LEONIDAS P. FLANGAS, an Individual, Appellant, *v.* PERFEKT MARKETING, LLC, an Arizona Limited Liability Company, Respondent.

No. 81385

April 14, 2022 507 P.3d 574

Appeal from a district court order denying a motion to set aside a domesticated foreign judgment. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

Affirmed.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Christopherson Law Offices* and *Ian Christopherson*, Las Vegas, for Appellant.

The Law Office of Vernon Nelson and *Vernon A. Nelson, Jr.*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Cadish, J.:

Respondent judgment creditor domesticated a foreign judgment in Nevada within the rendering state's statute of limitations but did not perfect service of the domestication notice on appellant judgment debtor until after the rendering state's limitations period for judgment enforcement passed. The district court denied appellant's motion to set aside the judgment, determining that respondent timely domesticated the judgment in Nevada and that respondent's accomplishment of actual service of the domestication notice on a later date did not affect the judgment's enforceability. Appellant now argues that the judgment is invalid and unenforceable because respondent did not renew it in the rendering state before it served appellant with notice of the domestication, thereby allowing the judgment to expire in the meantime. Appellant also argues that enforcement of a foreign judgment under such circumstances violates a judgment debtor's due-process rights.

We conclude that under the Uniform Enforcement of Foreign Judgments Act, which Nevada has adopted, a foreign judgment is enforceable in Nevada if the judgment creditor domesticates that judgment according to the provisions of the Act within the rendering state's limitations period, and additionally, complies with the statutory notice provisions of the Act, which the district court cor-

[1]The Honorable Abbi Silver, Justice, is disqualified from participation in the decision of this matter.

rectly determined that appellant did here. We further conclude that enforcement of the foreign judgment does not violate due process because respondent served the domestication notice by certified mail, as required by statute, and this type of service is reasonably calculated to reach interested parties in this context. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Respondent Perfekt Marketing, LLC, obtained a judgment, entered on May 5, 2014, against appellant Leonidas Flangas in Arizona. On February 5, 2019, Perfekt Marketing domesticated the judgment by filing a certified copy of the foreign judgment and an affidavit of the foreign judgment's validity and enforceability, along with the names and last known addresses of the judgment debtor and creditor, respectively, in a Nevada district court. On February 6, 2019, Perfekt Marketing sent a notice of the filed application and affidavit by certified mail, return receipt requested, to Flangas's last-known address, as well as to the address of Flangas's attorney in Arizona. Additionally, Perfekt Marketing filed an affidavit of service with the Nevada district court to verify the date of service of the notice of the application and affidavit.

Perfekt Marketing never received confirmation by way of the return receipt that Flangas received the mailed notice. Thereafter, it attempted personal service of the notice on Flangas at the same, last-known personal address on four subsequent occasions. Perfekt Marketing accomplished personal service on Flangas on June 6, 2019, this time at the address of Flangas's law firm, approximately 120 days after the domestication notice was first mailed to Flangas and his Arizona attorney.

Thereafter, Flangas sought relief from the foreign judgment under NRCP 60(b). He argued that the Arizona judgment had expired, and thus, was void, because Perfekt Marketing failed to renew the judgment under Arizona law before it perfected personal service of the domestication notice on Flangas. Flangas also contended that the judgment was not entitled to full faith and credit because the delay in service of the domestication violated statutory-notice and due-process guarantees. Perfekt Marketing opposed and argued that the registration of a foreign judgment in Nevada domesticates the judgment in Nevada and triggers the six-year statute of limitations in Nevada for judgment enforcement. It contended that it properly domesticated the Arizona judgment, regardless of the timing of personal service, because it filed the judgment in Nevada before its expiration under the Arizona statute of limitations. The district court ultimately denied Flangas's NRCP 60(b) motion, concluding "that the filing date of the application of foreign judgment [was] the effective date of the" judgment in Nevada and "that there [was] no

requirement that the notice of foreign judgment be served upon [the] judgment debtor." Flangas now appeals.

DISCUSSION

Enforceability of a foreign judgment is not defeated if a judgment creditor domesticates the judgment before its expiration in the rendering state, notwithstanding that the judgment debtor receives notice of the filing after its purported expiration in the rendering state

Flangas argues that the date on which a judgment creditor provides actual notice of the filing of the foreign judgment to the judgment debtor serves as the operative date to determine whether a foreign judgment is valid and enforceable in a Nevada court. He asserts that the Arizona judgment had expired by the time Perfekt Marketing provided Flangas with actual notice of the domestication because the notice was not accomplished until after the Arizona statute of limitations for judgment enforcement had expired, and Perfekt Marketing failed to renew the judgment in Arizona before that expiration date. Further, he contends that Nevada courts cannot enforce an expired judgment, as it is no longer valid. We disagree.

Nevada's "enforcement measures" apply to the enforcement of foreign judgments. *See Baker v. Gen. Motors Corp.*, 522 U.S. 222, 235 (1998) ("Enforcement measures . . . remain subject to the even-handed control of forum law."). Nevada has adopted the Uniform Enforcement of Foreign Judgments Act (UEFJA) to govern the procedures to domesticate and enforce a foreign judgment in Nevada. *See* NRS 17.330-.400. A foreign judgment is "any judgment of a court of the United States or of any other court which is entitled to full faith and credit." NRS 17.340. The UEFJA mandates enforcement of "any foreign judgment" by providing that "[a]n exemplified copy of any foreign judgment may be filed with the clerk of any district court of this state. *The clerk shall treat the foreign judgment in the same manner as a judgment of the district court of this state*." NRS 17.350 (emphasis added). We have explained that this language means that the act of domesticating a "foreign judgment in a Nevada district court" creates "a new action for the purposes of the statute of limitations." *Trubenbach v. Amstadter*, 109 Nev. 297, 301, 849 P.2d 288, 290 (1993). The foreign judgment, in effect, becomes a Nevada judgment subject to Nevada's enforcement rules. *See id.*; *see also* NRS 17.350 ("A judgment so filed has the same effect and is subject to the same procedures, defenses and proceedings for reopening, vacating or staying *as a judgment of a district court of this state and may be enforced or satisfied in like manner*." (emphasis added)). Thus, contrary to Flangas's argument, the date a foreign judgment is filed in Nevada, as opposed to the date actual notice of the filing is accomplished, provides the relevant date to determine a foreign judgment's enforceability and validity. *Trubenbach*, 109

Nev. at 299-300, 849 P.2d at 289. Accordingly, we focus on whether the Arizona judgment was enforceable and entitled to full faith and credit at the time Perfekt Marketing filed a copy of the foreign judgment in Nevada district court.

Here, the parties do not dispute that the foreign judgment remained enforceable under Arizona law when Perfekt Marketing domesticated the judgment in Nevada before its expiration under the Arizona statute of limitations. *See generally* Ariz. Rev. Stat. Ann. § 12-1551(A) (2013) (providing that a judgment is enforceable "at any time within five years"). Because the date of filing is operative in determining enforceability, and because Perfekt Marketing registered the judgment in Nevada within Arizona's limitations period, the Arizona judgment never expired. Thus, the district court properly determined that renewal was not required to enforce the judgment. *See Tandy Comput. Leasing v. Terina's Pizza, Inc*., 105 Nev. 841, 844, 784 P.2d 7, 8 (1989) (reviewing a decision on a motion to set aside a foreign judgment for an abuse of discretion); *Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1435, 148 P.3d 710, 714 (2006) (observing that the district court abuses its discretion when it makes an "arbitrary or capricious" decision or "exceeds the bounds of law or reason" (internal quotations omitted) (quoting *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001))).

Moreover, the six-year statute of limitations that governs the judgment's enforcement in Nevada began to accrue on February 5, 2019, when Perfekt Marketing filed the application, copy, and affidavit of the foreign judgment. *See Trubenbach*, 109 Nev. at 301, 849 P.2d at 290 (explaining that domestication of a foreign judgment according to the UEFJA's requirements triggers the six-year statute of limitations that governs judgment enforcement in Nevada); *see also* NRS 11.190(1)(a) (permitting a judgment creditor to enforce any "judgment or decree of any court of the United States, or of any state or territory within the United States" for six years). Regardless of whether actual notice was even required, Flangas received actual notice of the judgment before its expiration under the Nevada statute of limitations. Thus, we turn to the remaining issue of whether the Arizona judgment was entitled to full faith and credit when Perfekt Marketing filed the judgment in Nevada.

The Arizona judgment was entitled to full faith and credit when Perfekt Marketing filed it in Nevada district court

Flangas argues that the Arizona judgment is not entitled to full faith and credit because the Arizona statute of limitations expired before Perfekt Marketing accomplished actual notice of the domestication of the foreign judgment. Additionally, he argues that the Arizona judgment is invalid on full-faith-and-credit grounds because present enforcement of the judgment denies him present due process of law. We disagree.

A foreign judgment is entitled to full faith and credit if it constitutes a valid and final judgment of the rendering state. *Clint Hurt & Assocs., Inc. v. Silver State Oil & Gas Co.*, 111 Nev. 1086, 1088, 901 P.2d 703, 705 (1995). A foreign judgment's validity is vulnerable to attack only on "a showing of fraud, lack of due process, or lack of jurisdiction in the rendering state." *Id.* Plainly, then, a rendering state's statute of limitations does not relate to the judgment's validity, and thus, does not provide a basis for a court to refuse to recognize a foreign judgment as entitled to full faith and credit. *See Baker*, 522 U.S. at 235; *see also, e.g.*, *M'Elmoyle ex rel. Bailey v. Cohen*, 38 U.S. 312, 328 (1839) (applying forum's statute of limitations to bar enforcement of a valid and enforceable foreign judgment); *Boudette v. Boudette*, 453 P.3d 893, 896-97 (Mont. 2019) (applying Montana's ten-year statute of limitations to enforcement of an Arizona divorce decree that was registered in Montana under the UEFJA and reversing the trial court's order granting the husband's motion to extinguish the judgment on the basis that it expired under Arizona's five-year judgment-enforcement limitation period while recognizing that "the Full Faith and Credit Clause does not compel the forum state to use the period of limitation of a foreign state" (quoting *Wells v. Simonds Abrasive Co.*, 345 U.S. 514, 517 (1953))), *cert. denied*, ___ U.S. ___, 140 S. Ct. 2811 (2020); *see also* U.S. Const. art. IV, § 1 ("Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State."). In this vein, we have acknowledged that the full-faith-and-credit doctrine does not prevent states from applying the statutes of limitations of their forums to the enforcement of foreign judgments, even if such application bars enforcement of otherwise valid and final judgments. *See Trubenbach*, 109 Nev. at 300, 849 P.2d at 289-90. We also recognized that a judgment's validity presents a distinct question from its enforceability based on the statute of limitations. *See id.* at 298-99, 849 P.2d at 289 (noting that "[t]he parties agree[d] that the [foreign] judgment [wa]s valid" before discussing "what date triggers commencement of the [Nevada] statute of limitations" for the judgment's enforcement).

Here, Flangas challenges the validity of the Arizona judgment by claiming that the statute of limitations in Arizona expired before he received notice of the filing. However, a state's statute of limitations does not bear on the validity of the judgment. Instead, the dispositive issue is whether a full-faith-and-credit ground exists to refuse to recognize the judgment. Flangas offers none. He does not argue that Perfekt Marketing procured the judgment by fraud, that the rendering court lacked subject-matter or personal jurisdiction, or that the rendering court deprived him of due-process protections.[2] Nor

[2]Flangas's contention that enforcement of the Arizona judgment in Nevada denies him due process of law, and thus, renders the judgment invalid is legally insufficient under the full-faith-and-credit doctrine. A foreign judgment is

does the record support such claims. Accordingly, the Arizona judgment was entitled to full faith and credit. In these circumstances, the UEFJA mandates enforcement of the Arizona judgment. *See* NRS 17.350. Thus, we conclude that the district court did not abuse its discretion in recognizing and enforcing the Arizona judgment in Nevada.

The UEFJA's notice provisions are reasonably calculated to notify a judgment debtor of a judgment-enforcement proceeding, and Perfekt Marketing complied with its requirements

Flangas argues that the UEFJA's notice provisions violate due process, as those provisions do not require judgment creditors to ensure judgment debtors receive actual notice, and instead, allow creditors to notify judgment debtors of judgment-enforcement proceedings by certified mail, return receipt requested. He also contends that Perfekt Marketing failed to promptly comply with the UEFJA's requirements because it provided actual notice of the domestication four months after it filed the foreign judgment in Nevada. We disagree.

The UEFJA requires a judgment creditor, "[p]romptly upon filing the foreign judgment and affidavit," to "mail notice of the filing of the judgment and affidavit . . . to the judgment debtor and to the judgment debtor's attorney of record, if any, each at his or her last known address by certified mail, return receipt requested." NRS 17.360(2). The judgment creditor must also "file with the clerk of the court an affidavit setting forth the date upon which the notice was mailed." *Id.* However, the judgment creditor does not need to verify with the court that the certified-mailing receipt was returned, i.e., received, by the judgment debtor. *See id.* NRS 17.360(3) also delays "execution or other process for enforcement of a foreign judgment . . . until 30 days after the date of mailing the notice of filing" without reference to when the judgment debtor receives actual notice, if at all.

The issue of whether the absence of an actual-notice requirement under the UEFJA violates due process is one of first impression, which we review de novo. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007) (applying de novo review in considering the constitutionality of a statute). Actual notice means that an interested party in fact receives notice of any action against them. *See Dusenbery v. United States*, 534 U.S. 161, 169 (2002). The U.S. Supreme Court has declined to adopt bright-line rules or methods for constitutionally sufficient notice, and

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invalid under the full-faith-and-credit doctrine if the *rendering court* denied the judgment debtor due process *at the time the judgment was entered*. *See Clint Hurt*, 111 Nev. at 1088, 901 P.2d at 705. Flangas neither alleged facts to support that he was denied due process by the Arizona court nor presented any evidence thereof.

instead, has distinguished between "actual notice" and notice sufficient to satisfy due process. *E.g.*, *Jones v. Flowers*, 547 U.S. 220, 226 (2006); *Dusenbery*, 534 U.S. at 170. In so doing, the Supreme Court, and this court, have required "notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections" before a party is deprived of a protected property or liberty interest. *Grupo Famsa, S.A. de C.V. v. Eighth Judicial Dist. Court*, 132 Nev. 334, 337, 371 P.3d 1048, 1050 (2016) (internal quotations omitted) (quoting *Mullane v. Cent. Hanover Bank & Tr. Co.*, 339 U.S. 306, 314 (1950)). Thus, due process does not require, as a matter of right, receipt of actual notice in every context. *See, e.g.*, *Jones*, 547 U.S. at 226. Instead, the focus is on whether the method chosen is "reasonably calculated" to provide actual notice. *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478, 484 (1988). That determination considers "the reasonableness of . . . a particular method" in light of "the particular circumstances" in which the need for the method arises. *Id.*; *see also Grupo Famsa*, 132 Nev. at 337, 371 P.3d at 1050.

Unsurprisingly, the Supreme Court has expressly approved of the use of mail to accomplish the notice element of due process. *Tulsa Prof'l*, 485 U.S. at 489-90 (concluding that service by mail constituted "an inexpensive and efficient mechanism . . . reasonably calculated to provide actual notice"). It has also determined that the government may use certified mail to provide notice to those affected by an action. *See Jones*, 547 U.S. at 226-27. In *Jones*, the Supreme Court considered whether a state's method to provide notice to debtors by certified mail of tax delinquencies that entitled the state to sell their properties satisfied the reasonably calculated standard. *Id.* at 223, 226. It cautioned that notification by certified mail "make[s] actual notice less likely *in some cases*," and therefore, the method potentially necessitates "reasonable followup measures" by government officials, such as a "notice [posted] on the front door" of a debtor's property, once those officials realize that the chosen method failed to accomplish notice. *Id.* at 234-35 (emphasis added). Because state officials there became aware that the debtor never retrieved the certified mailing, it became necessary for the officials to "take[ ] additional reasonable steps to notify" the debtor. *Id.* at 234.

