. 2019) ("But evidence is also relevant if the absence of such evidence might lead a jury to make negative assumptions about the party with the burden of producing evidence."). Public fascination with forensic technology has led to increased juror expectations that every case involves forensic evidence and to the risk that jurors may make negative assumptions about the State's case when forensic evidence is not presented. *See id.*

Here, L.L. testified that Chaparro pulled down her tights and digitally penetrated her. A Sexual Assault Nurse Examiner testified that she collected the tights L.L. wore during the incident within hours of the assault. The DNA results from the tights were inconclusive as to possible contributors but showed the thoroughness of the investigation and completed the "story" of the evidence already presented regarding L.L.'s tights. Therefore, the inconclusive DNA evidence was relevant.

Chaparro also argues that the danger of undue prejudice substantially outweighed the probative value of the inconclusive DNA evidence. We disagree. As the video evidence showing that Chaparro was the man touching L.L. was not in dispute and the DNA evidence did not inculpate Chaparro, the risk of unfair prejudice did not outweigh the relevance of the inconclusive DNA evidence. *See* NRS 48.035(1). We conclude the district court did not abuse its discretion in admitting this evidence.

Cumulative error

Finally, Chaparro contends that cumulative error denied him a fair trial. Because we have rejected Chaparro's assignments of error,

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121 Nev. 436, 444, 117 P.3d 176, 181 (2005) (discussing the doctrine and providing that it must be construed narrowly).

we conclude that his allegation of cumulative error lacks merit. *See United States v. Rivera*, 900 F.2d 1462, 1471 (10th Cir. 1990) ("[A] cumulative-error analysis should evaluate only the effect of matters determined to be error, not the cumulative effect of non-errors.").

CONCLUSION

Unusual, historic circumstances can require unusual, temporary accommodations. We conclude that Chaparro was not denied a fair and just sentencing hearing where a pandemic made his physical presence at the hearing unsafe and he was provided with an appropriate alternative, in light of the extraordinary circumstances of the moment. We further apply the analysis set forth in *Franks v. State*, 135 Nev. 1, 432 P.3d 752 (2019), and conclude that the district court did not err in admitting evidence of Chaparro's prior conviction for battery with intent to commit sexual assault. And we determine that while district courts should not categorically limit inquiry during voir dire into jurors' views regarding defendants with prior convictions, the district court did not err in this regard here when it barred inquiry into their views as to Chaparro's prior conviction because that would have risked having jurors prejudge the evidence, depriving Chaparro of an impartial jury. Finally, we affirm the conviction and clarify that inconclusive DNA evidence may be admitted where relevant and otherwise in accord with the rules of evidence.

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

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Appellant, *v.* BAHRAM YAHYAVI, an Individual, Respondent.

No. 80107

CAPRIATI CONSTRUCTION CORP., INC., a Nevada Corporation, Appellant, *v.* BAHRAM YAHYAVI, an Individual, Respondent.

No. 80821

November 10, 2021 498 P.3d 226

Consolidated appeals from a final district court judgment pursuant to a jury verdict and a post-judgment order awarding attorney fees in a tort action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

Herndon, J., with whom Stiglich and Pickering, JJ., agreed, dissented in part.

Hutchison & Steffen, PLLC, and *Michael K. Wall*, Las Vegas; *Law Offices of Eric R. Larsen* and *Eric R. Larsen*, Las Vegas; *Wilson, Elser, Moskowitz, Edelman & Dicker, LLP*, and *David S. Kahn* and *Mark Severino*, Las Vegas, for Appellant.

Prince Law Group and *Dennis M. Prince* and *Kevin T. Strong*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

In this opinion, we clarify two points of law. First, evidence of a defendant's liability insurance is admissible under NRS 48.135(2) if the defendant first introduces evidence suggesting its inability to pay a judgment. Second, a plaintiff represented on a contingency-fee basis may recover the entirety of the contingency fee as post-offer attorney fees under NRCP 68. As the district court adhered to this law when rendering its decisions, we discern no error from these proceedings and affirm.

FACTS AND PROCEDURAL HISTORY

An employee of appellant Capriati Construction Corp., Inc., drove a forklift into a street travel lane and collided with respondent Bahram Yahyavi's vehicle, resulting in injury to Yahyavi.

Yahyavi brought an action against Capriati alleging negligence, and in its answer, Capriati denied liability. Capriati then filed a petition for bankruptcy. Following the conclusion of Capriati's bankruptcy proceedings, the negligence case proceeded to trial. Prior to trial, Yahyavi served Capriati with an offer of judgment for $4 million, pursuant to NRCP 68, which Capriati rejected. In his opening statement at trial, Yahyavi told the jury that Capriati had discarded the forklift operator's employment file. Capriati did not object. Yahyavi called the forklift operator as a witness, who admitted fault. Because of conflicting schedules, two of Capriati's experts also testified during Yahyavi's case in chief. They explained that Yahyavi's damages were exaggerated.

