JOCELYN SEGOVIA, PA-C, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MICHELLE LEAVITT, District Judge, Respondents, and MADDEN DUDA, a Minor, By and Through JOVAN DUDA, His Natural Father and Guardian; AUTUMN MATESI, Individually and as an Heir to the ESTATE OF MARY ANN HAASE; and ROBERT ANSARA, as Special Administrator of the ESTATE OF MARY ANN HAASE, Real Parties in Interest.

No. 72416

December 28, 2017 407 P.3d 783

Original petition for a writ of prohibition or, in the alternative, mandamus challenging a district court order in a medical malpractice action.

Petition denied.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith*, and *Erik J. Foley*, Las Vegas; *John H. Cotton & Associates* and *John H. Cotton* and *Katherine L. Turpen*, Las Vegas, for Petitioner.

Murdock & Associates, Chtd., and *Robert E. Murdock*, Las Vegas; *Eckley M. Keach, Chtd.*, and *Eckley M. Keach*, Las Vegas, for Real Party in Interest Madden Duda.

Seegmiller & Associates and *Clark Seegmiller*, Las Vegas, for Real Parties in Interest Autumn Matesi and Robert Ansara, as Special Administrator of the Estate of Mary Ann Haase.

Before Hardesty, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Hardesty, J.:

NRS Chapter 41A.035 limits the liability of "provider[s] of health care" by capping their damages in medical malpractice actions to $350,000 and abrogating joint and several liability. The 2015 Legislature amended NRS 41A.017 to add physician assistants to the definition of "[p]rovider of health care." Petitioner Jocelyn Segovia, a physician assistant, is a defendant in a medical malpractice action accruing before the 2015 amendments were enacted. She petitions this court to determine whether the amendment clarified the existing

definition of a provider of health care, so as to apply retroactively, or whether the amended definition operates prospectively only. Because the 2015 amendments expressly apply "to a cause of action that accrues on or after the effective date of this act," *see* 2015 Nev. Stat., ch. 439, § 11, at 2529; S.B. 292, 78th Leg. (Nev. 2015), and Segovia fails to rebut the presumption that statutory amendments are applied prospectively, we deny her writ petition.

FACTS AND PROCEDURAL HISTORY

In February 2012, Mary Haase, mother of real party in interest Madden Duda, saw Dr. George Michael Elkanich regarding pain she was experiencing in her leg and back. Dr. Elkanich diagnosed Haase with bilateral lower extremity radiculopathy and recommended surgery. Dr. Elkanich chose physician assistant Jocelyn Segovia to assist in the procedure. The surgery took place on March 5, 2012, at Valley Hospital. During the surgery, Dr. Elkanich and/or Segovia allegedly tore, sliced, or punctured Haase's aorta, causing substantial blood loss and a drop in blood pressure. According to the coroner's report, Haase died mid-surgery from a laceration to her aorta and the ensuing blood loss.

Madden Duda, along with real parties in interest Autumn Matesi and Robert Ansara, as special administrator of Haase's Estate (collectively, Duda), subsequently initiated a medical malpractice action. Duda moved for summary judgment as to Jocelyn Segovia. The motion sought to have the district court determine that Segovia was not a "[p]rovider of health care" per NRS 41A.017, and thus, not entitled to NRS Chapter 41A's abrogation of joint and several liability or the damages cap of $350,000. The district court granted Duda's motion, finding that Segovia was not entitled to the protections of NRS Chapter 41A because the language of NRS 41A.017 in effect at the time of the surgery did not cover physician assistants, and the subsequent 2015 amendment to the statute adding physician assistants only applies prospectively. Segovia then petitioned this court to answer the question of whether physician assistants are entitled to the statutory protections of NRS Chapter 41A for causes of action accruing before the effective date of the 2015 amendments.

DISCUSSION

Writ relief

Segovia seeks relief in the form of a writ of prohibition or, in the alternative, mandamus. "This court has original jurisdiction to issue writs of mandamus and prohibition." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); Nev. Const. art. 6, § 4. "A writ of prohibition is appropriate

when a district court acts without or in excess of its jurisdiction." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907 (2008). "A writ of mandamus is available to compel the performance of an act which the law requires as a duty resulting from an office, trust or station, or to control a manifest abuse or an arbitrary or capricious exercise of discretion." *Id*. at 39, 175 P.3d at 907-08 (alteration, footnote, and internal quotation marks omitted).

Because a writ petition seeks an extraordinary remedy, this court has discretion whether to consider such a petition. *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005). Extraordinary writ relief may be available where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). However, despite an available legal remedy, this court may still entertain a petition for writ "relief where the circumstances reveal urgency and strong necessity." *Barngrover v. Fourth Judicial Dist. Court*, 115 Nev. 104, 111, 979 P.2d 216, 220 (1999).

Segovia argues that resolution of this writ petition will promote judicial economy because most of the defendants in the underlying action have already settled, and determining whether Segovia is entitled to a damages cap will allow her to make informed settlement decisions and possibly avoid litigation altogether. We entertain the writ petition, treating it as one for mandamus, because Segovia seeks to compel the district court to retroactively apply the current version of NRS Chapter 41A, and conflicting statements exist in a published opinion and unpublished order of this court concerning that issue. "Questions of statutory interpretation are reviewed de novo." *Dykema v. Del Webb Cmtys., Inc.*, 132 Nev. 823, 826, 385 P.3d 977, 979 (2016).

The 2015 amendment to NRS 41A.017 does not apply retroactively

The "Keep our Doctors in Nevada" (KODIN) initiative was approved by Nevada voters in 2004, leading to the enactment of statutes limiting liability for providers of health care. *See* Nevada Ballot Questions 2004, Nevada Secretary of State, Question No. 3 (effective Nov. 23, 2004); NRS Chapter 41A. NRS Chapter 41A limits health care provider liability in two important ways: (1) the amount of noneconomic damages in medical malpractice suits "must not exceed $350,000, regardless of the number of plaintiffs, defendants or theories upon which liability [is] based," NRS 41A.035; and (2) joint and several liability is abrogated, making health care providers liable severally only for the portion of the judgment representing the percentage of negligence attributable to a specific defendant, NRS 41A.045.

NRS 41A.017 defines the term "[p]rovider of health care." At the time of the surgery in 2012, NRS 41A.017 read as follows:

> "Provider of health care" means a physician licensed under chapter 630 or 633 of NRS, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital and its employees.

The 2015 Legislature specifically added physician assistant, as well as a few other professions, to the definition. The current version of NRS 41A.017 reads in this manner:

> "Provider of health care" means a physician licensed pursuant to chapter 630 or 633 of NRS, *physician assistant*, dentist, licensed nurse, dispensing optician, optometrist, registered physical therapist, podiatric physician, licensed psychologist, chiropractor, doctor of Oriental medicine, medical laboratory director or technician, licensed dietitian or a licensed hospital, clinic, surgery center, physicians' professional corporation or group practice that employs any such person and its employees.

(Emphasis added.) The central issue in this petition is whether the 2015 amendment adding in "physician assistant" was meant to clarify the original intent of the previous version of the statute and, thus, covers Segovia's alleged malpractice from 2012, or whether it is an addition, meant to be applied only prospectively and, thus, does not afford the statutory protections to Segovia.

Segovia argues that the 2015 amendment was meant to clarify the intent of the original statute, rather than revise it, and Nevada law requires statutory amendments that clarify existing statutes to be applied retroactively. Segovia points to the legislative history of the 2015 amendments, citing John Cotton's testimony before the Senate Committee that the draft changes to the statute reestablish the Legislature's intent from the original statute. *See* Hearing on S.B. 292 Before the Senate Judiciary Comm., 78th Leg. (Nev., March 26, 2015) (testimony of John Cotton, KODIN). Moreover, Segovia asserts that this court already ruled that the 2015 amendment to NRS 41A.017 clarified rather than changed the law in the unpublished order in *Zhang v. Barnes*, Docket No. 67219 (Order Affirming in Part, Reversing in Part, and Remanding, Sept. 12, 2016).