The circumstances in *Jones*, where the government sought to deprive debtors of property *ex ante* to a judicial proceeding, are not analogous to the circumstances here, where a judgment creditor seeks to enforce a valid and final judgment. A post-judgment proceeding to enforce a judgment between private parties presents a meaningfully distinct situation from the underlying action that gave rise to the judgment. By the time the judgment creditor seeks to enforce the judgment, the judgment debtor has received notice

of and the opportunity to participate in the underlying action. *Cf.* NRCP 4.2(a)(2) (providing methods by which to serve a summons and copy of a complaint, such as "by leaving a copy of [both] . . . at the individual's dwelling or usual place of abode with a person of suitable age and discretion who currently resides therein"). Further, the judgment debtor has either appealed or forgone the right to appeal the underlying action to the full extent permitted by the rendering state's law. Therefore, unless obtained by default, a judgment debtor knows of the existence of the judgment against them and should expect future enforcement of the judgment. Additionally, the lack of a return receipt alerts the judgment creditor that additional steps may be needed to accomplish actual notice. Indeed, Perfekt Marketing took those steps to provide Flangas with notice after it became aware that Flangas did not receive the mailed notice, as it eventually served him with notice at alternate addresses.

Due-process jurisprudence recognizes a sliding scale that demands more protections the more substantial the intrusion or deprivation of a constitutionally protected right. *Cf. Valdez-Jimenez v. Eighth Judicial Dist. Court*, 136 Nev. 155, 165, 460 P.3d 976, 987 (2020) (concluding that "additional procedural safeguards are necessary before bail may be set in an amount that results in continued detention"). Not only does mail notice qualify as reasonably calculated to apprise interested parties of a proceeding, but also certified-mail notice here follows underlying completed litigation and concerns post-judgment enforcement.[3] We thus agree with those jurisdictions that have addressed notice provisions similar to the one at issue here and have concluded that post-judgment enforcement tolerates less robust notice provisions, as the judgment debtor has already litigated his rights and obligations. *See, e.g.*, *Gedeon v. Gedeon*, 630 P.2d 579, 582-83 (Colo. 1981) (concluding that a notice-by-mail requirement under Colorado's version of the UEFJA satisfied due process because "the debtor's interest in . . . his property . . . ha[d] already been protected by prior notice and hearing"); *Wells Fargo Equip. Fin., Inc. v. Retterath*, 928 N.W.2d 1, 10 (Iowa 2019) (same). Accordingly, we conclude the UEFJA's requirement that a judgment creditor send notice of the filing by certified mail with return receipt requested to the judgment debtor and his attorney at each's last-known address provides a method reasonably calculated to inform the judgment debtor of a post-judgment enforcement proceeding and to protect the judgment debtor's due-process rights and property interests.

Flangas does not dispute that Perfekt Marketing complied with the statutory requirements to send the notice of the filing and the affidavit by certified mail, return receipt requested, to him and his

[3]Additionally, post-judgment enforcement in Nevada provides protections to judgment debtors against wrongful deprivation of property. *See, e.g.*, NRS 21.075 (providing requirements for the content of a writ of execution).

attorney and to file an affidavit that verified the date of the certified mailing. Instead, he contends that the four months Perfekt Marketing took to accomplish actual notice through personal service was not prompt. We disagree, however, because the date when Flangas received the notice of the domestication is irrelevant to the issue of promptness in light of our conclusion that the certified-mail provision in NRS 17.360(2) satisfies due process. The record supports that Perfekt Marketing mailed the notice one day after it filed the foreign judgment. Thus, we conclude that Perfekt Marketing exercised due diligence.[4] Accordingly, enforcement of the Arizona judgment in Nevada does not violate Flangas's procedural due-process rights.[5]

Enforcement of the Arizona judgment in Nevada does not deprive Flangas of the opportunity to be heard

Flangas argues that enforcement of the Arizona judgment deprives him of due process because actual notice after the purported expiration of the Arizona judgment deprived him of defenses under Arizona law, which he does not identify, to attack the Arizona judgment. He says, without citation to authority, that the expiration of the Arizona judgment precludes him from raising a collateral attack on the judgment in an Arizona forum. Along the same lines, he also contends that he lost the ability to raise defenses under the UEFJA, which, again, he fails to identify. While Flangas bears "responsibility to present relevant authority and cogent argument," and "issues not so presented need not be addressed by this court," *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987), we nevertheless review de novo the district court's decision to enforce the judgment based on Flangas's claim that it implicates constitutional issues, *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007). However, we conclude that Flangas is not entitled to reversal because he has not established that any delay in serving notice of the judgment's domestication in Nevada deprived him of otherwise available Arizona and UEFJA defenses, and thus, due process.

Procedural due process guarantees the opportunity to present every available defense. *Nicoladze v. First Nat'l Bank of Nev.*, 94

[4]In any event, Perfekt Marketing accounted for the fact that Flangas did not receive the certified-mail notice by attempting on several occasions, and eventually accomplishing, personal service. *Cf. Jones*, 547 U.S. at 230.

[5]Flangas also disputes that Perfekt Marketing mailed the notice to a viable, last-known address. He points to no evidence in the record to support his claim, and instead, relies on arguments made by his attorney, one of which occurred after the district court issued its appealed order. Attorney statements are not evidence. *See, e.g.*, *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). Because Flangas fails to offer support in the record for his assertion, and because he did receive actual notice of the filing, we decline to consider this argument.

Nev. 377, 378, 580 P.2d 1391, 1391 (1978). "[T]he defenses preserved by Nevada's [UEFJA] and available under NRCP 60(b) are limited to those defenses that a judgment debtor may constitutionally raise under the" Full Faith and Credit Clause and that concern "the validity of the foreign judgment." *Rosenstein v. Steele*, 103 Nev. 571, 573, 747 P.2d 230, 232 (1987); *see also* NRS 17.350 (providing that a filed foreign judgment "is subject to the same . . . defenses . . . as a judgment of a district court of this state"). The Full Faith and Credit Clause limits attacks on a foreign judgment to those that concern fraud, lack of jurisdiction, and lack of due process at the time the rendering state entered the judgment. *Rosenstein*, 103 Nev. at 573, 747 P.2d at 231-32. Similarly, the rule against collateral attacks on a final judgment applies to the enforcement of domesticated judgments and limits challenges to the grounds that "the issuing court lacked personal jurisdiction or subject matter jurisdiction." *State v. Sustacha*, 108 Nev. 223, 226 n.3, 826 P.2d 959, 961 n.3 (1992).

Flangas does not point to any defenses under Arizona law that he lost because of the alleged delay in receiving actual notice. Indeed, he cannot identify those defenses because Arizona law, like Nevada law, allows a collateral attack on a judgment only on the grounds that the issuing court lacked personal or subject-matter jurisdiction. *See Walker v. Davies*, 550 P.2d 230, 232 (Ariz. 1976). Even if Flangas had actual notice of the filing before May 5, 2019, he still would lack any ability to attack the judgment on its substantive merits. More importantly, full faith and credit, not the date of actual notice of the domestication, limits Flangas's ability to attack the validity of the Arizona judgment. Those defenses under the Nevada UEFJA are virtually the same, or even more robust, than Arizona's rule against collateral attacks: fraud, lack of jurisdiction, and lack of due process. Thus, enforcement of the foreign judgment in these circumstances does not deprive Flangas of the opportunity to present defenses to attack the Arizona judgment because he never possessed, either under full faith and credit or under Arizona law, additional grounds beyond fraud, lack of jurisdiction, and lack of due process.[6]

CONCLUSION

Under the UEFJA, Nevada courts must enforce any foreign judgment entitled to full faith and credit as if that judgment was

[6]Flangas also argues that enforcement of the Arizona judgment deprives him of defenses under a settlement agreement. However, he did not offer a copy of the agreement in district court and thus the record contains no such agreement, and his alleged "numerous factual references" to the agreement below and on appeal do not prove the agreement's existence and content. We decline to address this claim of error, as "[w]e cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981) (refusing to consider a claim of error based on a document that does not appear in the record).

rendered in this state. The district court properly concluded that a foreign judgment's enforceability is determined on the date the foreign judgment is domesticated in Nevada district court pursuant to NRS 17.360(2), and that a domesticated foreign judgment is enforceable in Nevada for six years from the date of registration according to NRS 11.190(1)(a). Perfekt Marketing filed the copy of the foreign judgment and affidavit, as required by NRS 17.360(2), within the Arizona statute of limitations, and no full-faith-and-credit grounds exist to attack the Arizona judgment. Therefore, the foreign judgment is enforceable in Nevada as if it was rendered by a Nevada court.

We also conclude that the certified-mail method under NRS 17.360(2) is reasonably calculated to apprise a judgment debtor of a post-judgment enforcement proceeding, as it follows underlying litigation in which the judgment debtor's rights and liabilities were adjudicated. Flangas was not deprived of due process here because Perfekt Marketing sent, one day after it filed the judgment, the notice of the filing and the affidavit by certified mail, return receipt requested, to Flangas and his attorney at their last-known addresses. And although not required as a matter of course, Perfekt Marketing personally served the notice after it became aware that Flangas had not received the certified mailing. Finally, we conclude that enforcement of the Arizona judgment, which was registered in Nevada before it expired in Arizona, does not deprive Flangas of any defenses, as his defenses are inherently limited by the Full Faith and Credit Clause, regardless of the date he received actual notice of the domestication. Accordingly, we affirm the district court's order denying Flangas relief from the foreign judgment.

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

GAVIN COX; AND MIHN-HAHN COX, HUSBAND AND WIFE, APPELLANTS, *v.* DAVID COPPERFIELD, AKA DAVID S. KOTKIN; MGM GRAND HOTEL, LLC; BACKSTAGE EMPLOYMENT AND REFERRAL, INC.; DAVID COPPERFIELD'S DISAPPEARING, INC.; AND TEAM CONSTRUCTION MANAGEMENT, INC., RESPONDENTS.

No. 76422

April 14, 2022 507 P.3d 1216

Appeal from a district court judgment entered on a jury verdict and from a post-judgment order denying a motion for a new trial and for partial judgment as a matter of law in a personal injury action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

Affirmed.

[Rehearing denied June 1, 2022]

STIGLICH, J., with whom PARRAGUIRRE, C.J., agreed, dissented.

Harris & Harris, Injury Lawyers, and *Heather E. Harris* and *Brian K. Harris*, Las Vegas; *Morelli Law Firm, PLLC*, and *Benedict P. Morelli, Perry S. Fallick*, and *Sara A. Mahoney*, New York, New York, for Appellants.

Selman Breitman, LLP, and *Elaine K. Fresch* and *Gil Glancz*, Las Vegas, for Respondents David Copperfield and David Copperfield's Disappearing, Inc.

Selman Breitman, LLP, and *Jerry C. Popovich* and *Gil Glancz*, Las Vegas, for Respondent MGM Grand Hotel, LLC.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *Howard J. Russell* and *D. Lee Roberts, Jr.*, Las Vegas, for Respondent Backstage Employment and Referral, Inc.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith*, and *Chelsee C. Jensen*, Las Vegas, for Respondent Team Construction Management, Inc.

Before the Supreme Court, EN BANC.[1]

[1]The Honorable Abbi Silver, Justice, voluntarily recused herself from participation in the decision of this matter. The Honorable Mark Gibbons, Senior Justice, was appointed to sit in her place. The case was initially argued before a three-justice panel, then transferred and reargued before the en banc court.

OPINION

By the Court, Pickering, J.:

This is an appeal from a judgment on a defense verdict in a personal injury case. Appellants complain that the district court's evidentiary and instructional errors prejudiced their case, requiring reversal and remand for a new trial. Chief among the errors claimed is the district court's decision to admit six surveillance videos of appellant Gavin Cox walking easily and without assistance outside of court. The videos contradicted Cox's in-court presentation, where he used his attorney's or the marshal's arm to walk to and from the witness stand and testified that he uses assistance to walk even when not in court.

The videos qualified as impeachment-by-contradiction evidence, and the district court did not abuse its discretion in admitting them. The other claimed errors—that the district court did not adequately admonish defense counsel for improper statements during closing argument; that it misapprehended the record when it allowed the jury to consider comparative negligence; that it should have granted a new trial because the jury could not have followed the court's instructions and still returned the verdict it did; and that it should have told the jury why it canceled a jury view—also fall short. Most involve matters entrusted to the district court's sound discretion; some, the Coxes invited or failed to preserve; and none supports that the district court abused its discretion in denying a new trial. We therefore affirm.

I.

A.

Cox attended respondent David Copperfield's magic show at the MGM Grand Hotel in Las Vegas. Cox volunteered, and Copperfield chose Cox, as one of 13 audience participants in the show's "Lucky #13" illusion. The illusion begins with the audience participants sitting in two rows of chairs in an on-stage prop. A curtain is draped around the prop, the prop is illuminated, and the participants (apparently) disappear. While this is going on, employees of respondent Backstage Employment and Referral, Inc. (Backstage) guide the participants through a "runaround" route: out of the prop, down several stairs, through a hallway and, eventually, outdoors. The participants proceed along a stretch of the MGM's exterior, then reenter and reappear at the back of the showroom, as if by magic.

Cox fell during the outdoor portion of the runaround. The parties dispute where Cox fell and why. The Coxes allege, and Cox testified, that the outdoor portion of the runaround was intermittently dark, then light, and that he slipped on construction dust and fell while running as fast as he could up an unsafely sloped ramp.

Respondents maintain, and presented evidence to support, that Backstage employees guided participants through the route with lights, that they led the group along at a "brisk walk" or "light jog," and that Cox fell on level concrete, 15 or more feet away from the ramp. Respondents also presented experts, who examined the available evidence and opined that Cox tripped—not slipped—when he failed to pick up his foot and caught his toe on the ground.

B.

Cox and his wife, Minh-Hahn Cox, sued Copperfield—both individually and through his corporation, David Copperfield's Disappearing, Inc. (collectively, Copperfield)—MGM Grand Hotel, LLC, Backstage, and Team Construction Management, Inc. (Team) for negligence; respondeat superior; negligent hiring, training, and supervision; loss of consortium; and punitive damages, seeking over $1 million in damages for the traumatic brain, spine, and shoulder injuries that Cox allegedly suffered from the fall.

On respondents' motion, the district court bifurcated the trial into two phases: liability and damages. The Coxes opposed bifurcation, arguing that it would unfairly prevent them from explaining to the jury how Cox's injuries have affected him and the way he presents himself.[2] To address the Coxes' concerns, the district court crafted a unique bifurcation order. While the order generally precluded medical or other evidence relating to damages during the first phase of the trial, it permitted the Coxes to present evidence "concerning the nature of the injuries claimed," specifically, "what Mr. Cox alleges his injuries generally are and to establish that Mr. Cox may have less than a clear recollection of the events on the night of the fall."

Even bifurcated, the first phase of the trial took seven weeks. Before Cox testified, the judge gave the jury a preliminary instruction about Cox's alleged brain injury:

> Ladies and gentlemen, Mr. Cox alleges that, as a result of this accident, one of the injuries he sustained was a traumatic brain injury which may affect the way he testifies during this trial. You may take this allegation into consideration when you are evaluating his testimony.

On direct examination, Cox testified about his injuries:

> I hit the ground. And . . . I felt a pain shoot through me like I never, ever felt before. It was like a lightning bolt going through the whole of my shoulder and left-hand side.
>
> I'm in agony . . . . I am in so much pain . . . . I'm hurting and I'm hurt.

[2]We do not consider the propriety of the bifurcation order because the Coxes do not raise it as an issue on appeal.

The district court overruled respondents' objection to this testimony, deeming it permissible under the flexible parameters of the bifurcation order. Cox continued:

> I was sat down with my shoulder hanging in the center of my chest. . . . [Copperfield] said, "Are you hurt?" And I said yes.

Cox did not just verbalize his injuries to the jury. He also visually presented himself to the jury as a person who needs assistance to walk. Over the two days his testimony spanned, Cox used his attorney's or the marshal's arm as support to walk to and from the witness stand. Up to that point in the trial, he had also used help to come and go from the courtroom.

On cross-examination, Backstage's attorney asked Cox if he used assistance to walk when not in the jury's presence. Cox answered that he did. Backstage later moved to admit six 30-second video clips of Cox walking normally and without physical assistance outside of court. These videos show Cox walking his dog on a leash, with his wife, and with his family on the way to trial, all unassisted. Over the Coxes' objection that conduct is not testimony and cannot be impeached, the court admitted the videos, stating that "I consider[ ] that whatever has happened in open court is fair game. And, accordingly, I'll permit the video." Respondents played the videos for the jury alongside courtroom footage of Cox walking with assistance to and from the witness stand.