After Yahyavi rested his case, Capriati elicited testimony that its business had filed for reorganization. Yahyavi objected and moved for sanctions on the ground that his recovery would be prejudiced by Capriati's intentional elicitation of inadmissible evidence suggesting to the jury that it was unable to pay a judgment. Capriati asserted that it was rebutting Yahyavi's allegations of spoliation. The district court agreed with Yahyavi and, as relevant here, (1) struck Capriati's answer as to liability and disallowed its remaining witnesses to testify, and (2) instructed the jury that Capriati had liability insurance to satisfy any verdict. The jury returned a $5.9 million verdict in favor of Yahyavi.

After trial, Yahyavi moved for $2.3 million in attorney fees—his contingency fee—under NRCP 68 on the ground that the jury's verdict of $5.9 million exceeded the $4 million offer of judgment that Capriati rejected nine months before trial. The district court weighed the appropriate factors and awarded Yahyavi $2.3 million in attorney fees.

Capriati appeals, arguing that the district court erroneously (1) imposed case-concluding sanctions, (2) instructed the jury that it could consider Capriati's liability insurance, and (3) awarded Yahyavi attorney fees that were incurred before the offer of judgment was rejected.

DISCUSSION

Sanctions

Capriati argues that the district court erroneously imposed case-concluding sanctions by striking its additional witnesses. It adds that this constituted an unduly harsh sanction because it barred Capriati from showing the jury evidence that Yahyavi's damages were exaggerated. However, Capriati concedes that striking its answer as to liability was supported by substantial evidence because its employee admitted fault at trial.

We review a district court's sanctions order for an abuse of discretion. *MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc.*, 134

Nev. 235, 242, 416 P.3d 249, 256 (2018). We employ "a somewhat heightened standard of review for case-concluding sanctions." *Id.* (internal quotation marks omitted). Noncase-concluding sanctions, however, include those after which a party is still able "to defend on the amount of damages." *Valley Health Sys., LLC v. Estate of Doe*, 134 Nev. 634, 639, 427 P.3d 1021, 1027 (2018). We uphold noncase-concluding sanctions if substantial evidence supports the district court's sanction order. *Id.* "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." *Kolnik v. Nev. Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

The district court struck Capriati's answer as to liability. Because Capriati's employee admitted fault, the district court concluded that striking Capriati's answer as to liability alone would serve as a nominal sanction. Thus, the district court also struck Capriati's additional witnesses. Although Capriati argues that this was a case-concluding sanction, we disagree because it was still allowed to defend on the amount of damages. Specifically, Capriati presented testimony from two witnesses to show that Yahyavi's damages were exaggerated. Moreover, Capriati commented on Yahyavi's damages in its closing argument. Thus, we are unpersuaded that striking Capriati's additional witnesses amounted to a case-concluding sanction.

We further conclude that substantial evidence supported the district court's decision to strike Capriati's additional witnesses. The record shows that Capriati intentionally elicited inadmissible testimony describing its bankruptcy. *See* RPC 3.4(e) (providing that a lawyer's allusion to any matter unsupported by admissible evidence is misconduct); *see also Geddes v. United Fin. Grp.*, 559 F.2d 557, 560 (9th Cir. 1977) (explaining "that the financial standing of the defendant is inadmissible as evidence [to] determin[e] . . . compensatory damages"). Moreover, the record supports the district court's conclusion that striking Capriati's answer as to liability alone would serve as a nominal sanction because Capriati's employee admitted fault. Because substantial evidence supported the district court's sanctions order, it imposed sanctions within its discretion.[1]

Jury instruction

Capriati argues that the district court erroneously instructed the jury, "[Capriati] has liability insurance to satisfy in whole or part any verdict you may reach in this case." It argues that this

[1]Capriati adds that this sanction was also unduly harsh because it elicited evidence of its bankruptcy to rebut Yahyavi's allegations of spoliation. We reject this argument because Capriati could have objected to Yahyavi's opening statement, *see* NRS 47.040(1)(a), rather than eliciting inadmissible evidence regarding its bankruptcy. We further reject Capriati's unsupported argument that a lay juror would not understand that the term "reorganization" is synonymous with bankruptcy.

instruction was prejudicial because it informed the jury that it could reach *any* verdict, which violates NRS 48.135.[2] Yahyavi argues that, once a defendant introduces evidence suggesting its inability to pay a judgment, NRS 48.135(2) allows the plaintiff to introduce evidence of the defendant's liability insurance to cure any resulting prejudice.