Duda contends that the Legislature specifically declared the 2015 amendment to NRS 41A.017 to be prospective, because section 11 of S.B. 292 states, "The amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act." 2015 Nev. Stat., ch. 439, § 11, at 2529. Duda further argues that,

notwithstanding section 11's specific language, in general there is a strong presumption that amendments to statutes are to be prospective in application and that Segovia's arguments do not rebut this strong presumption. Duda cites to legislative history testimony from KODIN representative Lesley Pittman that physician assistants were added to the statute to address the way health care delivery has changed and morphed over the years, and thus, the amendment was not a clarification of the original statute. *See* Hearing on S.B. 292 Before the Senate Judiciary Comm., 78th Leg. (Nev., May 26, 2015) (testimony of Lesley Pittman, KODIN). Duda argues that *Zhang* is distinguishable from the instant case because even though it "did state that the 2015 amendment 'clarified' the law, it did not state such on a wholesale level."

Unpublished orders do not establish mandatory precedent, but parties may cite to unpublished dispositions issued after January 1, 2016, for their persuasive value, if any. NRAP 36(c)(2), (3). The portion of *Zhang* that references a "clarification" of the statute states this:

> In 2015, in fact, the Legislature amended the definition of "provider of healthcare" in NRS 41A.017 to expressly so state. This amendment did not change but clarified the law, stating in express statutory terms the result reached on the issue of the interplay between NRS Chapters 40 and 89 in *Fierle*.

Zhang, Docket No. 67219, at 13 (footnote omitted). NRS Chapter 89 deals with professional entities and associations, and the *Zhang* decision required NRS Chapters 41A and 89 to be read together in harmony so that professional entities, when vicariously liable for a doctor's actions, are also protected by the $350,000 damage cap. *Id*. Here, Segovia identifies no other NRS chapters regarding "physician assistants" that must be read in harmony with NRS 41A.017. The *Zhang* decision does not necessarily mean that every part of the 2015 amendments clarified the original statute's intent and applies retroactively, despite the way Segovia characterizes the holding.

In *Humboldt General Hospital v. Sixth Judicial District Court*, we dealt with another facet of NRS Chapter 41A regarding the requirement that medical malpractice actions be accompanied by a medical expert affidavit. 132 Nev. 544, 376 P.3d 167 (2016). We declined to retroactively apply the amendments, stating that:

> Many statutes in NRS Chapter 41A were amended during the 2015 legislative session. . . . The amended language does not apply here because the amendments became effective after the district court entered its order in this matter, and our reference to the statutes in this section are to those in effect at the time of the cause of action.

Id. at 547-48 n.2, 376 P.3d at 170 n.2. Like *Zhang*, *Humboldt* does not deal with the addition of "physician assistants" to the statute, but in a published opinion, the *Humboldt* court declined to apply the 2015 amendments retroactively.

Statutory amendments that clarify the intent of a previous statute generally apply retroactively. *Fernandez v. Fernandez*, 126 Nev. 28, 35 n.6, 222 P.3d 1031, 1035 n.6 (2010). However, statutes are otherwise presumed to operate prospectively "unless they are so strong, clear and imperative that they can have no other meaning or unless the intent of the [L]egislature cannot be otherwise satisfied." *Holloway v. Barrett*, 87 Nev. 385, 390, 487 P.2d 501, 504 (1971). "Courts will not apply statutes retrospectively unless the statute clearly expresses a legislative intent that they do so." *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988).

"When interpreting a statute, we first determine whether its language is ambiguous. If the language is clear and unambiguous, we do not look beyond its plain meaning . . . ." *Stockmeier v. Psychological Review Panel*, 122 Nev. 534, 539, 135 P.3d 807, 810 (2006) (footnote omitted). "A statute's language is ambiguous when it is capable of more than one reasonable interpretation." *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 402, 245 P.3d 527, 531 (2010). We do not find the pre-amendment version of NRS 41A.017 to be ambiguous on its face. It defines the term "provider of health care" by listing the specific professional titles that the Legislature considers to be providers of health care, none of which have been challenged by Segovia as ambiguous in meaning. The legislative history contains testimony that supports a conclusion that the amendment was both a clarification and an addition to the original version of the statute. However, considering the contradicting testimony in the legislative history, we conclude that Mr. Cotton's testimony alone does not rebut the "strong presumption against retroactivity to statutes that affect vested rights where the Legislature has not explicitly provided for retroactivity." *Badger v. Eighth Judicial Dist. Court*, 132 Nev. 396, 403 n.1, 373 P.3d 89, 94 n.1 (2016). The statute here, as amended, explicitly provides for prospective applications.

We deny Segovia's writ petition because the district court correctly found that the 2015 amendments adding physician assistants to NRS 41A.017 do not apply retroactively. Not only does the statutory amendment face a strong presumption of prospectivity, but the text of the senate bill itself contains language in section 11 specifically stating that "[t]he amendatory provisions of this act apply to a cause of action that accrues on or after the effective date of this act." 2015 Nev. Stat., ch. 439, § 11, at 2529; S.B. 292, 78th Leg. (Nev. 2015). Accordingly, we hold that at the time of the 2012 surgery, physi-

cian assistants were not "[p]rovider[s] of health care" under NRS 41A.017.[1] We therefore deny Segovia's writ petition.

PARRAGUIRRE and STIGLICH, JJ., concur.

WILLIS T. BROWN, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE WILLIAM D. KEPHART, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 72950

December 28, 2017 415 P.3d 7

Original petition for a writ of mandamus challenging the district court's denial of a motion for expert services at public expense.

Petition granted in part.

Law Office of Gary A. Modafferi and *Gary A. Modafferi*, Las Vegas, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Charles Thoman*, Deputy District Attorney, Clark County, for Real Party in Interest.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

In *Widdis v. Second Judicial District Court*, 114 Nev. 1224, 968 P.2d 1165 (1998), this court held that, notwithstanding the ability to retain counsel, a defendant is entitled to reasonable and necessary defense services at public expense if the defendant demonstrates both indigency and a need for the requested services. We take this opportunity to clarify the definition of an indigent person as well as the demonstration of need sufficient for a request for defense ser-

[1]Based on our disposition, we decline to address Segovia's arguments concerning agency law and public policy. Agency law was not argued in the district court and was raised for the first time in the writ petition. *See Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 679 (2011) (holding that it is an "inefficient use of judicial resources" to allow parties to make one set of arguments before a lower court and switch to alternative arguments later). Additionally, Segovia's policy arguments fail to overcome the established presumption of prospective statutory application.

vices. Additionally, we make clear that *Widdis* does not require an indigent defendant to request a sum certain before a motion for defense services at public expense can be considered or granted. Based on the district court's application of *Widdis*, we grant the petition in part.[1]

FACTS AND PROCEDURAL HISTORY

Petitioner Willis Brown faces multiple counts of lewdness with a child. Before the preliminary hearing, Brown moved for expert services at public expense pursuant to *Widdis v. Second Judicial District Court*, 114 Nev. 1224, 968 P.2d 1165 (1998), submitting an application containing financial information along with his motion. The justice court found Brown indigent and granted the motion, but limited the funds for the services to a stated amount.

After Brown was bound over to the district court, he again moved for expert services at public expense, submitting an updated application that showed he had gained employment and reduced his monthly liabilities since his previous motion. The motion acknowledged that Brown's extended family had paid for his legal fees but asked the district court to declare him indigent and permit him to retain an investigator and expert (Dr. Mark Chambers) at State expense to assist his defense. Brown claimed he needed to retain Dr. Chambers "to fully understand and convey to both the court and/or the jury the influences upon a child's accusation in a sexual prosecution" and averred that Dr. Chambers would "testify to psychological issues involving child testimony, parental influence on that testimony, and children's motivation regarding false allegations." Additionally, Brown claimed an investigator was necessary to serve subpoenas on and obtain statements from witnesses and to generally investigate the circumstances of the allegations.