Closing arguments focused on the conflicts in the evidence—including between Cox's trial and deposition testimony—as to the circumstances of his fall. Respondents urged the jury to consider the difference between the way Cox walked in court and in the videos in assessing Cox's credibility. MGM's counsel, Jerry Popovich, went further and argued that Cox has "been manipulating this jury from day one with every move he made. You shouldn't believe a word that comes out of his mouth . . . . He just wants a payoff." After the lunch recess, the Coxes objected to Popovich's comments but added "we're not asking for a mistrial. We're asking for an admonition." The district judge sustained the objection and, when the jury returned from lunch, admonished them to disregard Popovich's remarks.

The Coxes moved for judgment as a matter of law on respondents' comparative negligence defense. The district court denied their motion and instructed the jury on both negligence and comparative negligence. After deliberation, the jury returned a special verdict finding that Backstage and Team Construction were not negligent; that MGM and Copperfield were negligent but that their negligence was not the proximate cause of Cox's fall; and that Cox was comparatively negligent and 100 percent the cause of his fall. Renewing their earlier motion, the Coxes moved for judgment as a matter of law on respondents' comparative negligence defense. They also moved for a new trial under NRCP 59(a). The district court denied both motions, and the Coxes timely appealed.

II.

On appeal, the Coxes contend that the district court abused its discretion in denying their motion for a new trial under NRCP 59(a)(1). *See Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 74, 319 P.3d 606, 611 (2014) ("This court reviews a district court's decision to grant or deny a motion for a new trial for an abuse of discretion."). They assert that the district court erred, prejudicing their right to a fair trial, when it (1) admitted the sub rosa videos, (2) did not adequately admonish defense counsel for improper argument, (3) allowed the jury to consider comparative negligence, (4) did not find that the jury manifestly disregarded the instructions in reaching its verdict, and (5) did not tell the jury why it canceled the jury view. To be entitled to a new trial, the movant must establish *grounds*, *see* NRCP 59(a)(1) (listing as grounds for granting a new trial: "(A) . . . abuse of discretion by which either party was prevented from having a fair trial; (B) misconduct of the . . . prevailing party; . . . (E) manifest disregard by the jury of the instructions of the court; . . . [and] (G) error in law occurring at the trial and objected to by the party making the motion") and *prejudice* "materially affecting the substantial rights of the moving party." *Id.*; *see also Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 263-64, 396 P.3d 783, 786 (2017) ("[E]ven if one of NRCP 59(a)'s new-trial grounds has been established, the established ground must have 'materially affected the substantial rights of the aggrieved party' to warrant a new trial.") (quoting NRCP 59(a) (2019)).

A.

A district court's "decision to admit or exclude evidence [is reviewed] for abuse of discretion" and will not be disturbed "absent a showing of palpable abuse." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 913, 193 P.3d 536, 544 (2008). Over the Coxes' objection, the district court admitted six 30-second videos that showed Cox walking normally and without assistance outside of court. The district court admitted the videos to impeach Cox's in-court presentation of disability. In court, Cox walked with difficulty, using his lawyer's or the court marshal's arm for support, and testified that he also used assistance to walk when not in court.

The district court did not abuse its discretion in admitting the videos as impeachment-by-contradiction evidence. "Impeachment by contradiction occurs when a party offers evidence to prove that a fact to which a witness testified is not true." 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6096, at 655 (2d ed. 2007). Long recognized at common law, *see Jezdik v. State*, 121 Nev. 129, 136, 110 P.3d 1058, 1063 (2005), impeachment by contradiction is implicitly authorized by NRS 50.075 (providing that "[t]he credibility of a witness may be attacked by any party") and its federal cognate, Federal Rule of Evidence (FRE) 607. *United States v.*

Greenridge, 495 F.3d 85, 99 (3d Cir. 2007); *see also Jezdik*, 121 Nev. at 138-39, 110 P.3d at 1064. Contradiction evidence undermines credibility in two ways: "First, it permits the inference that the witness either lied or at least was mistaken with respect to the specific facts contradicted." 27 Wright & Gold, *supra*, at 656. Second, "since contradiction tends to show that the witness has erred or lied with respect to some facts, the jury could infer that the witness is generally an unreliable source of information and erred or lied with respect to other facts." *Id.* at 657.

The Coxes do not and did not in district court dispute the videos' authenticity but do make four distinct arguments why the district court should not have admitted them. First, they argue that the videos were not admissible to impeach Cox's conduct because only sworn verbal testimony is impeachable. Second, they argue that admitting the videos violated NRS 50.085(3), which prohibits the introduction of extrinsic evidence to prove a witness's bad character for truthfulness. Third, they argue that the videos were irrelevant to the liability phase of a bifurcated trial and therefore inadmissible because collateral to the matter. Finally, they maintain that the district court abused its discretion in denying their request to call a medical expert on rebuttal to explain why Cox walked differently in and out of court.

1.

The Coxes' first argument—that only sworn verbal testimony is impeachable—proceeds from a flawed premise. Conduct, equally with words, can constitute evidence. *See* NRS 51.045 (defining "statement" for hearsay purposes as including both "[a]n oral or written assertion" or "[n]onverbal conduct of a person, if it is intended as an assertion"); Hon. Robert E. Jones et al., *Rutter Group Practice Guide: Federal Civil Trials and Evidence* ¶ 8:364, at 8C-34 (Supp. 2021) (stating that "[a] party's appearance, demeanor or nontestimonial behavior in court may constitute evidence on matters at issue in the case") (citing *Pennsylvania v. Muniz*, 496 U.S. 582, 591 (1990)). So, "[f]or purposes of contradiction impeachment, a witness may be taken to testify to a fact where the witness engages in assertive conduct on the witness stand." 27 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6096, at n.1 (Supp. 2021) (discussing as an example *United States v. Hinkson*, 526 F.3d 1262, 1282-83 (9th Cir. 2008), *on reh'g en banc*, 585 F.3d 1247 (9th Cir. 2009), where a "witness who wore Purple Heart lapel pin while on [the] witness stand was engaging in conduct assertive of [the] fact he had been wounded while in military service"). Going further, while it is true that most impeachment-by-contradiction cases "involve attempts to contradict actual testimony given by parties, . . . this form of impeachment can target . . . forms

of evidence other than testimony." 3 Christopher B. Mueller & Laird C. Kirkpatrick, *Federal Evidence* § 6:86 (4th ed. 2021); *cf. Henriod v. Henriod*, 89 P.2d 222, 225 (Wash. 1938) (in assessing credibility, the finder of fact can consider "not only . . . the facts testified to in the court room, but also . . . the attitude and conduct of the witness during the progress of the trial"); *United States v. Shonubi*, 895 F. Supp. 460, 480 (E.D.N.Y. 1995) (Weinstein, J.) (noting that a finder of fact "may consider the demeanor and actions of a person even when that person is not testifying" and quoting Jerome Frank, *Law and the Modern Mind* 109 (1931), "The tongue of the witness, it has been said, is not the only organ for conveying testimony.") (internal quotation marks omitted), *rev'd on other grounds by* 103 F.3d 1085 (2d Cir. 1997).

Cox testified on direct examination about his injuries generally, and on cross-examination to using assistance walking even when not in court. In addition, he walked to and from the witness stand on the arm of his attorney or the marshal. Once sworn as a witness, he remained under oath until his testimony concluded the next day, so at least some of the demonstrative conduct occurred while he was under oath. From this, the district court properly concluded that Cox's courtroom conduct conveyed to the jury that the injuries he sustained in his fall left him unable to walk unassisted—and that the videos directly contradicted that evidence.

2.

The Coxes' second argument—that NRS 50.085(3) expressly precludes admission of all extrinsic evidence when used to attack a witness's credibility—also fails. Nevada's evidence code is modeled after a draft of the Federal Rules of Evidence, *see Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 170, 359 P.3d 1096, 1101 (2015), and NRS 50.085(3) is substantially similar to the pre-2003 version of FRE 608(b). *See Lobato v. State*, 120 Nev. 512, 519 n.11, 96 P.3d 765, 770 n.11 (2004). The gloss accompanying this federal rule is therefore persuasive when interpreting NRS 50.085(3). *See Rodriguez v. State*, 128 Nev. 155, 160 n.4, 273 P.3d 845, 848 n.4 (2012).

NRS 50.085(3) provides that "[s]pecific instances of the conduct of a witness, for the purpose of attacking or supporting the witness's credibility, other than conviction of crime, may not be proved by extrinsic evidence."[3] This language parallels that in the pre-2003 version of FRE 608(b). Courts addressing the pre-2003 version

[3]NRS 50.085(3) continues, stating: "They may, however, if relevant to truthfulness, be inquired into on cross-examination of the witness or on cross-examination of a witness who testifies to an opinion of his or her character for truthfulness or untruthfulness, subject to the general limitations upon relevant evidence and the limitations upon interrogation and subject to the provisions of NRS 50.090."

of Rule 608(b) found that it created "difficulty in distinguishing between Rule 608 impeachment and impeachment by contradiction." 4 Joseph M. McLaughlin, *Weinstein's Federal Evidence* § 608.12[6][a], at 608-41 (2d ed. 1999). They concluded that, while Rule 608(b) prohibits the use of extrinsic evidence of conduct to impeach a witness's credibility in terms of his general character for truthfulness—or untruthfulness—"the concept of impeachment by contradiction permits courts to admit extrinsic evidence that *specific testimony* is false, because contradicted by other evidence." *United States v. Castillo*, 181 F.3d 1129, 1132 (9th Cir. 1999) (emphasis added). They based this approach "on the grounds that the witness should not be permitted to engage in perjury, mislead the trier of fact, and then shield himself from impeachment" under Rule 608(b)'s prohibition, *id*. at 1132-33 (quoting 28 Charles A. Wright & Victor J. Gold, *Federal Practice and Procedure* § 6119, at 116-17 (1993)), as well as on Rule 607's (NRS 51.075's) general provision that "[a]ny party . . . may attack [a] witness's credibility." *See United States v. Benedetto*, 571 F.2d 1246, 1250 n.7 (2d Cir. 1978).

The 2003 amendments to Federal Rule of Evidence 608(b) confirm the correctness of cases like *Castillo*. The amendments substituted the phrase "character for truthfulness" for "credibility." The purpose was to "clarify that the absolute prohibition on extrinsic evidence applies only when the sole reason for proffering that evidence is to attack or support the witness'[s] character for truthfulness." Fed. R. Evid. 608 advisory committee's note to the 2003 amendment. As the advisory committee noted, "On occasion, the Rule's use of the overbroad term 'credibility' has been read to bar extrinsic evidence for bias, competency, and contradiction impeachment since they, too, deal with credibility." *Id.* (internal quotation marks omitted). "By limiting the application of [Rule 608(b)] to proof of a witness's *character for truthfulness*, the amendment leaves the admissibility of extrinsic evidence offered for other grounds of impeachment (*such as contradiction*, prior inconsistent statement, bias and mental capacity) to Rules 402 and 403," the general rules on relevance. *Id.* (internal quotation marks omitted; emphases added); *see also* discussion *infra* Section II.A.3. The 2003 amendment substituting "character for truthfulness" for "credibility" conforms Rule 608(b) "to its original intent, which was to impose an absolute bar on extrinsic evidence only if the sole purpose for offering the evidence was to prove the witness's character for veracity." *Id*.; *see also United States v. Tarantino*, 846 F.2d 1384, 1409 (D.C. Cir. 1988) (holding that admissibility of extrinsic evidence offered to contradict a witness is governed by Rules 402 and 403, as distinguished from evidence to impeach a witness's character for truthfulness, which is governed by Rule 608(b)); *State v. Hayes*, 462 P.3d 1110, 1119-20 (Idaho 2020) (holding that Idaho's version of FRE 608(b), which, similar to NRS 50.085(3), tracked the

pre-2003 version of Rule 608(b), only prohibits extrinsic evidence of the defendant's character for untruthfulness, not extrinsic evidence used to impeach by specific contradiction).

Cox walking unassisted outside of court is a neutral act. It does not inherently connote good or bad character for truthfulness. Its evidentiary value arises because it contradicts Cox's in-court assertion that he uses assistance to walk. NRS 50.085(3)'s prohibition against using extrinsic evidence to prove general character for truthfulness or untruthfulness thus does not apply.[4] *See* 28 Charles A. Wright & Victor J. Gold, *Federal Practice & Procedure* § 6118, at 113-22 (2d ed. 2012) (giving examples of conduct bearing on bad character for truthfulness, including perjury, fraud, lying repeatedly on official documents, and so on).

3.

The Coxes next argue that admitting the videos violated the common law collateral fact rule. This rule limits the admissibility of contradiction evidence by holding "[e]vidence extrinsic to a witness's testimony . . . inadmissible to contradict that witness on a collateral matter." 27 Wright & Gold, *supra*, at 659. "Facts are collateral if they are outside the controversy or are not directly connected with the principal matter or issues in dispute." *Jezdik*, 121 Nev. at 136-37, 110 P.3d at 1063 (internal quotation marks omitted). The Coxes maintain that the bifurcation order limited the trial to liability, not damages, and that, because Cox's (in)ability to walk concerned damages, not liability, the videos were collateral and should have been excluded as such.

This argument considerably overstates the bifurcation order. This is a personal injury case. The bifurcation order did not place the issue of Cox's injuries out of bounds during the first phase of the trial. At the Coxes' request, the order specifically permitted the introduction of evidence "concerning the nature of the injuries claimed" during the liability phase of the trial. And Cox availed himself of this permission in presenting his case, both in his testimony about his agonizing injuries and when he used assistance to walk to and from the witness stand to present that testimony. Although the bifurcation order deferred presentation of medical and

[4]Distinct from this case is *Jezdik v. State*, in which this court established an exception to NRS 50.085(3)'s prohibition against use of extrinsic evidence to prove general character for truthfulness when the defendant places a bad act at issue. 121 Nev. at 138-39, 110 P.3d at 1064. There, the court permitted the State to admit extrinsic evidence that the defendant was being investigated related to another matter and that he had opened a fraudulent credit card account to rebut his statement on direct examination that he had never been accused of anything other than the instant charges. *Id.* at 134, 136-37, 110 P.3d at 1062, 1063. The court reasoned that the defendant "opened the door" to contradictory extrinsic evidence, although collateral, by placing the bad act in issue. *Id.* at 138-40, 110 P.3d at 1064-65.

other specific damages evidence to the second phase of the trial, it did not make the general nature of Cox's injuries irrelevant or "collateral" to the first phase of the trial.

The collateral fact rule concerns relevance and is governed by NRS 48.015 through NRS 48.035, not the categorical prohibition in NRS 50.085(3). *Cf. Jezdik*, 121 Nev. at 138, 110 P.3d at 1064; *see also* 4 Jack B. Weinstein & Margaret A. Berger, *Weinstein's Federal Evidence* § 607.06[3][a] (2d ed. 2021). Evidence is logically relevant if it has "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. "All relevant evidence is admissible" except where otherwise provided by statute or constitution. NRS 48.025(1). Under NRS 48.035, in applying the collateral fact rule, the judge makes "a practical judgment as to whether the importance of the [extrinsic evidence] and the impeachment warrants the expenditure of the additional trial time" its presentation entails. 1 Robert P. Mosteller, *McCormick on Evidence* § 49, at 393 (8th ed. 2020). Such determinations are entrusted to the sound discretion of the district court. *See MEI-GSR Holdings, LLC v. Peppermill Casinos, Inc*., 134 Nev. 235, 243, 416 P.3d 249, 257 (2018).

Cox's (in)ability to walk without assistance was in issue with respect to both his claimed injuries and his credibility. The district court did not abuse its discretion when it so held. *Sweet v. Pace Membership Warehouse, Inc.*, 795 A.2d 524 (R.I. 2002), is analogous. In *Sweet*, also a personal injury case, the trial court excluded videos showing the plaintiff riding all-terrain vehicles, snowmobiling, and rollerblading, which the defendant offered to impeach the plaintiff's permanent disability claim. After being provided with the videos, the plaintiff chose to cut off his damages claim before the date of the first videos. The Rhode Island Supreme Court deemed the videos admissible and reversed for a new trial, holding that the damages-date restriction "did not lessen the relevance of the evidence for impeaching Sweet's credibility" and "to contradict Sweet's specific assertions that he had been permanently disabled by the accident." *Id.* at 528-29 & n.6; *see also Diamond Offshore Servs., Ltd. v. Williams*, 542 S.W.3d 539, 548, 552 (Tex. 2018) (reversing a judgment on a jury verdict where the district court excluded a video showing the plaintiff engaging in activities he claimed he could no longer pursue; his credibility was at issue as to both liability and damages); *James v. Carawan*, 995 So. 2d 69, 77 (Miss. 2008) (similar).