We review the district court's "decision to admit or refuse jury instructions for an abuse of discretion." *MEI-GSR Holdings*, 134 Nev. at 237, 416 P.3d at 253 (internal quotation marks omitted). We review whether the instruction "accurately states Nevada law" de novo. *Id.* at 238, 416 P.3d at 253 (internal quotation marks omitted).

We have not addressed whether evidence of a defendant's liability insurance is admissible under NRS 48.135(2) after the defendant introduces evidence suggesting its inability to pay a judgment. We interpret a statute consistently with its plain meaning. *See Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007). Turning to the statutory text,

> 1. Evidence that a person was or was not insured against liability is not admissible upon the issue whether the person acted negligently or otherwise wrongfully.
>
> 2. This section does not require the exclusion of evidence of insurance against liability when it is relevant for another purpose, such as proof of agency, ownership or control, or bias or prejudice of a witness.

NRS 48.135. We have explained that NRS 48.135(2) "use[s] 'such as' to introduce a nonexclusive list." *Bigpond v. State*, 128 Nev. 108, 115 n.5, 270 P.3d 1244, 1248 n.5 (2012). Thus, under the plain meaning of NRS 48.135(2), evidence of liability insurance may be admissible in situations other than those expressly listed in the statute.

Persuasive authorities lead us to conclude that evidence of a defendant's liability insurance is admissible under NRS 48.135(2) if the defendant first introduces evidence suggesting its inability to pay a judgment. *See Wheeler v. Murphy*, 452 S.E.2d 416, 426 (W. Va. 1994) ("[O]nce the defendant offers evidence of his financial status to influence the jury . . . , then the plaintiff may rebut such evidence by introducing proof of the defendant's liability insurance."); *see also Younts v. Baldor Elec. Co., Inc.*, 832 S.W.2d 832, 834 (Ark. 1992) (holding the same).

Capriati first introduced evidence of its bankruptcy, thereby suggesting that it was unable to pay a judgment in favor of Yahyavi. Thus, to cure the resulting prejudice, the district court appropriately instructed the jury that Capriati had liability insurance to satisfy

[2]Insofar as Capriati argues that this jury instruction was an improper sanction, we conclude that it was a proper curative instruction, given Capriati's misconduct. *See BMW v. Roth*, 127 Nev. 122, 133, 252 P.3d 649, 656 (2011) (explaining that a curative instruction may be issued as a sanction).

any judgment. This instruction accurately states Nevada law, and the district court therefore acted within its discretion.[3]

Attorney fees

Capriati argues that the district court erroneously awarded Yahyavi $2.3 million in attorney fees—the 40-percent contingency fee from the $5.9 million verdict—after Capriati rejected a $4 million offer of judgment nine months before trial. Capriati asserts that the plain meaning of NRCP 68 requires the district court to analyze which fees were incurred after the offer of judgment was rejected. It further argues that, when the plaintiff is represented on a contingency basis, district courts should apply the lodestar method to apportion NRCP 68 fees to those earned post-offer. Yahyavi argues that Nevada precedent interpreting NRCP 68 allows a party to collect the entire contingency fee as post-offer attorney fees because the contingency fee does not vest until the plaintiff prevails.

This court "review[s] an award of attorney fees for an abuse of discretion." *Logan v. Abe*, 131 Nev. 260, 266, 350 P.3d 1139, 1143 (2015). In exercising that discretion, the district court must make findings under the *Beattie* and *Brunzell* factors. *See Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). Under *Beattie*, the district court considers

> (1) whether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

99 Nev. at 588-89, 668 P.2d at 274. Under *Brunzell*, the district court considers

> (1) the qualities of the advocate: his ability, his training, education, experience, professional standing and skill; (2) the character of the work to be done: its difficulty, its intricacy, its importance, time and skill required, the responsibility imposed and the prominence and character of the parties where they affect the importance of the litigation; (3) the work actually performed by the lawyer: the skill, time and attention given to

[3]We reject Capriati's argument that this instruction was erroneous because it told jurors that Capriati's insurance could satisfy any verdict. Although such language could be improper in other cases, the language used here was warranted to cure the prejudicial effect of Capriati's misconduct. We also reject Capriati's argument that this instruction was improper under the collateral-source rule, which bars evidence showing that an injured party received a collateral payment. *See Khoury v. Seastrand*, 132 Nev. 520, 538, 377 P.3d 81, 93-94 (2016). Because Capriati was the tortfeasor, this rule is inapplicable.

> the work; (4) the result: whether the attorney was successful and what benefits were derived.