At the hearing on the motion, the district court stated its belief that Brown was not indigent:

> I don't reach that based on—I mean he's employed. He—it appears that he has to probably adjust his expenses. But for the State to be paying for his investigator fees under these circumstances, I don't think *Widdis* truly could—is saying that that's a mandatory requirement. And so I'm just making a finding based on his affidavit that he's not indigent in order to fit that.

The district court opined that the previous indigency determination might have been appropriate based on the initial application but

[1]We previously granted the petition in part in an unpublished order. Cause appearing, we grant the motion to reissue that decision as an opinion, NRAP 36(f), and issue this opinion in place of our prior unpublished order.

concluded that Brown no longer qualified as an indigent based on the updated information.

After this court ordered an answer to Brown's petition, the district court held another hearing in which it expounded upon its reasons for denying Brown's motion. The district court referenced the two requirements in *Widdis*, indigency and necessity of the services, and gleaned a third requirement from the *Widdis* dissent, a request for a sum certain. The district court referenced Brown's exhaustion of family resources to retain counsel and deduced from that fact that Brown had resources. Additionally, the district court noted that Brown's debt-to-income ratio had appreciably decreased between his submissions of the two applications. The district court went on to say that Brown "failed to show how an investigator needed for assisting his counsel . . . wouldn't have been included within his legal fees, or if it was even discussed when securing counsel." The district court concluded that its findings were that Brown was not indigent and had not met a showing of need, specifically stating it "was a cursory attempt to show need." Counsel argued that, while Brown was currently employed, there was a significant decrease in income between Brown's previous job and current job, which was a minimum-wage-plus-tips position. The district court replied:

> But it's not a question of indigency then. Just because he's paying less. And the thing is too I made the statement in the previous argument is that he may need to adjust his expenses. At the time that I received an application his debts were way lower than the initial debt. And—but he hadn't changed his so to speak lifestyle. He was still living in a pretty expensive place where he could change that. You know, it doesn't—because he's living at, you know, X amount a month doesn't mean he needs to continue living that way because obviously his incomes went down.

The district court denied Brown's motion for expert services at public expense. Brown now seeks a writ of mandamus directing the district court to grant his motion.

DISCUSSION

The decision to consider a writ of mandamus[2] is within this court's complete discretion, and generally such a writ will not issue if the

[2]While the petition is titled a petition for a writ of certiorari, mandamus, and/or, in the alternative, writ of prohibition, it discusses only mandamus. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court."). Prohibition is unavailable because Brown does not argue that the district court was without jurisdiction to hear and determine his motion, *see* NRS 34.320; *Goicoechea v. Fourth Judicial Dist. Court*, 96 Nev. 287, 289, 607 P.2d 1140, 1141 (1980) (holding

petitioner has a plain, speedy, and adequate remedy at law. NRS 34.170; *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008). Despite the availability of a remedy at law by way of an appeal should Brown be convicted, *see* NRS 177.045, we elect to exercise our discretion and consider the petition for a writ of mandamus in the interest of judicial economy and in order to control a manifest abuse or capricious exercise of discretion. *See State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 779-80 (2011). "A manifest abuse of discretion is [a] clearly erroneous interpretation of the law or a clearly erroneous application of a law or rule." *Id.* at 932, 267 P.3d at 780 (quoting *Steward v. McDonald*, 958 S.W.2d 297, 300 (Ark. 1997)). A "capricious exercise of discretion" involves a decision that is "'contrary to the evidence or established rules of law.'" *Id*. at 932-33, 267 P.3d at 780 (quoting *Capricious*, *Black's Law Dictionary* (9th ed. 2009)).

Widdis holds "that the State has a duty to provide reasonable and necessary defense services at public expense to indigent criminal defendants who have nonetheless retained private counsel," and the case requires that a defendant make a "showing of indigency and need for the services." 114 Nev. at 1228-29, 968 P.2d at 1167-68. In so holding, the *Widdis* court adopted the analytical framework of an out-of-state case that held "[i]rrespective of the absence of any express statutory authorization . . . the Sixth Amendment right to effective assistance of counsel provided authority for the payment requested by the defendant." *Id.* at 1228, 968 P.2d at 1168. Therefore, this court held that the right to receive funds for defense services at public expense was entwined with the right to effective assistance of counsel. *Id.* Numerous other courts have come to a similar conclusion that an indigent criminal defendant may receive defense services at public expense even if the defendant does not have appointed counsel. *E.g.*, *Dubos v. State*, 662 So. 2d 1189, 1192 (Ala. 1995) ("The simple fact that the defendant's family, with no legal duty to do so, retained counsel for the defendant, does not bar the defendant from obtaining funds for expert assistance when the defendant shows that the expert assistance is necessary."); *Jacobson v. Anderson*, 57 P.3d 733, 734-35 (Ariz. Ct. App. 2002) (concluding a defendant whose parents had retained counsel on her behalf was entitled to the opportunity to demonstrate need for requested defense services at the government's expense based on her status as an indigent); *Tran v. Superior Court*, 112 Cal. Rptr. 2d 506, 509-10, 512 (Ct. App. 2001) (considering a defendant whose counsel was

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that a writ of prohibition "will not issue if the court sought to be restrained had jurisdiction to hear and determine the matter under consideration"), and certiorari is unavailable because Brown does not argue that the district court exceeded its jurisdiction or ruled on the constitutionality or validity of a statute, *see* NRS 34.020(2), (3).

retained via family funding and ordering the defendant's application for ancillary services funds be granted based on his indigency); *Arnold v. Higa*, 600 P.2d 1383, 1385 (Haw. 1979) (interpreting statutory language as not limiting "the court's authority to approve funds for investigatory services for a defendant with private counsel"); *English v. Missildine*, 311 N.W.2d 292, 293-94 (Iowa 1981) ("For indigents the right to effective counsel includes the right to public payment for reasonably necessary investigative services. The Constitution does not limit this right to defendants represented by appointed or assigned counsel." (internal citations omitted)); *State v. Jones*, 707 So. 2d 975, 977-78 (La. 1998) ("[T]he defendant here, having private counsel provided from a collateral source, may still be entitled to State funding for auxiliary services."); *State v. Huchting*, 927 S.W.2d 411, 419 (Mo. Ct. App. 1996) (deciding that a defendant's retention of private counsel did not preclude the defendant from seeking state assistance for hiring an expert witness); *State v. Boyd*, 418 S.E.2d 471, 475-76 (N.C. 1992) ("That defendant had sufficient resources to hire counsel does not in itself foreclose defendant's access to state funds for other necessary expenses of representation—including expert witnesses—if, in fact, defendant does not have sufficient funds to defray these expenses when the need for them arises."); *State v. Wool*, 648 A.2d 655, 660 (Vt. 1994) (holding that a defendant who qualifies as a needy person has a right to necessary services at public expense that cannot be conditioned on the defendant being represented by an appointed attorney); *State ex rel. Rojas v. Wilkes*, 455 S.E.2d 575, 578 (W. Va. 1995) ("We conclude that financial assistance provided by a third party which enables an indigent criminal defendant to have the benefit of private counsel is not relevant to the defendant's right to have expert assistance provided at public expense.").

Widdis provides that a defendant must make a showing of indigency, but it does not define or set forth a test for determining indigency. However, this court has stated that the standard for determining indigency for the appointment of counsel is whether a person "is unable, without substantial hardship to himself or his dependents, to obtain competent, qualified legal counsel on his or her own." In the Matter of the Review of Issues Concerning Representation of Indigent Defendants in Criminal and Juvenile Delinquency Cases, ADKT No. 411 (Order, January 4, 2008). That standard further provides that those defendants who do not fall within a presumptive threshold of substantial hardship "will be subjected to a more rigorous screening process to determine if their particular circumstances, including seriousness of charges being faced, monthly expenses, and local private counsel rates, would result in a substantial hardship." *Id.* Based on *Widdis*'s logic that the right to defense services at public expense is connected to the right to effective assistance of

counsel, we conclude the standard for determining indigency for the appointment of counsel in ADKT No. 411 should also be used when determining indigency for purposes of *Widdis*.

