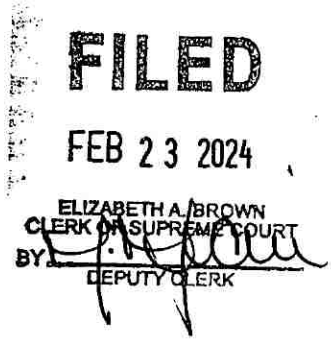
IN THE SUPREME COURT OF THE STATE OF NEVADA

MICHAEL LATHBURY, AN INDIVIDUAL,
Appellant,
vs.
JACKSON JONES, M.D., AN INDIVIDUAL; AND RENO ORTHOPAEDIC CLINIC, LTD., A DOMESTIC CORPORATION,
Respondents.

No. 85163



ORDER OF AFFIRMANCE

This is an appeal from a district court judgment on a jury verdict in a tort action. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Michael Lathbury sustained a femoral nerve injury during a hip replacement surgery performed by respondents Dr. Jackson Jones and Reno Orthopaedic Clinic, Ltd. ("ROC"). As a result, Lathbury brought a medical malpractice action against Dr. Jones and ROC, asserting professional negligence and lack of informed consent. Before trial, Lathbury filed motions in limine to exclude testimony from two of Dr. Jones' and ROC's proposed experts. He contended that one expert, Dr. Huddleston, could not assist the jury primarily because his deposition testimony contained legal fallacies about the standard of care. He contended that the other expert, life-care planner Lora White, could not assist the jury mainly because her testimony went beyond her

qualifications. Dr. Jones and ROC, meanwhile, sought to limit Lathbury's voir dire inquiries.

The district court denied Lathbury's motions, holding that the experts' proposed testimony did not run afoul of the pertinent requirements from *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008), and that the challenges were substantively concerned with the experts' credibility. As to the scope of voir dire, the district court allowed some but not all of Lathbury's preferred questions on tort reform, medical malpractice, insurance, and other related issues. For instance, the district court allowed Lathbury to ask, "Is [there] anyone here that thinks that there are too many frivolous lawsuits in our court system?"; "Who thinks, by raising their hand, that there should be a cap on the damages, that a cap is a good idea?"; and "Does anyone on the jury remember a ballot initiative in 2004 called Kodin, K-o-d-i-n?" Also, during voir dire, Lathbury made his for-cause objections in the jury panel's presence despite initially asking to approach to make these challenges. Ultimately, a 7-1 jury found no medical malpractice on the part of Dr. Jones and ROC. Lathbury appeals. After this case was submitted, the parties filed supplemental briefing on *Taylor v. Brill*, 139 Nev., Adv. Op. 56, 539 P.3d 1188 (2023), and how it bore on this case.

The district court did not err in limiting the scope of voir dire

Lathbury first argues that the district court erred in refusing to allow him to question prospective jurors on tort reform and any perceived medical malpractice crisis during voir dire. Voir dire is designed to uncover "whether a juror will consider and decide the facts impartially and conscientiously apply the law as charged by the court." *Khoury v. Seastrand*, 132 Nev. 520, 527, 377 P.3d 81, 86 (2016) (quoting *Lamb v. State*, 127 Nev. 26, 37, 251 P.3d 700, 707 (2011)). District courts enjoy broad discretion in setting the scope of voir dire. *Thomas v. Hardwick*, 126 Nev.

142, 148, 231 P.3d 1111, 1115 (2010); *see also Morgan v. Illinois*, 504 U.S. 719, 729 (1992) ("[V]oir dire is conducted under the supervision of the court, and a great deal must, of necessity, be left to its sound discretion." (emphasis omitted)). Indeed, Nevada law entrusts "the initial examination of prospective jurors" to the district court and then directs district courts to allow the parties "to conduct supplemental examinations which must not be unreasonably restricted." NRS 16.030(6).