85 Nev. at 349, 455 P.2d at 33. Insofar as an attorney-fees award invokes a question of law, we review it de novo. *See In re Estate & Living Tr. of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009).

Under NRCP 68(f)(1)(B), if an offeree rejects an offer of judgment and fails to obtain a more favorable judgment, the offeree must pay "reasonable attorney fees, if any be allowed, *actually incurred* by the offeror *from the time of the offer*." (Emphases added.) NRCP 68 "authorize[s] a party who makes an offer of judgment that is not improved upon to recover the reasonable attorney fees and costs incurred after the offer of judgment was made." *Logan*, 131 Nev. at 265, 350 P.3d at 1142.

District courts may award NRCP 68 attorney fees based on a contingency-fee agreement without billing records so long as the party seeking fees satisfies the *Beattie* and *Brunzell* factors. *O'Connell v. Wynn Las Vegas, LLC*, 134 Nev. 550, 562, 429 P.3d 664, 673 (Ct. App. 2018). Consistent with NRCP 68's plain meaning, the court of appeals in *O'Connell* explained that NRCP 68 attorney fees based on a contingency-fee agreement must be "limited to those fees earned post-offer." *Id.* However, *O'Connell* did not address whether a party may recover the entirety of the contingency fee as post-offer attorney fees. *Id.*

We now clarify that a district court may award the entire contingency fee as post-offer attorney fees under NRCP 68 because the contingency fee does not vest until the client prevails.[4] *See Grasch v. Grasch*, 536 S.W.3d 191, 194 (Ky. 2017) (holding that "the attorney does not possess a vested right to the actual contingent fee itself until the case is won or settled"); *see also Hoover Slovacek LLP v. Walton*, 206 S.W.3d 557, 562 (Tex. 2006) (holding the same). A contingency fee is contingent on the plaintiff prevailing, which will happen only *after* an offer of judgment is rejected—never before. Our holding is consistent with public policy justifications supporting contingency-fee agreements, *see O'Connell*, 134 Nev. at 559-60, 429 P.3d at 671-72, as the contingency-fee-based award properly serves as a punishment for rejecting a reasonable offer of judgment, *see MEI-GSR Holdings*, 134 Nev. at 245, 416 P.3d at 258 (explaining that one purpose of NRCP 68 is to punish parties for not accepting a reasonable offer of judgment). We reiterate that a party seeking NRCP 68 attorney fees based on a contingency-fee agreement must still satisfy the *Beattie* and *Brunzell* factors.

[4]We reject Capriati's argument that the lodestar method is necessary to apportion an award of NRCP 68 attorney fees based on a contingency-fee agreement. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 864, 124 P.3d 530, 549 (2005) (explaining district courts are "not limited to one specific approach" in determining reasonable attorney fees).

Based on our holding, the district court did not err by concluding that Yahyavi was entitled to recover the entirety of his contingency fee under NRCP 68. The district court methodically weighed the *Beattie* and *Brunzell* factors and concluded that the attorney fees were reasonable. Based on this record, we conclude that the district court's application of the *Beattie* and *Brunzell* factors does not constitute an abuse of discretion. Thus, we affirm the attorney-fees award.[5]

CONCLUSION

Evidence of a defendant's liability insurance is admissible under NRS 48.135(2) if the defendant first introduces evidence suggesting its inability to pay a judgment. Moreover, a plaintiff represented on a contingency-fee basis may recover the entirety of the contingency fee as post-offer attorney fees under NRCP 68, so long as that party satisfies the *Beattie* and *Brunzell* factors. We conclude that Capriati has presented no meritorious claims of error. Likewise, Capriati has not shown that the district court's sanctions order constitutes an abuse of discretion. Because the district court correctly applied Nevada law, we affirm the final judgment and attorney-fees order.[6]

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

Herndon, J., with whom Stiglich and Pickering, JJ., agree, concurring in part and dissenting in part:

I concur with the decision to affirm the district court's sanctions order and jury instruction. I disagree, however, with the majority's conclusion that the district court properly exercised its discretion in awarding the entirety of the contingency fee under NRCP 68 in the manner in which the district court did so in the underlying case.

As the majority recognizes, NRCP 68 provides for awards of post-offer attorney fees only. *Logan v. Abe*, 131 Nev. 260, 265, 350 P.3d 1139, 1142 (2015). In determining whether awarding such fees

[5]Insofar as Capriati argues that the district court's application of the *Beattie* and *Brunzell* factors constitutes an abuse of discretion, we decline to address this argument because Capriati did not cite the record to support any of its fact-based assertions, including those pertaining to whether its decision to proceed to trial was in bad faith. *See* NRAP 28(a)(10)(A); *Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal."). Thus, we cannot conclude that the district court abused its discretion.