With regard to the first prong of *Widdis*, a demonstration of indigency, the district court concluded that Brown was not indigent because his financial situation had improved since being found indigent in the justice court—he had reduced his monthly debts, he had procured a job, and he was able to retain the services of counsel through financial assistance from family. The district court's logic, however, works to disincentivize a defendant's efforts to better his or her financial situation by reducing liability and obtaining income, and it contradicts the logic we employed in *Widdis*. 114 Nev. at 1229, 968 P.2d at 1168 ("Although the use of public funds in this manner may appear to be a misuse of such funds, we feel that a contrary rule would have a greater negative impact on scarce public resources by creating disincentives for defendants to seek private representation at their own expense."). Additionally, we have held that a determination of indigency does not require a demonstration that the person "is entirely destitute and without funds." *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 805-06, 102 P.3d 41, 46 (2004); *see also Lander Cty. v. Bd. of Trs. of Elko Gen. Hosp.*, 81 Nev. 354, 360-61, 403 P.2d 659, 662 (1965) (recognizing that "a person does not have to be completely destitute and helpless to be considered a destitute or indigent person, but can have some income or own some property"). Further, despite Brown's financial improvement, he represented he had minimal assets that were insufficient to satisfy his basic necessities and a negatively disproportionate debt-to-income ratio, all while facing serious charges with possible sentences of life imprisonment. Given Brown's circumstances, we conclude the district court capriciously exercised its discretion by finding that Brown was not indigent, or put another way, was able to afford an investigator and/or an expert without substantial hardship.

As for the second prong of *Widdis*, a demonstration of need, the district court concluded that Brown made a cursory showing at best. Given Brown's proffer regarding the necessity of Dr. Chambers—to testify regarding psychological issues involving child testimony, parental influence on that testimony, children's motivations regarding false allegations, and the influences upon a child's accusations in a sexual prosecution—in a trial involving allegations of lewdness with a child, we conclude Brown demonstrated such an expert was reasonably necessary. In the same vein, Brown alleged he required the services of an investigator to serve subpoenas on and obtain statements from witnesses and to investigate the circumstances of the allegations. While less specific than Brown's proffer regarding the need for Dr. Chambers, we conclude that Brown demonstrated both an investigator and Dr. Chambers were reasonably necessary

to his defense and that the district court manifestly abused its discretion by concluding otherwise.

Lastly, the district court implied a third prong could be gleaned from the dissent in *Widdis*, requiring a sum certain be requested before a motion for expert services is granted. To the extent a dissent may be read to impose an additional requirement on a test adopted by the majority, we disagree with the notion that the failure to request a sum certain is fatal to a motion for expert services. Thus, the district court's reliance on Brown's failure to request a sum certain was an inappropriate reason to deny the motion. Rather, if the district court was concerned with the cost of the services, it could have inquired into the expected cost for the services, limited the amount granted to a sum certain with leave to ask for additional funds if necessary, and/or taken any other measures it deemed prudent in reasonably limiting the expenditure.

As we have concluded that the district court capriciously exercised and manifestly abused its discretion when it denied Brown's motion for expert services at public expense, we therefore grant the petition in part.[3] We direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Brown's motion for expert services at public expense and to reconsider the motion consistent with this opinion.[4]

HARDESTY and PARRAGUIRRE, JJ., concur.

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[3]Brown also challenges the denial of his pretrial petition for a writ of habeas corpus in which he challenged the probable cause determination at the preliminary hearing. This court generally does not exercise its discretion to entertain a pretrial challenge to a probable cause determination, *see Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 546, 612 P.2d 679, 680 (1980), and Brown does not demonstrate his challenge fits within the exception this court has made for a purely legal issue, *see Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565, 816 P.2d 458, 459-60 (1991); *State v. Babayan*, 106 Nev. 155, 174-76, 787 P.2d 805, 819-20 (1990). To the extent Brown's claim may be construed as one that his charges should have been severed, he did not make this argument before the justice court, and the authority he relies upon does not address proceedings at a preliminary examination. Accordingly, we deny the petition in part as it relates to this claim.

[4]The clerk of this court issued the writ on October 24, 2017, pursuant to our earlier unpublished order.

BOCA PARK MARKETPLACE SYNDICATIONS GROUP, LLC, a Nevada Limited Liability Company, Appellant, *v.* HIGCO, INC., a Nevada Corporation, Respondent.

No. 71085

December 28, 2017 407 P.3d 761

Appeal from a district court judgment following a bench trial in a breach of contract action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed.

Hejmanowski & McCrea LLC and *Charles H. McCrea*, Las Vegas, for Appellant.

Garman Turner Gordon and *Eric R. Olsen* and *Dylan T. Ciciliano*, Las Vegas, for Respondent.

Before Douglas, Gibbons and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

This is a commercial dispute over an exclusive use clause in a lease for space in a shopping center. The question presented is whether the doctrine of claim preclusion prevents a tenant from suing its landlord for contract damages after having won an earlier suit against the landlord for declaratory judgment, where both suits concern the same underlying facts. Ordinarily, claim preclusion bars a second suit seeking to vindicate claims that were or could have been asserted in the first suit. But the claim-preclusion doctrine makes an exception for declaratory judgment actions, which are designed to give parties an efficient way to obtain a judicial declaration of their legal rights before positions become entrenched and irreversible damage to relationships occurs. While a party may join claims for declaratory relief and damages in a single suit, the law does not require it. So long as the first suit only sought declaratory relief, a second suit for contract damages may follow. Also, in a case involving a continuing or recurrent wrong, a party may sue separately for after-accruing damages. We therefore reject the landlord's argument that the doctrine of claim preclusion requires reversal of the judgment awarding contract damages to the tenant and affirm.

I.

Appellant Boca Park owns a Las Vegas shopping center. In 2002, Boca Park entered into a 20-year lease with respondent Higco, Inc.

The lease allowed Higco to operate a tavern in its leased space and included an exclusive use clause, by which Boca Park granted Higco "an exclusive for Boca Park I for a tavern and gaming, except for any tenants currently located in the center which allow gaming (i.e. Vons, Longs)." Based on the lease, Higco opened a tavern and installed slot machines for its patrons' use.

In late 2011 or early 2012, Higco learned that Boca Park had entered into a lease with a new tenant, Wahoo's Fish Tacos, and that Wahoo's had applied for a gaming license. On April 23, 2012, Higco sued Boca Park for declaratory relief. In its complaint, Higco alleged that Boca Park had leased space to Wahoo's, who had applied for a gaming license, and sought a judgment declaring that the Higco/Boca Park lease gave Higco the exclusive right to offer gaming in the shopping center.

Shortly after Higco filed its declaratory judgment complaint, Wahoo's obtained its gaming license and opened for business, competing with Higco by also offering slot-machine gaming. Higco did not amend its complaint to seek damages or injunctive relief, and the case was submitted to the district court on cross-motions for summary judgment. The district court decided the cross-motions in Higco's favor and entered declaratory judgment for Higco. The judgment declared that the "controlling lease is unambiguous, and . . . Higco has a right to an exclusive use both for tavern and for gaming in Boca Park I, except for any tenants offering gaming in Boca Park I as of November 5, 2002." Neither side appealed, and the declaratory judgment became final in December of 2012, less than nine months after the action began.

Despite the declaratory judgment, Boca Park continued to allow Wahoo's to offer slot-machine gaming. Higco protested that this breached the exclusive use clause in the lease, causing ongoing economic damages. The parties tried to settle their differences, to no avail, and in December 2014, two years after the declaratory judgment became final, Higco filed a second complaint against Boca Park. In this complaint, Higco sought damages from Boca Park for breach of contract and breach of the implied covenant of good faith and fair dealing.

Boca Park moved to dismiss, arguing that the doctrine of claim preclusion barred Higco's claims for contract damages because those claims could and should have been made in the earlier declaratory judgment action. The district court denied Boca Park's motion. A bench trial followed, in which the district court awarded Higco $497,000 in damages for Boca Park's breach of the exclusive use clause in Higco's lease. Boca Park appeals.

II.