Cox's credibility was a central defensive issue with respect to both the extent of his injuries and the circumstances that led to his fall. The videos thus did not just bear on damages, but also on liability. *Diamond Offshore Servs. Ltd.*, 542 S.W.3d at 552. Evidence

suggesting that a party has feigned or exaggerated injuries to garner sympathy suggests consciousness of a weak case, which is relevant and admissible. 1 Edward J. Imwinkelried, *Uncharged Misconduct Evidence* § 7.2 (2020) (reasoning that "any act evidencing consciousness of the weakness of the litigant's position should be admissible" and is relevant); 2 John H. Wigmore, *Evidence* § 278 (Chadbourn rev. 1979) (reasoning that "a party's falsehood or other fraud in the preparation and presentation of his cause . . . is receivable against him as an indication of his consciousness that his case is a weak or unfounded one; and from that consciousness may be inferred the fact itself of the cause's lack of truth and merit"); *see also* Roger Park & Tom Lininger, *The New Wigmore, A Treatise on Evidence: Impeachment and Rehabilitation* § 4:2, at 203 (Supp. 2021) (noting that contradiction by even collateral evidence is permissible when it "is a fair response to overreaching by the opponent"). Allowing Cox to testify to the nature of his injuries and corroborate that testimony with visible courtroom conduct without allowing respondents to rebut his in-court presentation would be fundamentally unfair. *See* NRS 47.030 (the evidence code serves to "secure fairness in administration . . . to the end that the truth may be ascertained and proceedings justly determined"). The district judge was within the province of his authority when he held, on this record, that "whatever has happened in open court is fair game. And, accordingly, I'll permit the video."

4.

The district court granted the Coxes' initial request to recall Cox to rebut the videos. They then decided against recalling Cox and asked instead to call a medical expert to rebut the videos. The district court denied this request, which the Coxes contend on appeal was an abuse of discretion. NRS 47.040(1)(b) provides that "error may not be predicated upon a ruling which . . . excludes evidence unless a substantial right of the party is affected, and . . . the substance of the evidence was made known to the judge by offer or was apparent from the context within which questions were asked." This court "will not review exclusion of evidence where trial counsel makes no offer of proof" below. *E.g.*, *McCall v. State*, 97 Nev. 514, 516, 634 P.2d 1210, 1212 (1981) (citing *Van Valkenberg v. State*, 95 Nev. 317, 318, 594 P.2d 707, 708 (1979)). Here, the Coxes did not proffer the identity of their requested medical expert or what she or he might testify to, and the issue is accordingly waived. *See Van Valkenberg*, 95 Nev. at 318, 594 P.2d at 708 (holding that this court cannot determine if a party's substantial rights were prejudiced by the trial court's exclusion of evidence under NRS 47.040(1) if trial counsel failed to offer proof of that evidence).

B.

The Coxes next argue that attorney misconduct during closing arguments entitles them to a new trial under NRCP 59(a)(1)(B) and *Lioce v. Cohen*, 124 Nev. 1, 20, 174 P.3d 970, 982 (2008). "Under *Lioce*, this court decides whether there was attorney misconduct, identifies the applicable legal standard for determining whether a new trial was warranted, and assesses whether the district court abused its discretion in applying that standard." *Gunderson*, 130 Nev. at 74-75, 319 P.3d at 611. Although the abuse-of-discretion standard applies to the order granting or denying a new trial, de novo review applies to the issue of whether attorney misconduct occurred. *Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 364, 212 P.3d 1068, 1078 (2009).

Rule 3.4(e) of the Nevada Rules of Professional Conduct (RPC) states that a "lawyer shall not . . . state a personal opinion as to the justness of a cause, the credibility of a witness, [or] the culpability of a civil litigant." On appeal, the Coxes contend that counsel for Backstage, Copperfield, and MGM each made statements during closing arguments that violated RPC 3.4(e). But the Coxes did not object at trial to the statements that Backstage's and Copperfield's counsel made. *See Gunderson*, 130 Nev. at 75, 319 P.3d at 612 ("[F]ailure to object constitutes waiver . . . unless the failure to correct the misconduct would constitute plain error."). These statements, in which Backstage's and Copperfield's counsel invited the jury to consider the contradiction between the way Cox walked in court and in the videos in assessing his credibility and did not offer personal opinions, impugn Cox's character, or otherwise invite the jury to rely on emotion in deciding the case. They amounted to advocacy, not misconduct, and do not establish grounds for a new trial. *See id.* at 76, 319 P.3d at 612 (noting that the new trial analysis stops if this court concludes that misconduct did not occur).

But the statements that MGM's lawyer, Popovich, made during closing argument crossed the line between advocacy and misconduct. In concluding his argument, Popovich stated that Cox has "been manipulating this jury from day one with every move he made. You shouldn't believe a word that comes out of his mouth because the only reason to do that is the green box at the end. He just wants a payoff." These statements were improper because they asked the jury to step outside the relevant facts and hold MGM not liable because Cox is a liar who only sued for financial gain. *See Grosjean*, 125 Nev. at 364-65, 212 P.3d at 1079 (holding that attorney committed misconduct by calling respondent a "liar" and appealing to the jury's emotions rather than facts in evidence); *Lioce*, 124 Nev. at 22, 174 P.3d at 984 (holding that attorney committed misconduct by calling a plaintiff's case frivolous and worthless).

The Coxes objected at trial to Popovich's statements—albeit after Popovich finished his closing argument and the jury broke for

lunch—and the district court sustained their objection. Under the *Lioce* framework, if a party objects to attorney misconduct at trial, and the district court sustains the objection, it should "admonish the jury and counsel." 124 Nev. at 17, 174 P.3d at 980. The severity and frequency of attorney misconduct dictate whether an admonishment is sufficient to cure alleged prejudice. *See Grosjean*, 125 Nev. at 369, 212 P.3d at 1082 (recognizing that "a single instance of improper conduct might be cured by objection and admonishment"). This court also looks to whether the jury's verdict is well supported by evidence outside of the objected-to misconduct. *Id.*

Here, the parties presented the district court with a draft admonishment that the Coxes either drafted or approved. The district court changed the word "impermissible" to "the Court has sustained the objection." The Coxes did not object to this revision. When the jury returned from lunch, the district court gave the admonition, as revised, to the jury:

> Members of the jury, during Mr. Popovich's closing arguments, he stated that Gavin Cox is here because of the "green box at the end," and "he just wants a payoff." Those comments were objected to and **[~~impermissible~~]** *the Court has sustained the objection*, and I admonish you to disregard those comments and to dismiss them from your mind. You may not use those comments in coming to your decision in this case and must decide this case solely based on the evidence and law.

Despite not objecting to the revision in district court, the Coxes argue on appeal that the admonishment was insufficient because it did not adequately, and separately, rebuke Popovich.

The district court did not abuse its discretion by finding the admonishment sufficient such that no new trial was warranted. The Coxes objected to just a few sentences in Popovich's closing argument during a lengthy seven-week trial. The Coxes approved the form of admonition, which clearly instructed the jury to disregard Popovich's comments. In its verdict, the jury found Backstage and Team Construction not negligent; MGM and Copperfield negligent but not the proximate cause of Cox's fall; and Cox negligent and the cause of his fall. Although Cox disagrees with the verdict, it is sustained by the evidence. The Coxes presented evidence that he fell on a ramp in the runaround that had a slope of 5 degrees, which exceeds the maximum allowed pitch of 4.76 degrees under the building code, on which construction dust had accumulated, causing Cox to slip. But respondents presented contrary evidence showing that Cox fell on level ground, approximately 15 feet away from the ramp, and tripped because he was running too fast and not looking where he was going. This evidence permitted the jury to find MGM and Copperfield negligent but not the cause of Cox's fall, and Cox also negligent and the cause of his fall. The jury's verdict is

thus supported by tangible record evidence divorced from any emotion that Popovich's inflammatory comments may have inspired. The Coxes fail to establish that Popovich's single instance of misconduct was so extreme as to require a new trial despite the district court's sustained objection and admonishment.

C.

The Coxes argue that the district court erred in instructing the jury on comparative negligence and should have granted their motion for judgment as a matter of law, striking comparative negligence as an affirmative defense. In Nevada, "[i]ssues of negligence are properly resolved by a jury." *Brascia v. Johnson*, 105 Nev. 592, 595, 781 P.2d 765, 767 (1989). The same holds true for comparative negligence. *Wagon Wheel Saloon & Gambling Hall, Inc. v. Mavrogan*, 78 Nev. 126, 128, 369 P.2d 688, 689-90 (1962) (holding that the issue "is one of fact; it becomes a question of law only when the evidence is of such a character as to support no other legitimate inference").

NRS 41.141 requires the district court to instruct the jury on comparative negligence on request of a defendant when the issue is raised as a bona fide defense:

> In any action to recover damages for death or injury to persons or for injury to property in which comparative negligence is asserted as a defense . . . the judge *shall* instruct the jury that . . . [t]he plaintiff may not recover if the plaintiff's comparative negligence . . . is greater than the negligence of the defendant or the combined negligence of multiple defendants.

NRS 41.141(2)(a) (emphasis added). Comparative negligence is a "bona fide issue" when the evidence supports that it is a viable defense. *Buck ex rel. Buck v. Greyhound Lines, Inc.*, 105 Nev. 756, 764, 783 P.2d 437, 442 (1989). Under NRS 41.141, the district court *must* deliver a comparative negligence instruction upon a party's request if a bona fide issue exists. *Verner v. Nev. Power Co.*, 101 Nev. 551, 555-56, 706 P.2d 147, 150 (1985).

Comparative negligence "is conduct on the part of the plaintiff [that] falls below the standard to which [they] should conform for [their] own protection, and which is a legally contributing cause cooperating with the negligence of the defendant in bringing about the plaintiff's harm." Restatement (Second) of Torts § 463 (Am. Law Inst. 1965). A plaintiff's duty of care for the plaintiff's own safety is the same as a defendant's—that of a reasonable person under like circumstances. *Id.* § 464. And a defendant's coextensive duty of care to a foreseeable plaintiff does not obviate a plaintiff's duty of reasonable self-care. *See Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 777, 291 P.3d 150, 153 (2012) (holding that a landowner owes a duty of reasonable care to land entrants even if a dangerous condition

is open and obvious and reasoning that apportionment of liability depends on the landowner's breach of that duty and comparative fault); Restatement (Second) of Torts § 463; 3 Stuart M. Speiser et al., American Law of Torts ¶ 12:49 (Supp. 2021) (explaining that drivers still owe a duty of care to a plaintiff who darts into traffic but that comparative fault principles apply to limit a driver's liability).

At trial, respondents produced evidence showing that Cox voluntarily participated in the illusion and agreed that he could run; Cox drank alcohol before participating in the illusion; Cox was so excited that he chose to continue participating in the illusion, despite that it felt to him like "total pandemonium"; and Cox ran as fast he could, although other witnesses testified that participants were not encouraged to run and typically proceeded at a brisk walk or light jog. Trial testimony conflicted about whether the runaround route was dark: witnesses testified that it was not dark and that Backstage employees held bright lights directing participants through the route, while Cox testified that the route was intermittently dark. *Cf. Tryba v. Fray*, 75 Nev. 288, 293, 339 P.2d 753, 755 (1959) (stating that whether a plaintiff is contributorily negligent where she finds herself in a dark and unfamiliar situation but proceeds anyway is a question of fact for the jury). But although Cox testified that the route was dark and he lacked adequate direction, Cox also said that he did not look at the ground while running at full speed. *See Joynt v. Cal. Hotel & Casino*, 108 Nev. 539, 544, 835 P.2d 799, 802 (1992) (finding comparative fault was a viable defense where a plaintiff did not look before stepping backward).

Respondents further produced two expert witnesses who each reconstructed the fall and testified that Cox tripped on a flat surface when he caught the toe of his shoe on the ground. The experts testified that construction dust would not have interrupted Cox's gait to cause the toe catch and subsequent fall. The Coxes point to MGM's NRCP 30(b)(6) witness, Mark Habersack, who testified that he was not aware of anything that Cox did wrong during the illusion. But this testimony is not conclusive; rather, it is another piece of evidence for the jury to consider when determining comparative fault. *See Anderson v. Baltrusaitis*, 113 Nev. 963, 965, 944 P.2d 797, 799 (1997) (holding that comparative negligence is a question of fact for the jury); *see also Tryba*, 75 Nev. at 295, 339 P.2d at 757 (remanding because contributory negligence should have remained a question for the jury). Respondents produced significant evidence to offset Habersack's testimony and show that Cox may have acted unreasonably by running as fast as he could, through allegedly dark corridors, without knowing where he was going, culminating in a trip and fall. Therefore, respondents produced enough evidence to raise a bona fide issue of Cox's comparative negligence, and the district court did not abuse its discretion by delivering NRS 41.141's mandatory instruction. The district court therefore properly denied

the Coxes' motions for judgment as a matter of law or a new trial on these grounds.

D.

NRCP 59(a)(1)(E) provides that "manifest disregard by the jury of the instructions of the court" can constitute grounds for a new trial. Invoking this rule, the Coxes next argue that they are entitled to a new trial because the jury manifestly disregarded the district court's proximate cause instruction and ignored applicable law by concluding that MGM and Copperfield were negligent but not the proximate cause of Cox's injuries because no force intervened to sever the causal link. *See Price v. Sinnott*, 85 Nev. 600, 606, 460 P.2d 837, 840 (1969). But this court presumes that the jury followed the court's instructions, *Motor Coach Indus., Inc. v. Khiabani*, 137 Nev. 416, 424, 493 P.3d 1007, 1015 (2021), and will uphold a jury's verdict if "a reasonable mind might accept [the evidence] as adequate to support a conclusion." *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996); *see also Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009). And to establish manifest disregard of the instructions, the movant must demonstrate that, "had the jurors properly applied the instructions of the court, it would have been impossible for them to reach the verdict which they reached." *Weaver Bros., Ltd. v. Misskelley*, 98 Nev. 232, 234, 645 P.2d 438, 439 (1982); *McKenna v. Ingersoll*, 76 Nev. 169, 174-75, 350 P.2d 725, 728 (1960).

The record does not support that it was impossible for the jury to have followed the jury instructions and returned the verdict it did. As discussed, the evidence permitted the jury to find that MGM was negligent because its outdoor ramp violated the building code, and because of this, Copperfield was negligent for taking audience participants past the ramp. But while Cox testified that he slipped and fell on the ramp, respondents presented contrary evidence that he fell 15 or more feet away from the ramp, on level ground. This evidence supports the finding the jury made that MGM and Copperfield were negligent, but their negligence did not cause Cox to fall. And, as the preceding discussion of comparative negligence demonstrates, the evidence also supported, if it did not compel, a finding that Cox was comparatively negligent and the cause of his own fall.

Based on these divergent accounts of the incident, the jury weighed the evidence and concluded that respondents' negligence was not the proximate cause of Cox's fall and resulting injuries, *Taylor v. Silva*, 96 Nev. 738, 741, 615 P.2d 970, 971 (1980) ("Proximate cause is any cause[,] which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury complained of and without which the result would not have occurred.") (quoting *Mahan v. Hafen*, 76 Nev. 220, 225, 351 P.2d

617, 620 (1960)), which is within its province to do. *Barnes v. Delta Lines, Inc.*, 99 Nev. 688, 690, 669 P.2d 709, 711 (1983) (holding that proximate cause is a question of fact for the jury). Otherwise stated, the Coxes failed to establish a causal link based on the facts in evidence, thus missing a step while reaching for their conclusion of the jury's illogic. *See Rickard v. City of Reno*, 71 Nev. 266, 270-72, 288 P.2d 209, 210-11 (1955) (holding that plaintiff failed to establish proximate cause as a matter of law because she did not produce evidence showing that a depression in a city sidewalk—and the dirt, silt, etc. collected within it—caused her fall). Based on the trial evidence, the jury could both comply with the court's instructions and conclude, as it did, that respondents were negligent but not the proximate cause of Cox's injuries. The jury did not disregard the court's instructions or applicable law, and the district court therefore did not abuse its discretion in denying the Coxes' motion for a new trial on these grounds.