[6]The district court also denied Capriati's motions for a new trial and to retax costs. In Capriati's notice of appeal, it states that Capriati is also appealing these post-judgment orders. However, Capriati's briefs provided no argument as to these motions, and therefore we affirm them. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that arguments unsupported by citations to relevant authority need not be considered by this court).

is appropriate, a district court must first consider the factors laid out in *Beattie v. Thomas*, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983), and *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969). *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 81, 319 P.3d 606, 615-16 (2014). The fourth *Beattie* factor specifically requires the district court to consider whether the attorney fees sought "are reasonable and justified in amount." *Beattie*, 99 Nev. at 589, 668 P.2d at 274. Other jurisdictions have concluded that a district court cannot determine the reasonableness of attorney fees actually incurred post-offer based solely on a contingency-fee agreement. *Cooper v. Thompson*, 353 P.3d 782, 798-99 (Alaska 2015); *Ga. Dep't of Corr. v. Couch*, 759 S.E.2d 804, 815 (Ga. 2014); *cf. Blanchard v. Bergeron*, 489 U.S. 87, 92-93 (1989) (concluding that a contingency-fee agreement can be a factor in determining the reasonableness of an attorney-fee award but is not singularly determinative).

The majority concludes that an award of the entirety of the contingency fee is reasonable because a client who has agreed to a contingency-fee agreement has not incurred any attorney fees until the judgment is entered, which occurs after the NRCP 68 offer. However, those fees begin to be *earned* at the inception of the case, when the attorney's representation of the client begins, and they continue to be earned throughout the pendency of the case. They do not materialize only upon entry of the judgment. Thus, while fees are not yet *owed* by the client at the time of offer, they have clearly been accrued by the attorney. Indeed, under the attorney's contingency-fee agreement with the client, if the attorney is unsuccessful, the attorney alone is responsible for those fees. *See Couch*, 759 S.E.2d at 817 (recognizing that there is a "common sense understanding that attorneys are accruing reasonable fees as they work on a case; they simply are not entitled to collect the amount of fees agreed to under a contingency fee contract *from their client* until the conditions of the contract have been met").

This court has previously recognized that recoverable post-offer fees are not limited to those incurred by the client. *Logan v. Abe*, 131 Nev. 260, 265-66, 350 P.3d 1139, 1142-43 (2015) ("Because the statute[ ] [is] limited to the costs incurred rather than the party who pays them, we therefore hold that . . . NRCP 68 allow[s] a party to recover qualifying attorney fees and costs that were paid on its behalf by a third party."). Therefore, even if the client does not owe payment for his or her attorney fees until judgment is entered, those fees have been accrued by the attorney, and it is unreasonable to require the offeree party to be responsible for the entirety of the contingency fee when NRCP 68 only permits recovery of fees incurred "from the time of the offer." NRCP 68(f)(1)(B).

Moreover, it would be unfair to require the offeree party to pay the entirety of the contingency fee when the offeree was unaware

of the private contingency-fee agreement when he or she rejected the offer of judgment. *Cooper*, 353 P.3d at 798 (recognizing that an offeree cannot undertake an accurate risk-benefit analysis of accepting or rejecting an offer of judgment and potentially being liable for the opposing party's attorney fees when the offeree is unaware of the agreed-upon fees in a private contract); *see also Texarkana Nat'l Bank v. Brown*, 920 F. Supp. 706, 711 (E.D. Tex. 1996). A contingency-fee agreement "is a gamble for both the lawyer and the client, because the value of the professional services actually rendered by the lawyer may be considerably higher or lower than the agreed-upon amount, depending on how the litigation proceeds." *Couch*, 759 S.E.2d at 816. The offeree should not be forced to bear the risk the opposing party and his or her counsel agreed to when the offeree was not subject to that agreement. The *Texarkana* court aptly described why shifting the burden to the offeree to cover the entirety of the contingency fee is unreasonable:

> If the opposing counsel, in entering into a contingency fee agreement with a client, assumes the risk of nonpayment, then any compensation that opposing counsel may ultimately receive on account of the contingency should be paid by the client—not the opposing party that did not prevail at trial. Similarly, when the prevailing client assumed the risk of having to pay its counsel a large contingency fee rather than payment by the hour, the risk assumed by the client cannot equitably be shifted to the party that did not prevail at trial. After all, it was the client that struck the contingency fee agreement with its counsel, not the party that lost at trial.

920 F. Supp. at 711-12. Thus, without additional evidence supporting a contingency-fee-based award, a district court cannot find that awarding the entirety of the contingency fee as post-offer attorney fees under NRCP 68 is reasonable.