The district court here acted within the bounds of this discretion in limiting the scope of voir dire. Because the district court permitted Lathbury to ask the jury some questions about tort reform and medical malpractice litigation, we cannot say that the district court's bar on Lathbury's other requested questions was "arbitrary or capricious or exceeded the bounds of law or reason." *In re Eric A.L.*, 123 Nev. 26, 33, 153 P.3d 32, 36-37 (2007). In fact, the district court itself asked the jurors whether they held prejudice for either side because the case concerned medical malpractice. Such measured questioning indicates how an opportunity was provided to gauge any jurors' biases, subject to reasonable restrictions.

For the same reasons, the authorities Lathbury cites in support of his position are unconvincing. His reliance on briefing from *Capanna v. Orth*, 134 Nev. 888, 432 P.3d 726 (2018), for the proposition that jurors "*still* had impressions of a medical malpractice insurance crisis and strong feelings on tort reform in cases filed against doctors" 15 years after the Keep our Doctors in Nevada (KODIN) ballot initiative is unavailing because the prospective jurors in this case were surveyed on those impressions and

strong feelings.[1] Although Lathbury may have preferred additional questioning, the district court did not abuse its discretion in limiting further inquiry on these topics. *See In re Eric A.L.*, 123 Nev. at 33, 153 P.3d at 36-37; *see also Tighe v. Crosthwait*, 665 So. 2d 1337, 1341 (Miss. 1995) (concluding that any error in restricting the scope of voir dire regarding media coverage on tort reform was harmless given "those inquiries that plaintiff's counsel *was* allowed to propound" about the subject) (emphasis added).[2] Under these circumstances, we perceive no abuse of discretion.

The district court did not err in hearing for-cause challenges in the jury's presence

Lathbury next argues that the district court erred in requiring his counsel to make for-cause challenges in front of the jury panel. But Lathbury did not clearly make this objection below, and we are not convinced that the district court's failure to abide by Lathbury's preference

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[1]Of note, briefing in a case is not binding on this court.

[2]Moreover, Lathbury overstates the older authority he pulls from other states, which allegedly show that preventing voir dire on jurors' media exposure to medical malpractice crises or tort reform is "reversible error by itself." Not all of these cases, in fact, deemed such errors reversible. *See, e.g., Borkoski v. Yost*, 594 P.2d 688, 694 (Mont. 1979) (assigning harmless error to district court's prohibition on voir dire of personal-injury verdicts and increasing insurance premiums because the jurors never reached the issue of damages); *Tighe*, 665 So. 2d at 1341 (finding harmless error in refusing questions about jurors' exposure to tort-reform media campaigns in part because that line of questioning bore on damages). And some of these cases assigning reversible error did so because the district court excluded virtually all questioning on tort reform or medical malpractice. *See, e.g., Capoferri v. Children's Hosp. of Phila.*, 893 A.2d 133, 142-44 (Pa. Super. Ct. 2006) (reversing where there was no questioning by either the lower court or the attorneys on preliminary questions "designed to detect" jurors' exposure to "tort reform and medical negligence propaganda"). That is not the case here.

in this civil case rises to plain error when he fails to specify any prejudice stemming from the for-cause procedure. *See Parodi v. Washoe Med. Ctr., Inc.*, 111 Nev. 365, 368, 892 P.2d 588, 590 (1995). Really, Lathbury's argument rests on conjecture about the extent of bias among the seated jurors. As a result, even if the district court's procedure was in error, we conclude that reversal is not warranted here given the absence of identifiable prejudice. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("An error is harmless when it does not affect a party's substantial rights.").

The district court did not err in allowing Dr. Huddleston or Lora White, NP, to testify

This court reviews a district court's decision to permit or deny expert testimony for an abuse of discretion. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. In this context, this court has recognized that "[a]n abuse of discretion occurs when no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014).

A necessary element of a medical malpractice action is "that the doctor's conduct departed from the accepted standard of medical care or practice[.]" *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Expert testimony is generally needed to show a departure from or compliance with the standard of care. *See Staccato v. Valley Hosp.*, 123 Nev. 526, 530, 170 P.3d 503, 506 (2007). Such expert testimony is only admissible in Nevada if: (1) the expert is qualified, (2) the expert's "specialized knowledge" would assist the jury's understanding of the facts and evidence, and (3) the testimony is limited in scope to matters within that "specialized knowledge." *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. The testimony, like that of all evidence, is also subject to general relevance

requirements, *see id.*; meaning, it must have "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. And the probative value of the testimony must not be substantially outweighed by the danger of unfair prejudice. NRS 48.035(1).