E.

Finally, at trial and in the jury's presence, respondents moved for a jury view of the runaround route, which the district court granted. The Coxes argue that they suffered prejudice warranting a new trial because the district court did not explain its reasoning when it later canceled the jury view, thus implying to the jury (in the Coxes' estimation) that the Coxes caused the cancelation because they had something to hide. The Coxes did not object to the district court's cancelation of the jury view, ask the district court to explain to the jury why it canceled the jury view, or otherwise raise this issue below, and we decline to address it in the first instance. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981).

For these reasons we affirm the district court's judgment on the jury's special verdict for respondents and the district court's order denying the Coxes' motions for judgment as a matter of law or a new trial.

Hardesty, Cadish, and Herndon, JJ., and Gibbons, Sr. J., concur.

Stiglich, J., with whom Parraguirre, C.J., agrees, dissenting:

On the record before us, I believe the district court abused its discretion by admitting sub rosa surveillance videos that were not relevant to liability and were barred by the collateral fact rule. I respectfully dissent because this evidence should not have been presented in the liability phase, rendering the outcome unfair.

In light of the bifurcation, the videos were not relevant to liability

The trial here was bifurcated—at respondents' request—such that the only question at issue during this proceeding was liability. *See Verner v. Nev. Power Co.*, 101 Nev. 551, 554, 706 P.2d 147, 150

(1985) (providing that a separate proceeding on liability may be held only if "the issue of liability [is] separate and distinct from the issue of damages"). Contrary to the majority's conclusion, the bifurcation order was not "flexible." Respectfully, that is simply not true. Respondents moved to bifurcate the trial because, in their view,

> [t]he issue of liability is separate and distinct from the issue of damages as the evidence presented during the liability phase will focus solely on the execution of the [i]llusion to the point of Mr. Cox's fall while the damages phase will focus solely on the events after Mr. Cox's fall.

The district court granted Respondents' bifurcation motion and prohibited the Coxes from adducing any "evidence as to the nature or extent of Mr. Cox's alleged injuries" stemming from the fall during the liability phase. The order allowed the Coxes to present evidence only as to Cox's injuries generally at the time of the fall and "to establish that Mr. Cox may have less than a clear recollection of the events of the night of the fall." The record plainly contradicts the majority's framing.

During the liability phase, Cox's injuries were mentioned in the two ways—and only the two ways—allowed by the bifurcation order. First, the district court instructed the jury that Cox alleged a brain injury, "which may affect the way he testifies during this trial. You may take this allegation into consideration when you are evaluating his testimony." This instruction did not presume that Cox actually *had* a brain injury, and there was no sworn testimony regarding a brain injury. Second, Cox testified to his pain and injuries only within the context of describing the fall allegedly caused by respondents' negligence and its immediate aftermath. As in any personal injury trial, Cox's testimony regarding his initial experience of injury was relevant to whether respondents were liable.

The majority, however, conflates Cox's testimony about the pain when he fell with the extent of his injuries at the time of trial, misstating the record. For example, the majority correctly observes that Cox testified to the injuries incurred when he fell. But it uses that testimony to conclude that Cox "conveyed to the jury that the injuries he sustained in his fall left him unable to walk unassisted." Cox did no such thing: in accordance with the bifurcation order, he mentioned the pain he felt after his fall, not during the trial.

While Cox's current physical health and the extent of his injury would be relevant to determining damages, they were not relevant to whether respondents breached a duty of care owed to Cox, i.e., liability. The fact that testimony and the jury instruction on Cox's original experience of being hurt and "the way he testifies" touch on injuries in general does not place the injuries at issue during the liability phase.

The majority's view that nontestimonial behavior in court may constitute evidence rendering the videos relevant is mistaken. The extent of Cox's injuries was not at issue during the liability phase, and his walking with assistance was thus not relevant to a matter at issue. The majority's invocation of *Sweet v. Pace Membership Warehouse, Inc.*, 795 A.2d 524 (R.I. 2002), does not support a contrary conclusion. Unlike here, the defendant in that case "conceded liability, and the case proceeded to trial solely on the issue of damages." *Id*. at 526. Nontestimonial videos there were relevant in a way that they were not here. These videos were not relevant, and the district court should not have admitted them.

The videos were barred by the collateral fact rule

The collateral fact rule also should have barred admission of these videos. This rule provides that extrinsic evidence of specific instances of a witness's conduct, other than a criminal conviction, may not be proffered to show the witness's credibility or lack thereof. NRS 50.085(3). A fact is collateral when it is "outside the controversy, or [is] not directly connected with the principal matter or issue in dispute." *Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (quoting *Black's Law Dictionary* 262 (6th ed. 1990)).

Here, Cox's ability or inability to walk on his own was collateral to the proceedings at the liability phase of trial. The collateral fact rule exists to center the jury's attention on the primary questions before it; at this stage of the trial, the primary question was whether respondents negligently caused Cox's injuries. Respondents did not proffer the videos to rebut the Coxes' allegation of negligence, but rather to imply that Cox faked a need for assistance to elicit the jury's sympathy and thus was not credible. This tenuous connection makes the question of whether Cox could walk without assistance collateral.

The district court overruled the Coxes' objection to the videos, concluding "that whatever has happened in open court is fair game" and admitting the videos.[1] However, this misunderstands the scope of the collateral fact rule, which may bar impeachment even where sworn testimony has been given. *See Rembert v. State*, 104 Nev. 680, 683, 766 P.2d 890, 892 (1988) (holding that extrinsic evidence that the defendant was fired from a job he testified to leaving on his own terms was collateral and inadmissible when it went to the defendant's credibility rather than whether defendant committed the crime). "[W]hatever has happened in open court" is too broad a characterization of what conduct may be impeached. Here, whether

[1]The trial record memorializes only that Cox walked to and from the witness stand with assistance from the marshal and his attorney. The arguments made in closing and on appeal regarding other instances of Cox using assistance in the courtroom are not supported by evidence in the record.

Cox could walk without assistance was collateral, even if it may have been relevant to his credibility in general. The district court again should not have admitted the video evidence.[2]

The videos were inadmissible under the specific contradiction exception to the collateral fact rule

The specific contradiction exception outlined in *Jezdik v. State*, 121 Nev. 129, 110 P.3d 1058 (2005), does not apply here. The exception provides that "false statements on direct examination trigger or 'open the door' to the curative admissibility of specific contradiction evidence." *Id*. at 138, 110 P.3d at 1064. The exception permits extrinsic evidence that specifically rebuts an "adversary's proffered evidence of good character," but this must "squarely contradict" the adverse testimony. *Id*. at 139, 110 P.3d at 1065; *see also Newman v. State*, 129 Nev. 222, 235-36, 298 P.3d 1171, 1181 (2013) (barring extrinsic testimony about a specific altercation that was fundamentally distinct from the offense charged and not offered to rebut a particular assertion).

Jezdik was born out of fairness considerations. *Jezdik* provided a narrow exception to prevent "the shield provided by NRS 50.085(3)" being used as a sword "for a defendant to purposefully, or even inadvertently, introduce evidence giving the jury a false impression through an absolute denial of misconduct and then frustrate the State's attempt to contradict this evidence through proof of specific acts." *Jezdik*, 121 Nev. at 139, 110 P.3d at 1065. When a party seeks to use extrinsic evidence to contradict testimony that is not a factual assertion made on direct examination, the collateral fact rule bars its admission.

I cannot find any rebuttable testimony regarding Cox's ability to walk. Respondents contend that, in using assistance to walk, Cox made specific nonverbal assertions during trial that they are permitted to rebut. They point out that NRS 51.045(2) defines a "statement" to include "[n]onverbal conduct of a person, if it is intended as an assertion." "Assertive conduct," however, means nonverbal behavior intended to functionally replace a spoken assertion (for example, a nod in response to a question, or a pointed finger). *See Assertive Conduct*, *Black's Law Dictionary* (11th ed. 2019). Cox's walking with assistance was not a rebuttable factual assertion because it was not made in lieu of a statement.

While the majority regards Cox's walking with assistance as assertive conduct, it offers no Nevada law supporting that position. It cites instead hornbook law on federal practice that in turn relies on distinguishable authorities, namely an out-of-state decision that

[2]It is noteworthy that while the majority suggests a number of reasons the evidence may have been admissible, respondents proffered impeachment as the sole basis to admit this evidence.

concluded that wearing a Purple Heart pin on the witness stand was assertive conduct, *United States v. Hinkson*, 526 F.3d 1262, 1282-83 (9th Cir. 2008), *rev'd* 585 F.3d 1247 (9th Cir. 2009), and other decisions standing for the general principle that a factfinder may consider the attitude and conduct of the witness, *e.g.*, *United States v. Shonubi*, 895 F. Supp. 460, 480 (E.D.N.Y. 1995); *Henriod v. Henriod*, 89 P.2d 222, 225 (Wash. 1938). But these cases are all examples of conduct on the witness stand, which is distinguishable from Cox's "conduct" here, walking to and from the witness stand with assistance. Further, these cases do not support the proposition for which they are implicitly used, that nonverbal conduct in this case (walking with assistance) is assertive in the same way as pointing a finger at someone or nodding one's head.

Cox's nonverbal actions were not rebuttable testimony simply because juries may consider a witness's demeanor or mannerisms. These observable qualities—such as the manner of walking, crying, being nervous, or laughing—do not constitute testimony or statements on their own. Treating such details as evidence ripe for rebuttal would invite a party to seek out all matter of irrelevant information, so long as it may be patched together, paying little heed to context, to deride the other side's credibility. Opening the door to contesting all sorts of largely unreviewable courtroom conduct would result in trials that would be civil in name only.

Further, the principle outlined in *Jezdik* relates to a party "opening the door" by eliciting false statements on *direct* examination. The cross-examining party cannot elicit testimony on a subject (here, Cox's current ability to walk) outside the scope of direct examination only for the purposes of impeaching that testimony with extrinsic evidence. If Cox *had* proffered this information on direct examination—that he had been entirely unable to walk without help since his injury—respondents' arguments under *Jezdik* might have merit. As it is, this argument fails because the courtroom conduct here was not impeachable testimony.[3]

The majority, however, takes this mistaken approach even further. It states that "the collateral fact rule concerns relevance and is governed by NRS 48.015 through NRS 48.035, not the categorical prohibition in NRS 50.085(3)." This, it cannot do. This court applies the laws as written by the Nevada Legislature. *See Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011) (observing that "[i]f the statute's language is clear and unambiguous, we enforce the statute as written"). The Legislature has provided that even relevant

[3]Respondents did not argue below that the videos were admitted to specifically contradict Cox's statements on cross-examination regarding his need for assistance while walking, and that argument is therefore waived. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

evidence may be inadmissible where otherwise provided by statute or the state or federal constitution. NRS 48.025(1). NRS 50.085(3) states one of those limitations, prohibiting the introduction of extrinsic evidence to demonstrate specific instances of a witness's conduct "for the purpose of attacking or supporting the witness's credibility." In my view, the majority errs by disregarding the intent of the Legislature.

The improper admission of the sub rosa surveillance videos warranted a new trial

I maintain further that the improper admission of the sub rosa surveillance videos is reversible error because I do not believe the jury would have found respondents not liable for Cox's injury had the videos not been admitted. The videos were shown to the jury to rest respondents' case-in-chief and played again during closing arguments. During those arguments, Cox was described as "deceiving the jury since day one" and "manipulating the jury . . . with every move he's made." The jury was told to disregard the entirety of Cox's testimony due to "the fact that he faked it, the fact that he attempted to deceive you." Respondents' counsel argued that, because of the videos, "you shouldn't believe a word that comes out of his mouth . . . he just wants a payoff" and "the Cox family was part of the deception." The videos' importance to the case was emphasized repeatedly in statements like "the tapes speak for themselves. The tapes speak the truth." One attorney remarked, "[Cox's attorney] should be praying because the jury saw what they saw." Another told the jury, "I saw the way some of you reacted when you first saw this. I know you aren't going to be fooled."

In short, closing argument became dominated by the allegation that Cox had made a calculated, deceitful effort to manipulate the jury, only to be dramatically exposed through surveillance. The jury members were told that they would be fools not only if they believed that Cox needed help walking, but if they believed even one word he had told them. Cox's testimony that he had been rushed through darkness, slipped, and fell was integral to the issue of liability. The jury found Cox completely responsible for his own injuries; it might reasonably have reached a different result if the videos had not been admitted. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (concluding that prejudicial error occurs when "the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached"). Therefore, I would reverse on this issue.

The district court committed other, non-reversible errors

The district court committed two other mistakes that warrant discussion, even though they do not, alone, rise to the level of

reversible error. First, I believe that the district court erred in its comparative negligence instruction. Second, the district court did not properly admonish Popovich for his attorney misconduct during closing arguments.

The district court incorrectly gave the comparative negligence instruction

Respondents argue five reasons why Cox was comparatively negligent: (1) Cox willingly participated in the magic trick, (2) Cox negligently proceeded down a dark path, (3) Cox was running, (4) Cox failed to look at the ground, and (5) Cox tripped on his own feet. I do not believe these allegations warranted a comparative negligence instruction, as they did not support a theory that Cox acted unreasonably and that his negligence was a substantial factor in bringing about his injury. *See Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 859-60, 124 P.3d 530, 546 (2005) (discussing when comparative negligence applies).

Notably, respondents organized the magic show and created the conditions in which they contend Cox was negligent. They maintain both that Cox was lying about the conditions being dark, rushed, or unsafe, and that Cox's running along the dark, unsafe path was unreasonable and negligent. But respondents concede in their briefing that volunteers were asked whether they can run before they participate in the show. They try to have it both ways by arguing that Cox was negligent because he was running as part of a show in which the ability to run is, as respondents state in their brief, "the most important" question asked of prospective volunteers. Further, respondents' experts contradicted their position on appeal: MGM's head of risk management admitted that Cox did not act carelessly or do anything wrong while performing the illusion. Therefore, I do not believe that respondents made an adequate showing that Cox acted unreasonably or in a negligent manner.

The district court did not admonish Popovich for his misconduct

I agree with the majority that Popovich committed attorney misconduct in closing argument, and though I disagree that the district court's admonition was sufficient, I concur that relief is not warranted on this basis. On a meritorious objection to attorney misconduct, "the district court should sustain the objection and admonish the jury and counsel, respectively, by advising the jury about the impropriety of counsel's conduct and reprimanding or cautioning counsel against such misconduct." *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 75, 319 P.3d 606, 612 (2014).

The Coxes timely objected, the parties argued the issue, and the district court found the comments improper. The district court discussed the proposed admonition with counsel, specifically saying,

"I'm not inclined to use the term 'misconduct' or 'impropriety' or anything like that."

The district court noted the comments and instructed the jury to disregard them. The jury, however, was not advised that the conduct had been improper, only that it had been objected to and sustained. Merely telling the jury to disregard without making plain that Popovich's comments were inappropriate does not provide the jury with suitable guidance. Nor did the district court reprimand or caution Popovich beyond a cursory remark that his statements "appear[ ] to me to be synonymous" with a statement deemed misconduct in another case. The district court's admonition was inadequate under *Gunderson*.

Nevertheless, Cox did not demonstrate that a more appropriate admonition would have affected the verdict. As the majority notes, the misconduct was a short portion within lengthy closing arguments by multiple attorneys. Popovich inappropriately impugned Cox's credibility and motive. These facts, however, did not rise to the level of misconduct affecting the verdict, and thus I would not reverse on this issue. *See Grosjean v. Imperial Palace, Inc.*, 125 Nev. 349, 365, 212 P.3d 1068, 1079 (2009) (considering "the scope, nature, and quantity of [attorney] misconduct as indicators of the verdict's reliability").

I believe that the court has erred in resolving this appeal. I respectfully dissent.