Further, the district court erred in finding that "there is no way to reasonably divide a contingency fee." While *O'Connell v. Wynn Las Vegas, LLC*, concluded that a district court cannot deny attorney fees because an attorney working on a contingency-fee basis does not submit hourly billing records, the court of appeals recognized that in order to satisfy the *Beattie* and *Brunzell* factors, an attorney would have to submit some sort of evidence demonstrating the reasonableness of the fees sought. 134 Nev. 550, 558, 562, 429 P.3d 664, 670, 673 (Ct. App. 2018). While a contingency-fee agreement may be "a guidepost to the reasonable value of the services the lawyer performed, . . . [it] is not conclusive, and it cannot bind the court in determining that reasonable value." *Couch*, 759 S.E.2d at 816. This can work both ways, as there may be times when the contingency fee does not reflect the fees incurred by the attorney and a larger or a smaller award may be necessary, as demonstrated with

additional evidence or a lack thereof. *Id.* (recognizing that a larger award may be necessary when the opposing party is "unnecessarily litigious or otherwise [fails] to follow the law governing civil litigation in a sanctionable way"). If a party is seeking recovery of post-offer attorney fees, that party has the burden to provide support for the reasonableness of the fees sought, which may include the contingency-fee agreement but should also include additional evidence or argument.[1] *See O'Connell*, 134 Nev. at 561-62, 429 P.3d at 672-73 (recognizing that there are ways to determine the reasonableness of attorney fees sought by the party besides hourly billing records).

Therefore, I conclude that the district court abused its discretion by awarding the entirety of the contingency fee as post-offer attorney fees under NRCP 68 without additional support demonstrating the reasonableness of those attorney fees having been incurred post-offer. Accordingly, I dissent and would reverse and remand the award of attorney fees to the district court so that it can determine what fees were reasonably incurred post-offer.

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[1]The majority recognizes that there must be different approaches available to district courts in determining reasonable attorney fees. However, by concluding it is appropriate to award the entirety of the contingency fee post-offer, the majority is either (1) limiting the district court's ability to determine reasonable attorney fees under NRCP 68 when there is a contingency-fee agreement by requiring the entirety of the contingency fee to be awarded in these circumstances, or (2) discouraging attorneys from keeping accurate records of their time spent on contingency-fee cases so that they can seek the entirety of the contingency fee under NRCP 68 on the ground that they lack any evidence, other than the contingency-fee agreement itself, to demonstrate what fees were reasonably incurred post-offer, *see O'Connell*, 134 Nev. at 562 n.7, 429 P.3d at 673 n.7 (recognizing that the best practice for an attorney working on a contingency-fee case is "to keep hourly statements or timely billing records to later justify the requested fees").

CURTIS WILSON, an Individual, Appellant, *v.* LAS VEGAS METROPOLITAN POLICE DEPARTMENT, a Governmental Agency; POLICE OFFICER E. VONJAGAN, BADGE NO. 16098, an Employee of the Metropolitan Police Department; and POLICE OFFICER TENNANT, BADGE NO. 9817, an Employee of the Metropolitan Police Department, Respondents.

No. 81940

November 18, 2021 498 P.3d 1278

Appeal from a district court order dismissing a complaint in a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

Brandon L. Phillips, Attorney at Law, PLLC, and *Brandon L. Phillips*, Las Vegas, for Appellant.

Kaempfer Crowell and *Lyssa S. Anderson, Ryan W. Daniels*, and *Kristopher J. Kalkowski*, Las Vegas, for Respondents.

Before the Supreme Court, Parraguirre, Stiglich, and Silver, JJ.

OPINION

By the Court, Silver, J.:

In this appeal, we consider whether the district court erred in determining that a proceeding before a citizen review board does not warrant tolling the statute of limitations under our holding in *State, Department of Human Resources v. Shively*, 110 Nev. 316, 871 P.2d 355 (1994), or under equitable tolling principles. We conclude the review board proceeding does not toll the statute under *Shively* because participation in the proceeding was not mandatory. We also conclude that the doctrine of equitable tolling does not apply here because appellant failed to demonstrate that he acted diligently and that an extraordinary circumstance prevented him from timely filing his civil complaint in district court. Accordingly, we affirm the district court's order dismissing his complaint.

FACTS AND PROCEDURAL HISTORY

On August 22, 2017, Las Vegas Metropolitan Police Department (LVMPD) Officers Vonjagan and Tennant stopped appellant Curtis Wilson for an improper lane change. Officer Vonjagan instructed

Wilson to get out of his car and move to the front of the LVMPD vehicle, where Officer Vonjagan handcuffed him. Officer Tennant placed a second set of handcuffs around Wilson's wrists. Wilson, an African-American, alleges that the officers were motivated by racial animus and that they handcuffed him so forcefully that they permanently injured his hands and wrists. Wilson further alleges that the officers harassed him and made him wait outside in high temperatures for a long time. Wilson avers that the officers released him only after discovering that he is a retired firefighter.