Claim preclusion makes a valid final judgment conclusive on the parties and ordinarily bars a later action based on the claims that

were or could have been asserted in the first case. *See Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008). Whether claim preclusion operates to bar this action for contract damages based on the final judgment Higco obtained in its earlier declaratory relief action presents a question of law that we review de novo. *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011).

A.

Claim preclusion—or res judicata, as it formerly was called—is a policy-driven doctrine, designed to promote finality of judgments and judicial efficiency by requiring a party to bring all related claims against its adversary in a single suit, on penalty of forfeiture. *See Weddell v. Sharp*, 131 Nev. 233, 238-41, 350 P.3d 80, 83-85 (2015). Exceptions to the doctrine have been created to address situations in which barring a later-filed claim does not advance the doctrine's underlying policies or conflicts with a statutory scheme, constitutional rights, or the agreed-upon or stated limits of the first proceeding. *See* Restatement (Second) of Judgments § 26 (Am. Law Inst. 1982) (cataloging black-letter exceptions to the rule against claim-splitting that underlies claim preclusion). In *G.C. Wallace*, for example, we recognized an exception to claim preclusion where a statute-based summary eviction proceeding was later followed by an action for damages for unpaid rent. 127 Nev. at 703, 262 P.3d at 1136. By design, the summary eviction statutes provide an expeditious way for a landlord to regain possession of its property; requiring litigation of the related damage claims and potential counterclaims would frustrate, not promote, judicial efficiency. *See id.* at 705, 262 P.3d at 1137. So, we adopted the exception section 26(d) of the Restatement makes to claim preclusion, where a statutory scheme contemplates multiple actions on related claims. *Id.* at 707, 262 P.3d at 1139 ("adjudication of a [later-filed damages] claim should not be precluded when it appears 'from a consideration of the entire statutory scheme that litigation, which on ordinary analysis might be considered objectionable as repetitive, [was] intended to be permitted'") (quoting Restatement (Second) of Judgments § 26 cmt. e); *see Five Star*, 124 Nev. at 1058, 194 P.3d at 716 (recognizing "a public policy exception to claim preclusion in cases involving a determination of paternity") (citing Restatement (Second) of Judgments § 19 cmt. e).

Similar to the split-claim exception recognized in *G.C. Wallace*, the Restatement (Second) of Judgments endorses an exception to claim preclusion where an action seeking a declaratory judgment is followed by a later action for damages or other coercive relief:

> When a plaintiff seeks solely declaratory relief, the weight of authority does not view him as seeking to enforce a claim

> against the defendant. Instead, he is seen as merely requesting a judicial declaration as to the existence and nature of a relation between himself and the defendant. The effect of such a declaration, under this approach, is not to merge a claim in the judgment or to bar it. Accordingly, regardless of outcome, the plaintiff or defendant may pursue further declaratory or coercive relief in a subsequent action.

Restatement (Second) of Judgments § 33 cmt. c.[1] Like the majority of courts that have addressed the claim-preclusive effect of declaratory judgments, *Andrew Robinson Int'l, Inc. v. Hartford Fire Ins. Co.*, 547 F.3d 48, 56-57 (1st Cir. 2008) (collecting cases); 18 James Wm. Moore et al., *Moore's Federal Practice* § 131.24[3] (3d ed. 2017) (same), we find the Restatement's reasons for a declaratory judgment exception persuasive and therefore hold that claim preclusion does not apply where the original action sought only declaratory relief.

Claim preclusion is inconsistent with the legislative scheme providing for declaratory relief. The Uniform Declaratory Judgments Act, which Nevada adopted in 1929 and codified in NRS 30.010 to 30.160, 1929 Nev. Stat., ch. 22, § 16 at 30, contemplates "that declaratory actions are to supplement rather than supersede other types of litigation." *See* Restatement (Second) of Judgments § 33 cmt. c. Thus, the Uniform Act, as adopted in Nevada, provides that "[f]urther relief based on a declaratory judgment or decree may be granted whenever necessary or proper." NRS 30.100. Although the statute permits a party to seek damages or other coercive relief in a declaratory action, it also allows a party to pursue a separate damages action based on the rights established by the declaratory judgment. *Id.* (providing that "application [for further relief] shall be by petition to a court having jurisdiction to grant relief"); *Principal Mut. Life Ins. Co. v. Straus*, 863 P.2d 447, 451 (N.M. 1993) (explaining that when the declaratory relief action is limited to a request for declaratory judgment, "[r]equests for damages may then be pursued by separate litigation as supplement relief" under provision similar to NRS 30.100); *Bankers & Shippers Ins. Co. of N.Y. v. Electro Enters., Inc.*, 415 A.2d 278, 285 (Md. 1980) (interpreting provision similar to NRS 30.100 as "expressly permit[ting] a party to bring one action requesting only a declaratory judgment and then to bring a separate action for further relief based on the rights determined by that judgment"); *Winborne v. Doyle*, 59 S.E.2d 90, 93-94 (Va. 1950) (interpreting provision similar to NRS 30.100 to allow for further relief whether "by petition filed in [the declaratory

[1]In contrast, a declaratory judgment does have issue-preclusive effect as to "any issues actually litigated by [the parties] and determined in the action." Restatement (Second) of Judgments § 33.

relief action] or in a separate and independent action"). The statutory scheme providing for declaratory relief therefore is "antithetical" to claim preclusion, justifying an exception to its bar. Restatement (Second) of Judgments § 33 cmt. c; *cf.* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4415 (3d ed. 2016) (although courts should be cautious in applying exceptions to claim preclusion, "[s]pecial features of a statutory scheme also may suggest departure from ordinary rules of claim preclusion").

"A declaratory action is intended to provide a remedy that is simpler and less harsh than coercive relief . . . ." Restatement (Second) of Judgments § 33 cmt. c. It conserves judicial resources by providing a mechanism for courts "to clarify the legal relationships of parties before they have been disturbed thereby tending towards avoidance of full-blown litigation." *Andrew Robinson*, 547 F.3d at 58 (internal citations and quotation marks omitted); *see also Aronoff v. Katleman*, 75 Nev. 424, 432, 345 P.2d 221, 225 (1959) ("[A] declaratory judgment in essence does not carry with it the element of coercion as to either party. Rather, it determines their legal rights without undertaking to compel either party to pay money or to take some other action to satisfy such rights as are determined to exist by the declaratory judgment."). It would frustrate that purpose "were parties required to bring, as part of a declaratory judgment action, all conceivable claims and counterclaims on pain of preclusion," *Andrew Robinson*, 547 F.3d at 58, because "what would have been a simple declaratory judgment action [likely would] blow[ ] up to involve all related claims for coercive relief." *Stilwyn, Inc. v. Rokan Corp.*, 353 P.3d 1067, 1078 (Idaho 2015). Claim preclusion also conserves judicial resources by requiring parties to bring all related claims in a single action. *Five Star*, 124 Nev. at 1058, 194 P.3d at 715; *Andrew Robinson*, 547 F.3d at 58. But in weighing the competing policy concerns, we agree with the First Circuit that the Restatement "sensibly" concludes "that, on balance, public policy is furthered rather than retarded by the ready availability of a no-strings-attached declaratory remedy that is simpler, faster, and less nuclear than a suit for coercive relief." *Id*. at 58; *cf.* 18 Wright, Miller & Cooper, *supra*, § 4415 (observing that "[t]he values of repose and reliance [furthered by claim preclusion] are gained at the expense of denying any opportunity to litigate matters that . . . may involve valid rights to relief").

This case illustrates the utility of the declaratory judgment exception. Faced with an incipient dispute with Boca Park respecting the proper interpretation of the exclusivity provision in its lease, Higco sought only a declaration of the parties' rights in that respect. Higco has maintained (and Boca Park does not dispute) that it did not seek further relief in the first action because it believed that Boca

Park would honor a judgment declaring the parties' rights under the lease agreement, avoiding the need for coercive relief and conserving judicial resources. *See* Restatement (Second) of Judgments § 33 cmt. c ("[T]he declaratory plaintiff ought to be permitted to make a partial presentation of his side of the controversy, in the hope of preventing a full-blown claim from arising . . . ."). Start to finish, Higco's declaratory judgment action took less than nine months to reach final judgment. The current action, by contrast, has taken several years and a full-blown trial to resolve.