NEVADA POLICY RESEARCH INSTITUTE, INC., a Nevada Domestic Nonprofit Corporation, Appellant, *v.* NICOLE J. CANNIZZARO, an Individual Engaging in Dual Employment With the Nevada State Senate and Clark County District Attorney; JASON FRIERSON, an Individual Engaging in Dual Employment With the Nevada State Assembly and Clark County Public Defender; GLEN LEAVITT, an Individual Engaging in Dual Employment With the Nevada State Assembly and Regional Transportation Commission; BRITTNEY MILLER, an Individual Engaging in Dual Employment With the Nevada State Assembly and Clark County School District; DINA NEAL, an Individual Engaging in Dual Employment With the Nevada State Senate and Nevada State College; JAMES OHRENSCHALL, an Individual Engaging in Dual Employment With the Nevada State Senate and Clark County Public Defender; MELANIE SCHEIBLE, an Individual Engaging in Dual Employment With the Nevada State Senate and Clark County District Attorney; JILL TOLLES, an Individual Engaging in Dual Employment With the Nevada State Assembly and University of Nevada, Reno; SELENA TORRES, an Individual Engaging in Dual Employment With the Nevada State Assembly and Clark County School District; and the LEGISLATURE OF THE STATE OF NEVADA, Respondents.

No. 82341

April 21, 2022 507 P.3d 1203

Appeal from a district court order dismissing a complaint for declaratory and injunctive relief. Eighth Judicial District Court, Clark County; Jim Crockett, Judge.

Reversed and remanded.

Fox Rothschild LLP and *Colleen E. McCarty* and *Deanna L. Forbush*, Las Vegas, for Appellant.

Legislative Counsel Bureau, Legal Division, and *Kevin C. Powers*, General Counsel, Carson City, for Respondent Legislature of the State of Nevada.

Nevada State College and *Berna L. Rhodes-Ford*, General Counsel, Henderson; *University of Nevada, Reno*, and *Gary A. Cardinal*, Assistant General Counsel, Reno, for Respondents Dina Neal and Jill Tolles.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Daniel Bravo*, Las Vegas, for Respondents Brittney Miller and Selena Torres.

Wiley Petersen and *Jonathan D. Blum*, Las Vegas, for Respondents Nicole J. Cannizzaro, Jason Frierson, and Melanie Scheible.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

Appellant Nevada Policy Research Institute, Inc. (NPRI) filed a complaint against respondents, alleging that their dual service as members of the state Legislature and as employees of the state or local government violates the Nevada Constitution's separation-of-powers clause. The district court dismissed the complaint for lack of standing, finding that NPRI did not allege a personal injury for traditional standing and did not satisfy the requirements of the public-importance exception to standing.

The issue in this appeal, thus, is whether this case falls within the public-importance exception, such that NPRI had standing without needing to show a personal injury. In *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016), we recognized that a public-importance exception applies when an appropriate party sues to protect public funds by raising a constitutional challenge to a legislative expenditure or appropriation in a case involving an issue of significant public importance. But the constitutional challenge at issue here does not involve an expenditure or appropriation. We thus take this opportunity to limitedly expand the public-importance exception in Nevada to cases such as this—specifically, we hold that traditional standing requirements may not apply when an appropriate party seeks to enforce a public official's compliance with Nevada's separation-of-powers clause (even if it does not involve an expenditure or appropriation), provided that the issue is likely to recur and there is a need for future guidance. The constitutional separation-of-powers challenge at issue here meets those requirements. Accordingly, we reverse the district court order dismissing the complaint for lack of standing and remand for further proceedings.

FACTS

NPRI filed a complaint against respondents Nicole J. Cannizzaro, Jason Frierson,[1] Glen Leavitt, Brittney Miller, Selena Torres, James

[1]As requested by the Legislature, we have modified the caption to reflect that Jason Frierson is a member of the Nevada State Assembly, not the Nevada State Senate, and we direct the clerk of this court to modify the caption on this docket to conform to the caption in this opinion.

Ohrenschall, Melanie Scheible, Jill Tolles, and Dina Neal, seeking declaratory and injunctive relief. NPRI sought a declaration that respondents' dual service as elected members of the Legislature and as paid employees of state or local government violates the Nevada Constitution's separation-of-powers clause, and NPRI also sought an injunction prohibiting respondents from simultaneously holding those positions. Respondents moved to dismiss the complaint because NPRI did not satisfy the injury requirement for traditional standing and did not meet the public-importance exception to the traditional standing requirements. Specifically, respondents argued that the public-importance exception did not apply because NPRI did not assert a constitutional challenge to a specific legislative expenditure or appropriation and NPRI was not an appropriate party to litigate the matter.

In its opposition to the motions to dismiss, NPRI argued that it satisfied the traditional standing requirements because it was forced to expend valuable resources bringing this lawsuit. NPRI also argued that it satisfied all three requirements for the public-importance standing exception because respondents' violation of the separation-of-powers clause is an issue of public importance; the Legislature appropriated funds that paid legislators a daily salary and per diem allowances while the Legislature was in session, which violated the separation-of-powers clause for the legislators who were also employed by the executive branch of state or local government; and NPRI was an appropriate party because it would be impossible to find individual plaintiffs both willing and able to seek the legislators' executive-branch positions.

The district court granted the motions to dismiss, concluding that NPRI failed to satisfy the traditional standing requirements because it did not allege any particularized harm. The district court further concluded that the public-importance exception did not apply because NPRI did not directly challenge a legislative appropriation or expenditure and because NPRI is not the sole and appropriate party to bring this suit. This appeal followed.

DISCUSSION

NPRI argues on appeal that the district court erred in finding that it lacked standing under the public-importance exception announced in *Schwartz v. Lopez*, 132 Nev. 732, 382 P.3d 886 (2016). Alternatively, NPRI argues that this court should expand the public-importance exception or otherwise waive standing here so that NPRI may litigate the issue of significant public importance presented in its complaint.

We review whether a party has standing de novo. *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). "The question of standing concerns whether the party seeking relief has a sufficient interest in the litigation," so as "to ensure the liti-

gant will vigorously and effectively present his or her case against an adverse party." *Schwartz*, 132 Nev. at 743, 382 P.3d at 894. Thus, to have standing to challenge an unconstitutional act, a plaintiff generally must suffer a personal injury traceable to that act "and not merely a general interest that is common to all members of the public." *Id*.; *see also Morency v. State, Dep't of Educ.*, 137 Nev. 622, 625-26, 496 P.3d 584, 588 (2021). However, in *Schwartz*, we recognized a public-importance exception to the personal-injury requirement. We held that in appropriate cases, "we may grant standing to a Nevada citizen to raise constitutional challenges to legislative expenditures or appropriations without a showing of a special or personal injury." 132 Nev. at 743, 382 P.3d at 894. As set forth in *Schwartz*, this exception applies only when the plaintiff demonstrates that (1) the case presents "an issue of significant public importance," (2) the case involves "a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution," and (3) the plaintiff is an "appropriate" party to bring the action. *Id.* at 743, 382 P.3d at 894-95.

NPRI did not meet the second requirement of the public-importance exception delineated in *Schwartz*, as it did not bring "a challenge to a legislative expenditure or appropriation on the basis that it violates a specific provision of the Nevada Constitution." NPRI asks us to nevertheless conclude that it has standing based on the public importance of the separation-of-powers issue. We are cognizant that *Schwartz* requires all three of the public-importance exception factors to be met for the exception to apply. 132 Nev. at 743, 382 P.3d at 894. However, unlike in *Schwartz*, we are now faced with a case that presents a constitutionally based challenge, but not to a legislative expenditure or appropriation.

We recognize, as other jurisdictions have, that in limited circumstances this court must use its discretion to exercise jurisdiction in cases involving separation-of-powers questions "as a matter of controlling necessity[,]" "because the conduct at issue affects, in a fundamental way, the sovereignty of the state, its franchises or prerogatives, or the liberties of its people." *State ex rel. Coll v. Johnson*, 990 P.2d 1277, 1284 (N.M. 1999) (internal quotation marks omitted); *cf. Comm. for an Effective Judiciary v. State*, 679 P.2d 1223, 1226 (Mont. 1984) (noting "that standing questions must be viewed in part in light of discretionary doctrines aimed at prudently managing judicial review of the legality of public acts" (internal quotation marks omitted)). And, where there are "clear threats to the essential nature of state government guaranteed to . . . citizens under their [c]onstitution—[specifically,] a government in which the three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers," *Johnson*, 990 P.2d at 1284 (internal quotation marks omitted)—the ability of an appro-

priate party to obtain judicial review of a public official's actions serves an essential role in maintaining the constitutional structure of the state government and preventing government actors from either overstepping or abdicating their public duties. *See, e.g.*, *Thompson v. Heineman*, 857 N.W.2d 731, 752 (Neb. 2015) ("[W]ithout an exception for matters of great public concern, elected representatives could flout constitutional violations with impunity. . . . The exception for matters of great public concern ensures that no law or public official is placed above our constitution."); *ACLU of N.M. v. City of Albuquerque*, 188 P.3d 1222, 1233 (N.M. 2008) (citing *Johnson*, 990 P.2d at 1284, and recognizing the "great public importance" of such cases); *S.C. Pub. Interest Found. v. S.C. Dep't of Transp.*, 804 S.E.2d 854, 858 (S.C. 2017) (stating that "public importance standing" is intended "to allow interested citizens a right of action in our judicial system when issues are of significant public importance to ensure accountability and the concomitant integrity of government action" (alterations, omission, and internal quotation marks omitted)). Consequently, courts have been willing to confer public importance standing in cases concerning "citizens' interest in their form of government," *Thompson*, 857 N.W.2d at 751; *Johnson*, 990 P.2d at 1284, that are likely to recur and for which there is a need for future guidance, *cf. Sears v. Hull*, 961 P.2d 1013, 1019 (Ariz. 1998); *S.C. Pub. Interest Found.*, 804 S.E.2d at 859. So too do these courts recognize that the doctrine must be kept in check, lest they paradoxically expand judicial jurisdiction beyond the boundaries of their respective states' separation-of-powers clauses in the supposed interest of those same clauses and at the expense of the political process and franchise. *See Horner v. Curry*, 125 N.E.3d 584, 595 (Ind. 2019); *see also State ex rel. Ohio Acad. of Trial Lawyers v. Sheward*, 715 N.E.2d 1062, 1080 (Ohio 1999) ("The concept of standing embodies general concerns about how courts should function in a democratic system of government.").

With these countervailing considerations in mind, we strike a balance here, expanding the public-importance exception articulated in *Schwartz* to the instant suit and those of similar caliber, where a plaintiff seeks vindication of the Nevada Constitution's separation-of-powers clause, but still limiting the exception's reach to extraordinary cases even within that category. *Sloan v. Sanford*, 593 S.E.2d 470, 472 (S.C. 2004) (noting that while "[c]itizens must be afforded access to the judicial process to address alleged injustices[,]" "standing cannot be granted to every individual who has a grievance against a public official"). Thus, the public-importance doctrine may apply both where a plaintiff seeks to protect public funds or where, as here, the plaintiff seeks to enforce a public official's compliance with a public duty pursuant to the separation-of-powers clause, but only where an appropriate party seeks enforcement of that right, the issue is likely to recur, and it requires

judicial resolution for future guidance. In such cases, we may confer standing under the public-importance exception.[2]

We conclude that this is one of those rare cases. NPRI alleges that respondents' dual service as legislators and employees in the state executive branch and local government violates the Nevada Constitution's separation-of-powers clause, which divides the powers of the state government into three separate departments and prohibits "persons charged with the exercise of powers properly belonging to one of these departments [from] exercis[ing] any functions, appertaining to either of the others, except in the cases expressly directed or permitted in this constitution." Nev. Const. art. 3, § 1(1). This court has recognized separation of powers as "probably the most important single principle of government declaring and guaranteeing the liberties of the people." *Heller v. Legislature*, 120 Nev. 456, 466, 93 P.3d 746, 753 (2004) (quoting *Galloway v. Truesdell*, 83 Nev. 13, 18, 422 P.2d 237, 241 (1967)). Thus, the question of whether respondents' dual service violates the separation-of-powers clause is one that implicates specific conduct of state officials and a matter of great and equal concern to all Nevada citizens. *Johnson*, 990 P.2d at 1284 (limiting exception to questions with "constitutional moment"); *Haik v. Jones*, 427 P.3d 1155, 1161 (Utah 2018) (noting that exception has been limited to questions "where a large number of people would be affected by the outcome" (internal quotation marks omitted)).

Our refusal to grant standing under these circumstances could result in serious public injury—either by the continued allegedly unlawful service of the above-named officials, or by the refusal of qualified persons to run for office for fear of acting unconstitutionally—because this unsettled issue continues to arise. *See Sheward*, 715 N.E.2d at 1083 (limiting application of the public-importance exception to circumstances where serious public injury would result otherwise). Indeed, this court has previously been asked to decide a similar question regarding whether state and local government employees could simultaneously serve as members in the Legislature. *See Heller*, 120 Nev. at 466, 93 P.3d at 753. In *Heller*, the Nevada Secretary of State asked this court to declare that dual service violates the separation-of-powers clause and to order the Legislature to oust those legislators who were also employed by the state executive branch and local governments. *Id.* This court declined to reach the issue, finding that the Secretary lacked standing and also that the separation-of-powers clause barred the relief sought because only the Legislature may judge the qualifications of

[2]We further hold that a party who brings an action for declaratory relief and satisfies these requirements for the public-importance exception to standing establishes a legally protectable interest as required to obtain declaratory relief. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 86, 367 P.3d 1286, 1291 (2016) (establishing requirements for a court to grant declaratory relief).

its members.[3] *Id.* at 460-62, 466-72, 93 P.3d at 749-50, 752-56. The dual service issue has since been raised in other court cases, but no court has addressed it on the merits for a variety of reasons.[4] *See, e.g.*, *Pojunis v. Denis*, No. 60554, 2014 WL 7188221 (Nev. Dec. 16, 2014) (Order of Affirmance) (affirming dismissal of complaint based on lack of standing and mootness); *Indep. Am. Party of Nev. v. Titus*, Docket No. 43038 (Order Denying Petition for Writ of Mandamus, July 14, 2004) (denying petition based on lack of standing).

The greater the need for future guidance, the greater "the extent to which public interest would be enhanced by reviewing the case." *Snohomish County v. Anderson*, 881 P.2d 240, 244 (Wash. 1994) (emphasis omitted); *McConkey v. Van Hollen*, 783 N.W.2d 855, 861 (Wis. 2010) (applying the doctrine because "as a law development court, we think it prudent that the citizens of Wisconsin have this important issue of constitutional law resolved"). And here, future guidance is necessary because of the lack of judicial interpretation of Nevada's separation-of-powers clause, this issue's recurrence over an extended period, and the potential impact that resolution of this issue will have on state government and those who seek public office. *See S.C. Pub. Interest Found.*, 804 S.E.2d at 859 (concluding that "future guidance is needed since there is no judicial guidance addressing the issue and there is evidence SCDOT will inspect this type of property in the future"). This need for future guidance in the separation-of-powers arena "gives meaning to an issue [that] transcends a purely private matter and rises to the level of public importance," *ATC S., Inc. v. Charleston County*, 669 S.E.2d 337, 341 (S.C. 2008), alleviating concerns of a potential flood of spurious litigation claims against public officials better addressed via the democratic process. *See Haik*, 427 P.3d at 1160-61.

Furthermore, we conclude that NPRI is an appropriate party to challenge the constitutionality of respondents' dual service. *See Schwartz*, 132 Nev. at 743, 382 P.3d at 894-95 (clarifying that an appropriate party "mean[s] that there is no one else in a better position who will likely bring an action and that the plaintiff is capable of fully advocating his or her position in court"). Expanding on the discussion in *Schwartz*, we agree with our sister states that "[a]ppro-

[3]In *Heller*, this court specifically noted that the dual service issue would be justiciable if it were instead "raised as a separation-of-powers challenge to legislators working in the executive branch, as the qualifications of legislators employed in the executive branch are not constitutionally reserved to that branch." *Id.* at 472, 93 P.3d at 757.

[4]In addition, this issue has been the subject of opinions by the Nevada Attorney General and the Nevada Legislative Counsel Bureau on at least six prior occasions. *See* 2004-03 Op. Att'y Gen. 17 & n.1 (2004) (citing five earlier opinions concerning dual service). These opinions are not binding on this court, *see Clark Cty. Office of Coroner/Med. Exam'r v. Las Vegas Review-Journal*, 136 Nev. 44, 57, 458 P.3d 1048, 1058 (2020), but serve to demonstrate the recurring and unresolved nature of the dual service issue.

priateness has three main facets: the plaintiff must not be a 'sham plaintiff' with no true adversity of interest; he or she must be capable of competently advocating his or her position; and he or she may still be denied standing if 'there is a plaintiff more directly affected by the challenged conduct in question who has or is likely to bring suit,'" which ensures that the plaintiff will serve as a true and strong adversary. *Baxley v. State*, 958 P.2d 422, 428 (Alaska 1998) (quoting *Trs. for Alaska v. State*, 736 P.2d 324, 329 (Alaska 1987)); *see also Hunsucker v. Fallin*, 408 P.3d 599, 602 (Okla. 2017) (limiting doctrine to cases where there is "lively conflict between antagonistic demands" (internal quotation marks omitted)); *McConkey*, 783 N.W.2d at 860-61 (applying doctrine where plaintiff had "competently framed the issues and zealously argued his case," and "a different plaintiff would not enhance [the court's] understanding").