Wilson filed a citizen complaint with the LVMPD Citizen Review Board (CRB) in October 2017. The CRB is an advisory board to LVMPD. The CRB may refer citizen complaints against police officers to the LVMPD and make recommendations regarding discipline, as well as review LVMPD's internal investigations.[1] In the present case, the CRB referred Wilson's complaint to a hearing panel for further review. The CRB informed Wilson that if he was not satisfied with the panel's decision, he could "contact legal counsel to pursue any other legal remedies available." The LVMPD Internal Affairs Bureau simultaneously reviewed the matter, but it did not find a policy violation. At the CRB's initial hearing, the panel disagreed with the bureau's determination and scheduled an evidentiary hearing for March 14, 2018. That same day, following the evidentiary hearing, the CRB found that there was no policy violation but concluded that the officers had unnecessarily escalated the situation. On this basis, the CRB recommended additional officer training.

On November 13, 2019, Wilson filed a civil complaint in district court against LVMPD, Officer Vonjagan, and Officer Tennant (collectively, when possible, LVMPD respondents), asserting claims for battery, false imprisonment, and negligence. LVMPD respondents filed a motion to dismiss, arguing that Wilson's complaint was barred by the statute of limitations. Wilson countered that the statute of limitations was tolled while he sought administrative remedies and that equitable considerations favored tolling. The district court granted the motion to dismiss, finding that tolling the statute of limitations was not warranted.

DISCUSSION

Standard of review

We review a dismissal for failure to state a claim pursuant to NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A decision to

[1]We explained the CRB's purpose and function in *Las Vegas Police Protective Ass'n Metro, Inc. v. Eighth Judicial District Court*, 122 Nev. 230, 234, 130 P.3d 182, 186 (2006) (citing, inter alia, NRS 289.387(4)).

dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal, with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Id*. Dismissal of a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id*. at 228, 181 P.3d at 672.

The district court did not err in dismissing Wilson's complaint

NRS 11.190(4) provides a two-year limitations period for an action for battery or false imprisonment, or for "an action to recover damages for injuries to a person . . . caused by the wrongful act or neglect of another." NRS 11.190(4)(c), (e). That period begins to run "when the wrong occurs and a party sustains injuries for which relief could be sought." *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). When a plaintiff's complaint is untimely and the statute of limitations is not tolled, dismissal of the complaint is proper. *See Fausto v. Sanchez-Flores*, 137 Nev. 113, 120, 482 P.3d 677, 683 (2021).

There is no dispute that Wilson filed his complaint more than two years after the incident and that the complaint is time-barred unless the statute was tolled. But Wilson argues that, under *Shively*, his pursuit of administrative remedies tolled the statute of limitations. Wilson further argues that *Shively* applies even when the exhaustion of administrative remedies is not mandatory and that Nevada's equitable tolling principles favor tolling the statute here. LVMPD respondents counter that *Shively* does not apply because CRB is neither an administrative agency nor an administrative court and filing a complaint with the CRB was not a prerequisite to filing a lawsuit. LVMPD respondents also contend that equitable tolling is not available because Wilson was not diligent and failed to demonstrate that extraordinary circumstances prevented him from timely filing his complaint. We address *Shively* and equitable tolling in turn.

Shively *is distinguishable*

As noted, Wilson primarily relies on *Shively*. There, the state welfare department initiated an administrative proceeding to terminate benefit payments to a Medicaid recipient who fraudulently obtained eligibility for the program. 110 Nev. at 317, 871 P.2d at 355. After the hearing officer affirmed the department's right to terminate benefits, the department filed a complaint in district court to recover the benefits paid. *Id.* The defendant argued the statute of limitations barred the complaint, and the district court granted summary judgment. *Id.* at 317, 871 P.2d at 355-56. We reversed, explaining the department was *required* to participate in the administrative action before it could discontinue benefits or recoup expenses and thus

should not be penalized for pursuing the requisite administrative remedy before seeking relief in court. *Id.* at 318, 871 P.2d at 356. We therefore concluded the statute of limitations was tolled during the pendency of the administrative process. *Id.*

Unlike the situation in *Shively*, Wilson was not required to bring his tort claims to the CRB. NRS 289.387(4), which sets forth the CRB's duties and powers, provides that the CRB "*may* . . . [r]eview an internal investigation of a [police] officer . . . and make *recommendations* regarding any disciplinary action against the [police] officer." (Emphases added.) Nothing in the statutes authorizing the creation of the CRB and defining its authority provide that participation in the CRB process is mandatory, a prerequisite to filing a lawsuit, or binding on the police officer's employer. *See, e.g.*, NRS 289.380; NRS 289.387. Moreover, correspondence from the CRB notified Wilson that he was free to pursue legal remedies. Thus, nothing prevented Wilson from filing his civil complaint before the completion of the CRB process. Accordingly, this case is not analogous to *Shively*.