For the declaratory judgment exception to apply, the original action must have only sought declaratory relief. Restatement (Second) of Judgments § 33 cmt. c ("When a plaintiff seeks *solely* declaratory relief, the weight of authority does not view him as seeking to enforce a claim against the defendant.") (emphasis added); *see also id.* cmt. d ("[A] pleader demanding money damages may also ask for a corresponding declaration. For res judicata purposes, the action should be treated as an adversary personal action concluded by a personal judgment with the usual consequences of merger, bar, and issue preclusion."). Thus, if the plaintiff stated a claim for coercive relief in addition to declaratory relief in the original action, the exception does not apply. *E.g.*, *Laurel Sand & Gravel, Inc. v. Wilson*, 519 F.3d 156, 164 (4th Cir. 2008) ("While it is true that courts have limited the preclusive effect of declaratory judgments, declaratory judgments have no limiting effect if coercive relief such as damages or an injunction is also sought."). Boca Park suggests that Higco expanded upon the relief it was seeking in the original action when it asserted in its summary judgment motion that Boca Park had already breached the lease. But "[a] contract may be construed [in a declaratory relief action] either before or after there has been a breach thereof." NRS 30.050. Thus, the fact that Higco characterized Boca Park's decision to allow Wahoo's to also offer slot-machine gaming in the shopping center as a breach of the exclusive use clause in the Boca Park/Higco lease is immaterial.

No doubt Higco could have amended its declaratory judgment complaint to state a claim for damages or other coercive relief. And, the district court could have declined to proceed on the declaratory relief action after Higco suggested that Boca Park had already breached the lease agreement. *See* NRS 30.080 ("The court may refuse to render or enter a declaratory judgment or decree where such judgment or decree, if rendered or entered, would not terminate the uncertainty or controversy giving rise to the proceeding."); *see* Restatement (Second) of Judgments § 33 cmt. c ("[T]he court whose discretion is invoked by a declaratory action has means of preventing abuse. The court should lean toward declining the action if another remedy, such as a coercive action on an existing claim,

is plainly available and would have wider [claim preclusive] effects."). But neither of these eventualities materialized, probably because Boca Park did not include counterclaims in its answer or otherwise seek to expand the declaratory judgment action to address damages.[2] As Higco's original action sought only declaratory relief, the declaratory judgment exception to claim preclusion applies.

B.

A second, independent ground exists for denying claim-preclusive effect to the declaratory judgment Higco won: "A judgment in an action for breach of contract does not normally preclude a plaintiff from thereafter maintaining an action for breaches of the same contract that consist of failure to render performance due after commencement of the first action." Restatement (Second) of Judgments § 26 cmt. g. When Higco sued Boca Park for declaratory judgment, Wahoo's had yet to offer slot-machine gaming in the shopping center. After Wahoo's obtained its gaming license and opened for business with slot-machine gaming, Higco could have amended its complaint to add claims for contract damages or other coercive relief, but the law did not require that it do so.

III.

Because the original action between the parties sought only declaratory relief, claim preclusion did not bar the second action. Accordingly, the district court properly denied Boca Park's motion to dismiss this action based on claim preclusion. Boca Park does not raise any other arguments regarding the validity or amount of the judgment. We therefore affirm.

DOUGLAS and GIBBONS, JJ., concur.

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[2]This occurred in *Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015), where we applied claim preclusion to bar the later-asserted claims by the defendant to a declaratory judgment action based on the answer and counterclaims he asserted to his litigation adversary's complaint for declaratory relief. The party against whom claim preclusion applied did not argue that comment c to the Restatement (Second) of Judgments § 33 applied.

TAWNI MCCROSKY, INDIVIDUALLY AND AS THE NATURAL PARENT OF LYAM MCCROSKY, A MINOR CHILD, APPELLANT, *v.* CARSON TAHOE REGIONAL MEDICAL CENTER, A NEVADA BUSINESS ENTITY, RESPONDENT.

No. 70325

December 28, 2017 408 P.3d 149

Appeal from a district court judgment after jury verdict in a medical malpractice action. First Judicial District Court, Carson City; James Todd Russell, Judge.

Affirmed in part, reversed in part, and remanded.

Durney & Brennan, Ltd., and *Peter D. Durney* and *Allasia L. Brennan*, Reno, for Appellant.

Carroll, Kelly, Trotter, Franzen, McKenna & Peabody and *John C. Kelly, Robert C. McBride*, and *Chelsea R. Hueth*, Las Vegas, for Respondent.

Matthew L. Sharp, Ltd., and *Matthew L. Sharp*, Reno, for Amicus Curiae Nevada Justice Association.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

This medical malpractice suit requires us to reconsider under what circumstances a hospital can be vicariously liable for the alleged negligence of a doctor who works at the hospital as an independent contractor. The district court held that the hospital could not be liable, particularly when the doctor independently settled with the plaintiff and when the plaintiff signed forms stating that all doctors at the hospital are independent contractors. We disagree because Nevada law recognizes vicarious liability under these circumstances so long as an ostensible agency relationship existed between the hospital and the doctor. We reverse and remand for a jury to determine whether such an ostensible agency relationship existed under the facts of this case.

BACKGROUND

In September 2012, Tawni McCrosky learned from her primary family physician that she was pregnant. Her physician advised her to go to the Maternal Obstetrical Management (MOM's) clinic, a prenatal care clinic operated by Carson Tahoe Regional Medical

Center (CTRMC). The MOM's clinic is staffed by nurses and physicians who volunteer their time, including Dr. Hayes, the obstetrician who would later deliver McCrosky's child.

Every time McCrosky went to the MOM's clinic, she signed a "Conditions of Admissions (COA)." The COA was a two-page document listing twelve conditions. The sixth condition stated:

> All physicians and surgeons furnishing healthcare services to me/the patient, including the radiologist, pathologist, anesthesiologist, emergency room physicians, hospitalists etc., are independent contractors and are NOT employees or agents of the hospital. **I am advised that I will receive separate bills for these services.** _____ (Initial)

(Emphasis in the original.) This was the only condition on the COA that required the patient's initials. McCrosky initialed in the indicated space and signed her full name at the end of each form. She claims that she has no recollection of reading or signing these forms on five separate occasions. She alleges that they were handed to her without explanation.

On April 2, 2012, McCrosky preregistered with CTRMC to deliver her infant at the hospital. It is standard practice for expecting mothers at the MOM's clinic to preregister with CTRMC within three months of their expected delivery date. When she preregistered, McCrosky signed and initialed a COA identical to the five COAs she had previously signed at the MOM's clinic.

Twenty-two days later, McCrosky went into labor. When she arrived at CTRMC to deliver, Dr. Hayes was the obstetrician on call. Although Dr. Hayes volunteers at the MOM's clinic, she had never met McCrosky, and there is no indication that McCrosky selected Dr. Hayes to deliver her child. McCrosky did not sign a COA at this time.

The delivery did not go as planned. It resulted in McCrosky's child suffering permanent, debilitating injuries. McCrosky sued Dr. Hayes and CTRMC, alleging that they provided negligent care which proximately caused her son's injuries. McCrosky settled with Dr. Hayes prior to trial. In their settlement, McCrosky and Dr. Hayes signed a release which explicitly reserved "[a]ll rights against the hospital predicated upon the actions or omissions of Dr. Hayes."

McCrosky's suit against CTRMC was predicated on two theories. First was that CTRMC was directly negligent in its treatment. A jury rejected this claim after an eleven-day trial.

Second, McCrosky sought to hold CTRMC vicariously liable for Dr. Hayes's alleged negligence. McCrosky concedes that Dr. Hayes is an independent contractor rather than an employee of CTRMC; she is paid through Carson Medical Group to provide on-call obstetrical service at CTRMC. Nonetheless, McCrosky argues that a

reasonable patient in her position would have understood Dr. Hayes to be a CTRMC employee, making Dr. Hayes an ostensible agent of the hospital and exposing it to vicarious liability for Dr. Hayes's conduct.