NPRI is a nonprofit corporation whose primary missions are to conduct public policy research and advocate for policies that protect individual liberties and promote transparency, accountability, and efficiency in government. NPRI thus is not a "sham plaintiff"—its "sincerity" in challenging the legislators' dual employment "is unquestioned." *See Trs. for Alaska*, 736 P.2d at 330 (concluding the plaintiffs were appropriate parties because "[t]hey are not sham plaintiffs; their sincerity in opposing the state's mineral disposition system is unquestioned"). NPRI has demonstrated "it has 'the interest necessary to effectively assist the court in developing and reviewing all relevant legal and factual questions.'" *Utah Chapter of Sierra Club v. Utah Air Quality Bd.*, 148 P.3d 960, 972 (Utah 2006) (quoting *Jenkins v. Swan*, 675 P.2d 1145, 1150 (Utah 1983)).

Moreover, it is represented by counsel who have competently advocated NPRI's position and named as defendants all of the individuals who currently serve in dual roles. *See Trs. for Alaska*, 736 P.2d at 329-30, 330 n.9 (explaining that "standing may be denied if the plaintiff appears to be incapable, for economic or other reasons, of competently advocating the position it has asserted"). And as we recognized in *Heller*, the declaratory relief action NPRI filed in district court is an appropriate proceeding in which to resolve the dual service issue, as it will allow "a full record [to] be developed regarding the nature and scope of [respondents'] employment duties." 120 Nev. at 467, 93 P.3d at 754 (quoting *State v. Evans*, 735 P.2d 29, 33 (Utah 1987)); *see also id.* at 472-73, 93 P.3d at 757.

NPRI also has demonstrated that the dual service issue is unlikely to be properly raised by any other parties with greater interest. The mere possibility that other individuals may have a more direct interest in bringing a challenge to respondents' dual service does not mean that NPRI is an inappropriate party to do so, particularly as no such individual has filed suit or will likely do so in the future. *See Trs. for Alaska*, 736 P.2d at 330 (holding "the mere possibility that the Attorney General may sue does not mean that appellants are

inappropriate plaintiffs" and stating "the crucial inquiry is whether the more directly concerned potential plaintiff has sued or seems likely to sue in the foreseeable future"); *see also Utah Chapter of Sierra Club*, 148 P.3d at 972-73 (recognizing that more than one party may be appropriate and a party is not required to have the greatest interest to have standing). Because we conclude that NPRI has demonstrated that it seeks enforcement of the separation-of-powers clause as applied to public officials and NPRI has the ability to vigorously litigate this important, recurring issue, we elect to confer standing on NPRI to bring this challenge.

CONCLUSION

Though the public-importance exception to standing that we announced in *Schwartz* requires that the plaintiff challenge a legislative expenditure or appropriation as violating a specific provision of the Nevada Constitution, we may apply the public-importance exception in cases where a party seeks to protect the essential nature of "a government in which the three distinct departments, . . . legislative, executive, and judicial, remain within the bounds of their constitutional powers," *Johnson*, 990 P.2d at 1284 (internal quotation marks omitted), as against a public official, even when this requirement is not met. We elect to apply the public-importance exception here and confer standing on NPRI because it is an appropriate party and the issue in this case implicates separation of powers under our state constitution, is likely to recur, and is of such significant public importance as to require resolution for future guidance. We therefore reverse the district court order dismissing NPRI's complaint and remand for further proceedings on its claims.[5]

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

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[5]NPRI also argues that the district court erred in granting the Legislature's motion to intervene and in denying NPRI's motion to disqualify the Nevada System of Higher Education's official attorneys from representing respondents. We conclude that NPRI waived its argument as to the district court's grant of permissive intervention, *see Khoury v. Seastrand*, 132 Nev. 520, 530 n.2, 377 P.3d 81, 88 n.2 (2016) (concluding an appellant waives an argument by raising it for the first time in his or her reply brief), and fails to demonstrate any abuse of discretion by the district court in denying the motion to disqualify counsel, *see State ex rel. Cannizzaro v. First Judicial Dist. Court*, 136 Nev. 315, 317, 466 P.3d 529, 531 (2020).

ASHLEY WILLIAM BENNETT, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 82495

April 28, 2022 508 P.3d 410

Appeal from a district court order denying a petition to establish factual innocence. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Reversed and remanded.

Armstrong Teasdale, LLP, and *D. Loren Washburn*, Reno; *Clyde Snow & Sessions, P.C.*, and *Neil A. Kaplan* and *Katherine E. Pepin*, Salt Lake City, Utah; *Rocky Mountain Innocence Center* and *Jennifer Springer*, Salt Lake City, Utah, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Alexander Chen*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Parraguirre, C.J., Hardesty and Pickering, JJ.

OPINION

Per Curiam:

A jury found appellant Ashley William Bennett guilty of first-degree murder with the use of a deadly weapon. Eighteen years later, Bennett filed a petition to establish factual innocence, alleging a bona fide issue of factual innocence based on two new pieces of evidence: (1) a declaration from a trial witness recanting her testimony identifying Bennett, and (2) an affidavit from a new witness averring that Bennett was not present and did not shoot the victim. The district court denied the petition at the pleading stage without conducting an evidentiary hearing, determining that the petition improperly relied upon a witness's recantation and impeachment evidence; in so doing, the court also suggested that the impeachment evidence was not credible.

The statutory scheme providing for a petition to establish factual innocence is a relatively recent addition to Nevada law. This case provides an opportunity to address the statutory provisions that guide the district court's decision whether to order a hearing on this type of petition. In particular, we clarify two considerations relevant to the pleading requirements a petition must satisfy under NRS 34.960(2)(b). First, a petition may rely on a witness's recantation of trial testimony as newly discovered evidence provided the

recantation is not the only newly discovered evidence identified in the petition. Second, a petition may rely on newly discovered evidence that conflicts with a trial witness's testimony provided the newly discovered evidence is substantive and exculpatory, not merely impeachment evidence. We also clarify that the relevant statute requires the district court to treat the newly discovered evidence as credible, because the decision whether to conduct an evidentiary hearing occurs at the pleading stage, and to consider it with all the other evidence in the case, including evidence presented at trial and any evidence developed after trial. Because the district court's decision to deny the petition in this case without conducting an evidentiary hearing is inconsistent with the applicable statutes, we reverse and remand for the district court to conduct an evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

Multiple assailants shot and killed Joseph Williams on March 3, 2001. Bennett, A. Gantt, and one other person were identified as being involved in the shooting and charged with Williams's murder. Gantt pleaded guilty to a lesser charge and testified against his codefendants. Gantt testified that during a gathering to mourn a person murdered the day before, Bennett suggested shooting at a rival's home in retaliation for the murder. As the group of mourners walked through a parking lot on the way to their rival's home, they came across Williams. Bennett, Gantt, and others spread out and shot Williams. Another witness, P. Neal, testified that she saw the shooting from outside her apartment, and she identified Gantt, Bennett, and one other person as the shooters.[1] The jury found Bennett guilty of first-degree murder with use of a deadly weapon. The district court sentenced Bennett to serve two consecutive terms of life without the possibility of parole. This court affirmed the judgment of conviction and sentence on appeal. *Bennett v. State*, Docket No. 39864 (Order of Affirmance, October 5, 2004).

Less than a month after the district court entered the judgment of conviction, Gantt signed an affidavit asserting that Bennett was innocent and that he did not know Bennett or see him on the day of the crime. Gantt admitted that he falsely testified against Bennett because he had been threatened with additional charges and the death penalty, even though he was a minor at the time of the crime. Bennett filed a postconviction habeas petition based on Gantt's recantation, which the district court denied. This court affirmed the district court's decision, concluding that Gantt's affidavit was not newly discovered given the three-year delay between Gantt signing the affidavit and Bennett filing the petition and that a different

[1]The State dismissed unrelated criminal charges against Neal before she testified against Bennett.

result was not probable based on Gantt's recantation because Neal also had testified that Bennett was one of the shooters. *Bennett v. State*, Docket No. 46324 (Order of Affirmance, August 29, 2006).

About 13 years later, Bennett filed a petition to establish factual innocence. The petition relied on two new pieces of evidence: (1) a declaration by Neal recanting her trial testimony identifying Bennett as one of the shooters; and (2) an affidavit from a percipient witness, C. Walker, asserting that Bennett was not one of the shooters. The district court denied the petition without conducting an evidentiary hearing. In doing so, the district court determined that the petition improperly relied upon recantation and impeachment evidence, which it also suggested was not credible based on the timing and circumstances of Walker coming forward.

DISCUSSION

Bennett argues that the district court erred in denying his petition without conducting an evidentiary hearing. We agree.

NRS 34.970(3) provides that "the district court shall order a hearing" on a petition to establish factual innocence if the court determines that the petition satisfies the pleading requirements set forth in subsections 2 and 3 of NRS 34.960 and "that there is a bona fide issue of factual innocence." *See also* NRS 34.960(4) (providing that "the court shall dismiss" a petition that does not meet the requirements of subsection 2 or that meets the requirements of subsection 2 but does not meet the requirements of subsection 3, unless the court finds circumstances allowing it to waive the requirements of subsection 3). To satisfy the pleading requirements in subsection 2, the petition "must contain an assertion of factual innocence [made] under oath by the petitioner" and must allege that "[n]ewly discovered evidence exists that is specifically identified and, if credible, establishes a bona fide issue of factual innocence."[2] NRS 34.960(2)(a); *see also* NRS 34.920 (defining "factual innocence" as meaning that the petitioner did not engage in the conduct for which he was convicted, engage in conduct constituting a lesser included offense, commit another crime reasonably connected to the facts supporting the criminal charge upon which he was convicted, or commit the charged conduct under any theory of criminal liability alleged in the charging documents). Subsection 2 also requires that the newly discovered evidence must (1) "[e]stablish[ ] innocence and [be] material to the case and the determination of factual innocence," (2) not be "merely cumulative of evidence that was known," (3) not rely solely upon a witness's recantation of trial testimony, (4) not be "merely impeachment evidence," and (5) be "distinguishable from any claims raised in any previous

[2]The petitioner must support this assertion with "affidavits or other credible documents." NRS 34.960(2).

petitions." NRS 34.960(2)(b). Determining whether the petitioner has satisfied subsection 2 requires the district court to consider the newly discovered evidence in the context of "all other evidence in the case, regardless of whether such evidence was admitted during trial." NRS 34.960(2)(d). To satisfy the pleading requirements in subsection 3, the petition must assert that the evidence identified by petitioner as newly discovered was not known and could not have been known through the exercise of reasonable diligence "at the time of trial or sentencing or in time to include the evidence in any previously filed post-trial motion or postconviction petition." NRS 34.960(3)(a); *see also* NRS 34.930 (similarly defining "newly discovered evidence"). If the district court determines that the petitioner has satisfied the pleading requirements set forth above, the court must direct the State to file an answer within 120 days, specifying the claims that warrant a response and the newly discovered evidence supporting those claims, and allow the petitioner to file a reply.[3] NRS 34.970(1)-(3). Finally, in deciding whether to conduct an evidentiary hearing after considering the pleadings, the district court must determine whether there is a bona fide issue of factual innocence, i.e., "that the newly discovered evidence presented by the petitioner, if credible, would clearly establish the factual innocence of the petitioner." NRS 34.970(3); NRS 34.910 (defining "bona fide issue of factual innocence").

Here, the petition alleged a bona fide issue of factual innocence based on two pieces of newly discovered evidence: Neal's declaration recanting her trial testimony identifying Bennett as one of the shooters and Walker's affidavit asserting that he witnessed the shooting and Bennett was not present or one of the shooters.[4] The district court concluded that this evidence did not satisfy the pleading requirements in NRS 34.960(2) because it relied on a witness's recantation of trial testimony (Neal's declaration) and impeachment evidence (Walker's affidavit). We conclude the district court erred in both respects.

NRS 34.960(2)(b)(2) says the newly discovered evidence identified by the petitioner cannot be "reliant *solely* upon recantation of testimony by a witness against the petitioner." (Emphasis added.) The word "solely" means that a recantation cannot be the *only*

[3]Although the State did not file a complete response within 120 days of the district court's order directing a response, we conclude no relief is warranted based on that omission.

[4]Bennett satisfied the "oath" requirement by signing the petition "under criminal penalty under the laws of the State of Nevada," asserting his factual innocence throughout the petition, and averring the petition was true and correct. NRS 208.165 ("A prisoner may execute any instrument by signing his or her name immediately following a declaration 'under penalty of perjury' with the same legal effect as if he or she had acknowledged it or sworn to its truth before a person authorized to administer oaths.").

newly discovered evidence identified by the petitioner. *See Solely*, *Oxford Dictionary of English* (3d ed. 2010) (defining "solely" as "not involving anyone or anything else; only"). But that language does not preclude a petitioner from including a witness's recantation as part of the newly discovered evidence identified in a petition to establish factual innocence. Here, the newly discovered evidence identified in Bennett's petition included a witness's recantation of testimony against Bennett, but the petition did not rely *solely* on the recantation given that it also included Walker's affidavit.

NRS 34.960(2)(b)(2) also says that the newly discovered evidence identified by the petitioner cannot be "merely impeachment evidence." Impeachment evidence is "[e]vidence used to undermine a witness's credibility." *Evidence (impeachment)*, *Black's Law Dictionary* (11th ed. 2019); *see also Lobato v. State*, 120 Nev. 512, 518, 96 P.3d 765, 770 (2004) (discussing the various methods of impeachment, including attacks upon a witness's competence to testify or a witness's reputation for truthfulness, the use of prior convictions, prior inconsistent statements, specific instances of conduct, and ulterior motives to testify). As the Utah Court of Appeals explained in applying a statutory requirement similar to NRS 34.960(2)(b)(2), evidence is merely impeachment when that evidence does not negate a specific element of the charges or directly relate to the charges but instead is offered solely for the purpose of calling into question a witness's credibility. *Magallanes v. South Salt Lake City*, 353 P.3d 621, 623 (Utah Ct. App. 2015). Contrary to the district court's assessment, Walker's declaration is not *merely* impeachment evidence. *See Merely*, *Oxford Dictionary of English* (3d ed. 2010) (defining "merely" as "just; only"). Yes, the declaration arguably undermines the credibility of witnesses who testified at trial that Bennett was present and was one of the shooters, but it does so only because the statements in Walker's affidavit *conflict* with those witnesses' testimony. *See Evidence (conflicting)*, *Black's Law Dictionary* (11th ed. 2019) ("Evidence that comes from different sources and is often irreconcilable."). But Walker's declaration also relates directly to the conduct for which Bennett was convicted. It provides substantive, exculpatory evidence; Walker claims to be a percipient witness to the shooting and says that Bennett was not there and was not one of the shooters. *See Evidence (substantive)*, *Black's Law Dictionary* (11th ed. 2019) ("Evidence offered to help establish a fact in issue, as opposed to evidence directed to impeach or to support a witness's credibility."); *see also State v. Huebler*, 128 Nev. 192, 201-02, 275 P.3d 91, 98 (2012) (describing exculpatory evidence as evidence that proves the factual innocence of the defendant and distinguishing this from impeachment evidence). Walker ultimately may not be a credible witness, as the district court implied when it pointed out that Walker came forward years

after the crime and months after entering prison. But at the pleading stage, NRS 34.960(2) requires the court to assume that the newly discovered evidence is credible. NRS 34.960(2)(a) (requiring that a petition aver that "[n]ewly discovered evidence exists that is specifically identified and, *if credible*, establishes a bona fide issue of factual innocence" (emphasis added)); *see also* NRS 34.910 (providing that a "[b]ona fide issue of factual innocence means that newly discovered evidence presented by the petitioner, *if credible*, would clearly establish the factual innocence of the petitioner" (internal quotation omitted and emphasis added)); *Brown v. State*, 308 P.3d 486, 495 (Utah 2013) (observing that at the pleading stage under Utah's similar statute, "the court is in no position to assess credibility"); *see also Berry v. State*, 131 Nev. 957, 968-69, 363 P.3d 1148, 1156 (2015) (observing that when deciding whether to conduct an evidentiary hearing on a gateway claim of actual innocence in a postconviction habeas petition, a court generally assumes the truth of the new evidence but may examine the probable reliability of that evidence and its effect on a reasonable juror).[5]

The petition further satisfied the requirements of NRS 34.960(3) by asserting that the newly discovered evidence was not known and could not have been discovered with the exercise of reasonable diligence at the time of trial, sentencing, or prior postconviction proceedings. Both witnesses came forward years after Bennett's trial and resolution of his postconviction petition—Walker provided an affidavit in 2012 and Neal provided a declaration recanting her testimony in 2017.