To the extent Wilson invites us to expand *Shively* to toll the statute of limitations for administrative proceedings that are not mandatory, we decline to do so for three reasons. First, Wilson presents no arguments or authorities supporting his assumption that a CRB proceeding is an administrative proceeding. *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 issues not adequately briefed, not supported by relevant authority, and not cogently argued); *see also Las Vegas Police Protective Ass'n Metro*, 122 Nev. at 234, 130 P.3d at 186 (explaining the CRB is an advisory body to the police department that reviews internal investigations and makes disciplinary recommendations). Second, we declined a similar invitation in *Siragusa v. Brown*, where we explained that *Shively*'s holding is "limited to [its] facts and [has] no broader application." 114 Nev. 1384, 1394 n.7, 971 P.2d 801, 808 n.7 (1998). Third, carving out the ad hoc exception Wilson urges would undermine the Legislature's intent in enacting a statute of limitation such as NRS 11.190(4). *See Fausto*, 137 Nev. at 115, 482 P.3d at 680 (explaining that statutes of limitations are intended to prevent stale claims and "'to encourage the plaintiff to pursu[e] his rights diligently'" (alteration in original) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014))). Accordingly, we conclude that the CRB proceeding did not toll the statute of limitations pursuant to *Shively*.

Equitable tolling does not apply

We recently established the threshold requirements for equitable tolling of NRS 11.190(4)(e)'s limitations period: (1) the plaintiff exercised diligence in pursuing his or her claims, and (2) some

extraordinary circumstance prevented the plaintiff from bringing a timely action.[2] *See Fausto*, 137 Nev. at 117, 482 P.3d at 682. We address these factors in turn.

Wilson was not diligent

When considering diligence, we evaluate, among other factors and circumstances, whether the plaintiff made prompt efforts to assert the claim. *See id.* (concluding that a plaintiff was not diligent, despite initially reporting a crime perpetrated against her, because she "did not seek counsel or assert her claims until two and a half years later"). In this case, Wilson waited over a year and half after the CRB made its decision before he filed his complaint in district court, and he provided no explanation for this delay. Therefore, we conclude that Wilson did not diligently pursue his claims.

No extraordinary circumstance prevented Wilson from timely asserting his claims

Extraordinary circumstances exist where some circumstance prevents the plaintiff from timely filing a complaint. *See id.* at 683 (concluding that the plaintiff did not show extraordinary circumstances where nothing prevented her from timely filing her complaint). Wilson does not point to any extraordinary circumstance beyond his control that prevented him from timely filing his complaint, and the record does not indicate that Wilson faced any such circumstance. At best, Wilson suggests that LVMPD encouraged him to participate in the CRB process. However, nothing in that correspondence indicated to Wilson that he was *required* to complete the CRB complaint process before filing a civil complaint or that the CRB process would provide the same remedies as a civil action.

Even assuming, *arguendo*, that Wilson was somehow discouraged from filing a claim while the CRB proceeding was ongoing, this does not explain why Wilson waited over 18 months after the CRB process concluded to file his complaint. Moreover, to the extent Wilson mistakenly believed the statute of limitations was tolled for the duration of his CRB complaint, that mistaken belief is not an extraordinary circumstance warranting equitable tolling. *See Salloum*, 137 Nev. at 555, 495 P.3d at 518 (rejecting the notion that this court should equitably toll "otherwise-expired claims because of [the plaintiff's] 'miscalculation of an amended statute' while represented by counsel"). Thus, we conclude that Wilson failed to establish that an extraordinary circumstance prevented him from

[2]If these threshold factors are met, the district court must consider the additional applicable factors set forth in *Copeland v. Desert Inn Hotel*, 99 Nev. 823, 826, 673 P.2d 490, 492 (1983). *See Salloum v. Boyd Gaming Corp.*, 137 Nev. 549, 495 P.3d 513 (2021).

timely asserting his claims and the district court properly determined that the statute of limitations barred Wilson's complaint.

CONCLUSION

Shively does not provide grounds for tolling the statute of limitations here, and Wilson additionally failed to establish grounds for equitable tolling. We therefore conclude that the district court properly dismissed his untimely complaint. Accordingly, we affirm the district court's dismissal order.

PARRAGUIRRE and STIGLICH, JJ., concur.