CTRMC moved for partial summary judgment on the issue of vicarious liability. The district court granted that motion, finding that (1) NRS 41A.045 abrogates vicarious liability for providers of health care, (2) McCrosky's settlement with Dr. Hayes precluded additional recovery from CTRMC for Dr. Hayes's conduct, and (3) as a matter of law, Dr. Hayes was not an ostensible agent of CTRMC.

McCrosky appeals, challenging that order granting partial summary judgment, as well as the jury's finding that CTRMC was not directly negligent.

DISCUSSION

The district court erred in granting summary judgment on the issue of vicarious liability

We review a district court's order granting partial summary judgment de novo. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if no genuine issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id*. We view all evidence in a light most favorable to the nonmoving party. *Id.*

NRS 41A.045 does not abrogate vicarious liability

The district court found that NRS 41A.045 precludes CTRMC from being vicarious liable for Dr. Hayes's conduct. We disagree. NRS 41A.045(1) provides:

> In an action for injury or death against a provider of health care based upon professional negligence, each defendant is liable to the plaintiff . . . severally only, and not jointly, for that portion of the judgment which represents the percentage of negligence attributable to the defendant.

The purpose of NRS 41A.045(1) is "to abrogate joint and several liability of a provider of health care in an action for injury or death against the provider of health care based upon professional negligence." NRS 41A.045(2). In short, NRS 41A.045 substitutes a joint and several liability scheme—wherein each defendant is liable for all of the damages that joint defendants caused—for a several liability scheme, wherein a plaintiff "can recover only the defendant's share of the injured plaintiff's damages." *Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1008, 363 P.3d 1168, 1171 (2015).

Vicarious liability is related to but distinct from the concepts of several liability and joint and several liability. Vicarious liability is

"[l]iability that a supervisory party . . . bears for the actionable conduct of a subordinate . . . based on the relationship between the two parties." *Black's Law Dictionary* 1055 (10th ed. 2014). The supervisory party need not be directly at fault to be liable, because the subordinate's negligence is imputed to the supervisor. *See* Restatement (Third) of Torts: Apportionment of Liability § 13 (Am. Law Inst. 2000). Vicarious liability applies "regardless of whether joint and several liability or several liability is the governing rule." *Id*.

Because NRS 41A.045 is silent regarding vicarious liability, it leaves vicarious liability intact. *See, e.g.*, *Wiggs v. City of Phoenix*, 10 P.3d 625, 629 (Ariz. 2000) (holding that a statute abrogating joint liability left intact vicarious liability). An employer can be vicariously liable even in a several liability scheme. *See* Restatement (Third) of Torts: Apportionment of Liability § 13 (Am. Law Inst. 2000). For example, we may imagine a situation in which Defendants A and B each caused 50% of Patient's damages, and Hospital is vicariously liable for Defendant A's actions, but not for Defendant B's. Under a joint and several liability scheme, each defendant is liable for 100% of Patient's damages. Because Hospital is vicariously liable for Defendant A's share, Hospital would also be liable for 100% of the damages. By contrast, under NRS 41A.045's several liability scheme, each defendant is liable only for the damages he or she caused—here, 50% each. Because Defendant A is liable for 50% of Patient's damages, Hospital is vicariously liable for 50% as well.

In short, vicarious liability survives in the several liability scheme created by NRS 41A.045.

Settling with Dr. Hayes did not extinguish vicarious liability claims against CTRMC

The district court further held that McCrosky's settlement with Dr. Hayes "removed the basis for any additional recovery from [CTRMC] for Dr. Hayes' conduct. To hold otherwise would result in a double recovery for Plaintiffs . . . ." We disagree.

Under the common law, "the release of one tortfeasor automatically released all other potential tortfeasors." *Russ v. Gen. Motors Corp.*, 111 Nev. 1431, 1435, 906 P.2d 718, 720 (1995) (criticizing the common law rule as "harsh and without any rational basis"). Finding the common law rule unsatisfactory, the Nevada Legislature abrogated that rule with NRS 17.245, which establishes that one tortfeasor's settlement does not release others liable for the same tort unless the settlement so provides. *Id.* at 1437-38, 906 P.2d at 722.

NRS 17.245 applies to situations involving vicarious liability. *Van Cleave v. Gamboni Constr. Co.*, 101 Nev. 524, 529, 706 P.2d 845, 848 (1985). In *Van Cleave*, a plaintiff sued for injuries resulting from an automobile accident in which an employee of the Gamboni

Construction Company was the driver who caused the accident. *Id*. at 525, 706 P.2d at 846. The plaintiff and the employee settled and released the employee from liability, but their agreement expressly reserved the plaintiff's claims against other parties. *Id*. We held that "a release of one of two parties liable for Van Cleave's injuries 'does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide.'" *Id*. at 529, 706 P.2d at 849 (quoting NRS 17.245(1)(a)). We went on to hold that the employer remained vicariously liable. *Id*. at 529-30, 706 P.2d at 848.

Like the settlement in *Van Cleave*, McCrosky's settlement with Dr. Hayes expressly reserved all claims against the employer. Thus, under NRS 17.245, her settlement does not extinguish CTRMC's vicarious liability, nor will this determination result in a double recovery for McCrosky. Should McCrosky recover damages from the hospital on a vicarious liability theory, those damages will be reduced by the amount McCrosky already received from Dr. Hayes. *See* NRS 17.245(1)(a).

An issue of fact existed as to whether Dr. Hayes was an ostensible agent of CTRMC

As a third basis for granting CTRMC's motion for partial summary judgment, the district court determined that, as a matter of law, no ostensible agency relationship existed between McCrosky and CTRMC.

The general rule of vicarious liability is that an employer is liable for the negligence of its employee but not the negligence of an independent contractor. *See Oehler v. Humana Inc*., 105 Nev. 348, 351, 775 P.2d 1271, 1273 (1989). However, an exception exists "if the hospital selects the doctor and it is reasonable for the patient to assume that the doctor is an agent of the hospital." *Renown Health, Inc. v. Vanderford*, 126 Nev. 221, 228, 235 P.3d 614, 618 (2010). In such a scenario, "[t]he doctor has apparent authority to bind the hospital," making the hospital vicariously liable for the doctor's actions under the doctrine of ostensible agency. *Schlotfeldt v. Charter Hosp. of Las Vegas*, 112 Nev. 42, 48, 910 P.2d 271, 275 (1996). Whether an ostensible agency relationship exists "is generally a question of fact for the jury if the facts showing the existence of agency are disputed, or if conflicting inferences can be drawn from the facts." *Id.* at 47, 910 P.2d at 274.

> Typical questions of fact for the jury include (1) whether a patient entrusted herself to the hospital, (2) whether the hospital selected the doctor to serve the patient, (3) whether a patient reasonably believed the doctor was an employee or agent of the hospital, and (4) whether the patient was put on notice that a doctor was an independent contractor.

Id. at 49, 910 P.2d at 275.

The district court found that, although questions of fact exist with respect to *some* of the *Schlotfeldt* factors, the COA that McCrosky signed established as a matter of law that Dr. Hayes was an independent contractor. We disagree.

While section 6 of the COA declares that "[a]ll physicians . . . are independent contractors and are NOT employees or agents of the hospital," it is debatable whether a typical patient would understand that statement to mean that the hospital is not liable for a physician's negligence. On the one hand, the COA drew attention to section 6 among the twelve conditions because it alone required a patient's initials alongside it, and it was the only section that contained boldfaced text. On the other hand, section 6 says nothing about liability; it requires patients to infer that the hospital is not liable for the negligence of independent contractors.