And finally, when the newly discovered evidence identified by Bennett is viewed with all the other evidence in the case, including the evidence presented at trial and the additional evidence developed after trial, Bennett's petition presented a bona fide issue of factual innocence. From the record provided, the primary evidence against Bennett at trial was the testimony of Gantt and Neal identifying Bennett as one of the shooters.[6] The newly discovered evidence identified in Bennett's petition calls into question whether Bennett engaged in the conduct for which he was convicted. And while Gantt's post-trial recantation cannot be considered newly discovered evidence because it was presented in earlier proceedings, *see* NRS 34.960(2)(b)(3), his recantation is relevant in determining whether the newly discovered evidence presented in the petition

[5]We note that the State further argues that the evidence was cumulative and immaterial. We disagree for the reasons discussed above.

[6]Although the record provided to this court does not include a complete trial transcript, the excerpts provided indicate that Gantt and Neal provided the key evidence against Bennett. The State has not suggested that the missing portions of the record would call into dispute the petition's factual assertions regarding the evidence presented at trial.

demonstrates Bennett's factual innocence. *See* NRS 34.960(2)(d). This is particularly so where this court rejected Bennett's prior post-conviction claim based on Gantt's recantation because there was no probability of a different outcome at trial given Neal's trial testimony identifying Bennett as one of the shooters. *Bennett*, Docket No. 46324, at *2-3.

CONCLUSION

Because Bennett satisfied the statutory pleading requirements, NRS 34.970(3) required that the district court order a hearing on the petition. We therefore reverse the district court's order and remand for an evidentiary hearing.

TYLER CHASE NIED, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 78147

May 5, 2022 509 P.3d 36

Appeal from a judgment of conviction, pursuant to a guilty plea, of reckless driving resulting in substantial bodily harm. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Affirmed in part, vacated in part, and remanded.

Viloria, Oliphant, Oster & Aman L.L.P. and *Thomas E. Viloria*, Reno, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Kevin P. Naughton*, Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Silver, J.:

This appeal concerns the imposition of restitution at sentencing. Appellant Tyler Nied argues that the evidence presented at the sentencing hearing did not support the restitution amount of $463,825.59. He also challenges the calculation of restitution for the victim's medical costs and argues that his restitution obligation must be offset by the settlement amount that his insurer paid to the victim. We conclude the restitution awarded was not supported by competent evidence; thus, we vacate the restitution portion of the judgment of conviction and remand the case to the district court for further restitution proceedings. Further, in resolving Nied's arguments regarding the proper calculation of restitution, we stress that restitution is intended to compensate the victim for costs and losses caused by the defendant. Thus, restitution for a victim's medical costs is limited to the amount that the medical provider accepts as payment in full rather than the amount initially billed by the medical provider. And a defendant's restitution obligation must be offset by any amount the defendant's insurer paid to the victim.

FACTS AND PROCEDURAL HISTORY

Nied drove a car at high speed through downtown Reno, eluding police, running red lights, and driving down a street in the wrong direction, before crashing into the victim's car, seriously injuring the victim. Nied pleaded guilty to reckless driving resulting in substantial bodily harm and agreed to pay restitution.

Shortly before sentencing, the Division of Parole and Probation provided Nied and the district court with a presentence investigation report and a victim impact letter written by the victim's mother. The victim impact letter stated that, because of the crash, the victim had been transported to a hospital, where he remained in a coma for a week. His injuries, which included a broken pelvis, a brain bleed, and face and head trauma, required two months of treatment in the hospital followed by approximately six weeks of treatment in a rehabilitation facility. He had lasting physical impairment and brain damage, was still being treated for his injuries, and was unable to resume his previous job. Due to his injuries, he became depressed and attempted to commit suicide exactly one year after the car accident, resulting in his hospitalization and treatment at a behavioral center. According to the letter, the victim's medical costs before the suicide attempt amounted to around $600,000.

The presentence report recommended that Nied be ordered to pay restitution in the amount of $459,147.26 for the victim's medical costs plus $4,678.33 for the damage to his vehicle. The report included a one-page "Medical Bills Summary" listing the total amount billed by each of the victim's medical providers, but it did not include any other documentation, such as bills or receipts. Nied filed an objection to the presentence report's recommended restitution amount, arguing that no documentation supported it and that it was improperly calculated.

At the sentencing hearing, the victim's mother produced printouts that she had received from the victim's health insurance provider showing his medical claims from June 2017 to September 2018. She also provided a spreadsheet she had created that contained a summary of the total medical costs and the victim's out-of-pocket costs. This spreadsheet stated that the victim's insurance was billed a total of $277,503.43 for the hospitalization costs incurred from the accident and from his subsequent suicide attempt. Out of that amount, the victim's insurance paid $87,242.79, his out-of-pocket costs were $6,052.87, and the rest was written off by the medical providers. The document also showed that the victim received Nied's automobile policy limit of $50,000 from his automobile insurance provider, 33 percent of which went to attorney fees.

The district court ordered Nied to pay $463,825.59 in restitution and sentenced him to 30 days in jail and 5 years of probation. Nied objected to the restitution amount, and this appeal followed. Nied challenges only the restitution portion of the judgment of conviction.

DISCUSSION

Nied argues that the restitution award is not based on reliable and accurate information, as neither the testimony nor the documentation at the sentencing hearing supported the restitution amount awarded by the district court. He further argues that the restitution

for medical costs should not have included the costs arising from the victim's suicide attempt, the costs paid by the victim's insurance provider, or the amounts initially billed by the medical providers but not actually charged. Finally, he contends that the restitution amount must be offset by the payments Nied's automobile insurer made to the victim.

Sufficiency of evidence

NRS 176.033(3) authorizes a sentencing judge to "set an amount of restitution for each victim of the offense" if restitution is "appropriate." A sentencing judge generally has wide discretion when ordering restitution pursuant to NRS 176.033(3) but must use "reliable and accurate evidence" in calculating a restitution award. *Martinez v. State*, 115 Nev. 9, 12-13, 974 P.2d 133, 135 (1999). Because restitution is a sentencing determination, this court will not overturn it absent an abuse of discretion. *Id.*

Here, at the sentencing hearing, the victim presented testimony and documents regarding his medical costs, including printouts from his insurance provider of the medical claims and a spreadsheet summarizing those claims. In arriving at the restitution amount of $463,825.59, the district court appears to have relied on the presentence report's computation of $459,147.26 for the victim's medical costs and $4,678.33 for his vehicle damage. Nied objected to this amount because it was not supported by competent evidence substantiating the $459,147.26 in medical costs alleged in the presentence report.[1]

Because Nied challenged the restitution amount for the victim's medical costs that the Division of Parole and Probation recommended in the presentence report, the State was required to present evidence at sentencing to prove the amount of restitution. *See id.* at 13, 974 P.2d at 135; 6 Wayne R. LaFave et al., *Criminal Procedure* § 26.6(c) (4th ed. 2021) ("It is up to the prosecutor to prove the amount of loss."). And where, as here, the evidence at sentencing does not support the amount of costs stated in the presentence report, we conclude the district court abuses its discretion in relying on that amount to calculate restitution. Although it is clear from the record that the victim suffered serious and extensive injuries that resulted in significant medical costs, we must vacate the district court's award of restitution in the amount of $463,825.59 because it is not supported by competent evidence. Given the conflicting

[1]In fact, the spreadsheet summary, which the victim's mother prepared, showed a total amount of $277,503.43 billed by the medical providers, and $92,870.66 paid by the victim and his insurer. The victim's mother further testified that her summary of the medical bills accurately reflected all the medical costs incurred since the accident, though she appeared to offer contradictory testimony that the $459,147.26 amount in the presentence report accurately reflected the medical costs incurred after the accident but before the victim's suicide attempt.

evidence regarding the victim's actual total medical expenses, we remand for further proceedings on the calculation of restitution.

Calculation of restitution

Nied's remaining challenges to the restitution award concern how restitution should be calculated. Because we believe these challenges will arise on remand, we address them to provide the district court with guidance in ordering restitution.

Costs related to the victim's suicide attempt

Nied contends that the medical costs arising from the victim's suicide attempt were not a proper subject of restitution because no competent evidence supported the conclusion that the suicide attempt directly resulted from Nied's criminal conduct. We disagree. We have held that restitution may include a victim's "medical costs for the treatment of [his] injuries directly resulting from the crime." *Norwood v. State*, 112 Nev. 438, 441, 915 P.2d 277, 279 (1996). At the sentencing hearing, the victim's wife testified that the victim was depressed about his diminished physical and mental capacity resulting from the crash and that he attempted to commit suicide on the one-year anniversary date of the crash. This testimony and the timing of the victim's suicide attempt directly connected the victim's mental health issues to Nied's reckless driving offense. *Cf. United States v. Thunderhawk*, 860 F.3d 633, 636-37 (8th Cir. 2017) (upholding restitution for medical expenses, including those stemming from a suicide attempt, where the evidence established a causal relationship between the crime and the event giving rise to the need for medical services); *State v. Jent*, 299 P.3d 332, 335-36 (Mont. 2013) (concluding a victim's suicide attempt was directly related to the criminal offense and thus restitution for those medical expenses was proper). It is unclear from the record whether the district court included the medical costs relating to the victim's depression and suicide attempt in the restitution award. We nevertheless conclude that Nied has failed to demonstrate that such restitution would be inappropriate given the evidence presented at the sentencing hearing and Nied's lack of cogent argument or supporting authority for his contention that the suicide attempt did not directly result from the reckless driving offense. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) (declining to consider issue where appellant failed "to present relevant authority and cogent argument").

Computation of medical costs

Nied provides two alternative arguments regarding the proper computation of medical costs when the victim's insurance covers the victim's medical care. First, he contends that restitution for med-

ical costs is limited to the victim's out-of-pocket costs and does not include costs that the victim's insurance company paid. We disagree. We held in *Martinez* that a defendant's restitution obligation for a victim's medical costs is not to be reduced by the amount the victim's insurance company pays. 115 Nev. at 12, 974 P.2d at 135. Thus, Nied's argument that his restitution obligation should not have included medical costs paid by the victim's insurer is foreclosed by *Martinez*.

Second, Nied contends that the restitution for medical costs should be based, at most, on the negotiated amounts that the victim and the victim's insurance provider actually paid, rather than the higher amounts the medical providers initially billed but subsequently wrote off. We agree, as we have explained that the primary purpose of restitution "is to compensate a victim for costs arising from a defendant's criminal act." *Major v. State*, 130 Nev. 657, 660, 333 P.3d 235, 238 (2014). As compensation is the primary purpose, restitution is limited to that amount which adequately compensates a victim for any economic loss or expense as necessary to make the victim whole, but without providing the victim with a windfall. We conclude that measuring restitution in the amount the victim's medical providers accepted as payment in full for their services to the victim, rather than the higher amount originally billed, is most consistent with, and best promotes, the primary purpose of restitution, as it fully compensates the victim for his or her actual costs. Because we are unable to determine from the record how the district court calculated Nied's restitution obligation for medical costs, we direct the district court on remand to calculate the restitution based on the amounts the victim and his insurer paid rather than the amounts billed.

Offset by payments from Nied's insurer

Finally, Nied argues that the restitution amount should have been reduced by the amount Nied's automobile insurance provider paid the victim, less any attorney fees. Nevada statutes are silent on this issue, but the State contends that *Martinez* precludes the reduction of a defendant's restitution obligation based on insurance payments to the victim. *Martinez*, however, concerned only whether a defendant's restitution obligation could be reduced because of payments that a victim received from *his or her own* insurance provider. 115 Nev. at 12, 974 P.2d at 135. It did not address the situation presented by this aspect of the case—where the victim receives payments from the *defendant's* insurance provider. Furthermore, the reasoning in *Martinez* convinces us that its holding was not intended to apply to this situation. This court in *Martinez* analogized its holding "to the collateral source doctrine in the law of torts," which precludes a victim's damages from being reduced by the compen-

sation that the victim receives "for his injuries from a source wholly independent of the tortfeasor." *Id.* at 12 & n.5, 974 P.2d at 135 & n.5 (citing *Proctor v. Castelletti*, 112 Nev. 88, 90 n.1, 911 P.2d 853, 854 n.1 (1996)). However, the collateral source doctrine does not apply to compensation that a victim receives from a defendant. *See* 2 Stuart M. Speiser et al., *American Law of Torts* § 8:16 (2022) ("The authorities are well agreed that payments from the tortfeasor himself or herself or through or by the defendant's insurer are not subject to the collateral source rule and may be shown in mitigation or reduction of recovery."); 2 Jacob A. Stein, *Stein on Personal Injury Damages* § 13:5 (3d ed. 2021) ("[T]he collateral source rule [does not] apply to payments made to the plaintiff by the defendant's liability insurer.").

Moreover, as the California Court of Appeal explained in *People v. Bernal*, 123 Cal. Rptr. 2d 622, 630-31 (Ct. App. 2002), reimbursement of the victim's losses by the victim's insurance provider is distinct from payments to the victim by the defendant's insurance provider. Reimbursement from sources "completely distinct and independent from the defendants . . . were simply fortuitous events from which the defendants should not benefit." *Id*. at 630. And, because payments by the victim's insurer can be subject to claims for reimbursement, e.g., through subrogation rights, "equitable principles would tend to place the loss on the wrongdoing defendant, preclude a windfall recovery by the victim, and reimburse the third party." *Id.* at 630-31. In contrast, when the defendant's insurance provider makes "payments to the victim on his behalf pursuant to its contractual obligation to do so," the provider would have no subrogation rights and thus no recourse; accordingly, if the defendant's restitution is not reduced by the insurance payment, "the victim would receive a windfall to the extent that such payments duplicated items already reimbursed by [the defendant's insurance provider]." *Id.* at 631.

We agree with this rationale and conclude that a district court must offset the defendant's restitution obligation by the amount the defendant's insurer paid to the victim for losses subject to the restitution order. The amount to be offset is limited to the portion of the payments intended to compensate the victim for costs recoverable as restitution; thus, any portion directed to pay attorney fees or excludable damages such as pain and suffering should not be credited against the restitution. *See, e.g.*, *People v. Jennings*, 26 Cal. Rptr. 3d 709, 720 (Ct. App. 2005). Such an offset furthers the primary purpose of restitution—to make the victim whole—without giving the victim a windfall or double recovery.

Here, the record reflects that Nied's automobile insurance provider paid a settlement amount of $50,000 to the victim, 33 percent of which went to the victim's attorneys, but it is unclear whether any

portion of the settlement was allocated to the victim's medical costs or the damage to his vehicle—i.e., the losses subject to restitution. On remand, the district court should determine what amount of offset is appropriate based on Nied's insurance settlement.

CONCLUSION

Although restitution should not provide the victim with a windfall, it should adequately compensate the victim for economic losses or expenses directly related to the criminal offense and necessary to make the victim whole. Expenses may include those associated with a suicide attempt if the evidence establishes a direct relationship to the crime. In calculating restitution, a district court should not consider reimbursement of the victim's losses by the victim's insurance provider, as such would unfairly benefit the defendant; however, the district court should offset payments to the victim by the defendant's insurance provider to avoid duplicating payments and creating a windfall for the victim. Because the evidence presented at the sentencing hearing did not support the restitution award, we vacate the restitution portion of the judgment of conviction and remand for further proceedings on restitution consistent with this decision.

CADISH and PICKERING, JJ., concur.