Moreover, the last line of this section, which is bolded and directly next to the spot where patients initial, states: "**I am advised that I will receive separate bills for these services.**" Boldfaced text draws a reader's attention; that is why certain statutes and rules require specific text to be bolded to effectively put the reader on notice. *See, e.g.*, NRS 40.640(5) (requiring disclosed constructional defects to be underlined and bolded to absolve a contractor of liability); RPC 1.5(c) (requiring contingent fee agreements to be in boldface type). The boldfaced text in section 6 highlights the issue of billing rather than liability. A reasonable patient may interpret section 6 to inform her only that she will receive separate bills from the doctor and hospital.[1] She might fail to read or understand the preceding language regarding doctors' status as independent contractors.

We recognize that some of our sister courts have found waivers similar to section 6 to be sufficient, as a matter of law, to dispel an appearance of agency. *See, e.g.*, *Markow v. Rosner*, 208 Cal. Rptr. 3d 363, 368, 372 (Ct. App. 2016); *Brookins v. Mote*, 292 P.3d 347, 356-57 (Mont. 2012). Others have disagreed. *See, e.g.*, *Schroeder v. Nw. Cmty. Hosp*., 862 N.E.2d 1011, 1015, 1020 (Ill. App. Ct. 2006); *Boren v. Weeks*, 251 S.W.3d 426, 429, 437 (Tenn. 2008). Here in Nevada, *Schlotfeldt* made clear that notice is only one "[t]ypical" factor a factfinder should consider when evaluating ostensible agency. 112 Nev. at 49, 910 P.2d at 275. As the district court recognized, there are issues of fact surrounding the other three *Schlotfeldt* factors. And the most recent occasion on which McCrosky signed a COA was when she preregistered, 22 days before she met Dr. Hayes on the night she delivered. Under these circumstances, the language of the COAs is not so sufficiently clear as to dispel the appearance of agency as a matter of law. *Cf. Westpark Owners' Ass'n v. Eighth*

[1]While separate billing suggests that the physician is an independent contractor, we cannot hold as a matter of law that notice of separate billing is sufficient to dispel an ostensible agency relationship.

Judicial Dist. Court, 123 Nev. 349, 361 n.37, 167 P.3d 421, 429 n.37 (2007) (holding vague language insufficient to waive liability in a construction defect dispute).

Therefore, because material issues of fact exist as to whether ostensible agency existed, the district court erred in granting summary judgment on this issue.

The district court erred in allowing CTRMC to introduce evidence of collateral payments made on behalf of McCrosky

With regard to the trial against CTRMC on the issue of the hospital's alleged negligence, CTRMC moved in limine to introduce evidence that McCrosky received collateral payments from Medicaid, a program funded jointly by the state and federal governments. The district court granted that motion.

Because the jury did not find CTRMC to be negligent, it did not reach the issue of damages. However, this issue will almost certainly arise again at trial, so we take this opportunity to address whether collateral source evidence is admissible to reduce a plaintiff's recovery in a medical malpractice case.

Nevada has adopted a "*per se* rule barring the admission of a collateral source of payment for an injury into evidence for any purpose." *Proctor v. Castelletti*, 112 Nev. 88, 90, 911 P.2d 853, 854 (1996) ("Collateral source evidence . . . greatly increases the likelihood that a jury will reduce a plaintiff's award of damages because it knows the plaintiff is already receiving compensation."). NRS 42.021(1) created an exception to that rule in the medical malpractice context, allowing defendants such as CTRMC to introduce evidence of collateral payments that the plaintiff received from third parties. The purpose of this law, according to the summary that was presented to voters in the ballot initiative that enacted it, was to prevent "double-dipping"—that is, the practice of plaintiffs receiving payments from both health care providers *and* collateral sources for the same damages. Secretary of State, Statewide Ballot Questions 16 (2004), https://www.leg.state.nv.us/Division/Research/VoteNV/BallotQuestions/2004.pdf. To protect plaintiffs from having their awards overly diminished, however, the second half of the enacted statute—NRS 42.021(2)—prohibits collateral sources from also recovering directly from plaintiffs.

Federal law complicates matters. 42 U.S.C. § 2651(a) provides that when the United States is required to pay for medical treatment on behalf of an individual, and the hospital becomes liable in tort to that individual, "the United States shall have a right to recover . . . the reasonable value of the care and treatment so furnished," and the United States' right to payment is subrogated to the individual's claim against the hospital. In short, § 2651(a) allows the United States to recover from a plaintiff who prevails in a medical

malpractice suit the Medicaid payments the plaintiff received—exactly what NRS 42.021(2) prohibits. When state and federal law directly conflict, federal law governs. *See* U.S. Const. art. VI, cl. 2; *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370-71, 168 P.3d 73, 79-80 (2007). Therefore, federal law preempts NRS 42.021(2) from preventing recovery of federal collateral source payments, such as Medicaid payments.[2]

Because of this preemption, the issue becomes whether NRS 42.021(1) is severable from NRS 42.021(2), such that we may strike the latter while leaving the former intact. *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515, 217 P.3d 546, 555 (2009) ("[I]t is the obligation of the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional portions." (internal quotation marks omitted)). We may not do so if the two sections are "inextricably intertwined," whereby enforcing section 1 without section 2 would "create unintended consequences and frustrate the very object of the act." *Finger v. State*, 117 Nev. 548, 575-76, 27 P.3d 66, 84 (2001). Reading NRS 42.021 as a whole, section 1 benefits defendants by discouraging juries from awarding damages for medical costs that a plaintiff did not actually incur, but section 2 protects plaintiffs by prohibiting collateral sources from recovering against prevailing plaintiffs. Leaving NRS 42.021(1) intact while applying 42 U.S.C. § 2651(a) would doubly reduce a plaintiff's recovery in a medical malpractice suit: first, by likely reducing the amount that juries award to the plaintiff, *see Proctor*, 112 Nev. at 90, 911 P.2d at 854, and second, by allowing the United States to recover Medicaid payments to the plaintiff, 42 U.S.C. § 2651(a). There is no evidence that NRS 42.021 was intended to effectuate a *double* reduction in a plaintiff's recovery. Therefore, because severing NRS 42.021(2) from the statute would result in the "unintended consequence[ ]" of doubly reducing plaintiffs' recoveries, we must strike the statute in its entirety as applied to federal collateral source payments. *See Finger*, 117 Nev. at 575-76, 27 P.3d at 84.

Absent application of NRS 42.021 to federal collateral source payments, we revert to the *per se* rule in Nevada that collateral source payments may not be admitted into evidence. *See Proctor*, 112 Nev. at 90, 911 P.2d at 854. Thus, on remand, CTRMC may not introduce evidence of Medicaid payments made on behalf of McCrosky.

McCrosky's remaining claims of error are without merit

McCrosky's remaining claims of error relate to her trial against CTRMC for directly providing negligent care. First, she claims that

[2]We note, however, that NRS 42.021 remains intact with respect to state or private collateral source payments.

the district court erred in putting Dr. Hayes's name on the jury form when Dr. Hayes had previously settled and was therefore not a defendant in the case against CTRMC. We find no error with the district court's decision, which was squarely in line with our decision in *Piroozi*, 131 Nev. at 1009-10, 363 P.3d at 1172.[3] Second, McCrosky challenges the jury's verdict as being contrary to the evidence. After a careful review of the record, we do not find the jury's verdict to be "manifestly and palpably contrary to the evidence." *Price v. Sinnott*, 85 Nev. 600, 608, 460 P.2d 837, 842 (1969) (reviewing whether a verdict was contrary to the evidence when no motion for a directed verdict was made). Thus, we affirm the judgment on the jury's verdict as to CTRMC's alleged negligence.

CONCLUSION

For the reasons set forth above, we reverse the district court's order granting summary judgment on the issue of vicarious liability and remand for further proceedings because factual issues remain as to whether CTRMC is vicariously liable under the theory of ostensible agency. On remand, CTRMC may not introduce evidence of Medicaid payments made on behalf of McCrosky because NRS 42.021 is preempted by federal law. We affirm the jury's verdict regarding CTRMC's direct negligence.

HARDESTY and PARRAGUIRRE, JJ., concur.

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[3]We decline to overrule *Piroozi* because McCrosky has failed to present "compelling reasons for so doing." *Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008).