Challenges to Dr. Huddleston

Lathbury argues that the district court abused its discretion by allowing Dr. Huddleston, who based his opinion on "risk," "complication," and "improper legal fallacies," to testify as to the standard of care. Noting that "the mere fact that the medical community considers something a 'risk' of surgery is immaterial to issues of standard of care," Lathbury asserts Dr. Huddleston's ultimate opinion that Dr. Jones and ROC met the standard care despite the nerve injury was unfairly prejudicial and cannot satisfy *Hallmark*'s assistance requirement. In support, he cites caselaw holding that it is improper to admit evidence of the patient's informed consent or assumption of the risk in medical malpractice actions. *See, e.g.*, *Wilson v. Patel*, 517 S.W.3d 520 (Mo. 2017); *Brady v. Urbas*, 111 A.3d 1155 (Pa. 2015).

These arguments are not persuasive. Chiefly, Dr. Huddleston did not opine that Dr. Jones and ROC were not negligent because Lathbury assented to this procedure with an inherent risk. Rather, Dr. Huddleston's opinion was essentially that Dr. Jones and ROC were not negligent because they completed the surgery properly and the injury occurred anyway. This is not a legal fallacy; "it is axiomatic that complications may arise even in the absence of negligence." *Mitchell v. Shikora,* 209 A.3d 307, 318 (Pa. 2019). Testimony reflecting the same, in this case, furthered the "goal" of "provid[ing] the trier of fact a resource for ascertaining truth in relevant areas outside the ken of ordinary laity" in accord with NRS 48.035 relevance and *Hallmark*'s assistance requirement, i.e., whether medical practice

falling below the standard of care caused Lathbury's nerve injury. *See In re Mosley*, 120 Nev. 908, 921, 102 P.3d 555, 564 (2004) (quoting *Prabhu*, 112 Nev. at 1547, 930 P.2d at 109). In *Brill*, we recently recognized that similar evidence of "risks and complications" can be admissible so long as it falls within the "ambit" of our professional negligence statute and passes muster under NRS 48.035(1), as it "may help inform a jury as it evaluates whether there has been a breach of the accepted standard of care."[3] 139 Nev., Adv. Op. 56, 539 P.3d at 1193. And the district court instructed the jury on the outer bounds of this premise: the fact that an injury is a risk or known complication does not mean that the defendant is not liable. Thus, we perceive no abuse of discretion and agree with the district court that Lathbury's challenge instead amounts to an attack on Dr. Huddleston's credibility—a challenge Lathbury was free to make at trial—rather than the admissibility of his opinions.[4] *See Banks ex rel. Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 66 (2004) (noting that the jury is free to "weigh the credibility of" witnesses with conflicting views).

We note Lathbury also points to Dr. Huddleston's inaccurate understanding of the standard of care at his deposition as proof that Dr. Huddleston's testimony could not have properly assisted the jury. While Dr. Huddleston misstated the legal definition of the standard of care at the deposition, Dr. Huddleston was not cross-examined on this misstatement

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[3]Although *Brill* discussed this admissible evidence in the context of *known* risks and complications, we conclude that the district court did not err in allowing expert opinion on the purportedly rare risks at play here.

[4]Lathbury's objections to the "conclusory" nature of Dr. Huddleston's opinions fail for the same reasons. *See Sunrise Hosp.*, 120 Nev. at 843, 102 P.3d at 66.

and the jury instructions included the correct legal statements of the standard of care. On these facts, Dr. Huddleston's testimony was able to assist the jury in the way *Hallmark* contemplates, 124 Nev. at 500, 189 P.3d at 651, in accord with NRS 48.035's relevance commands, and we cannot say "no reasonable judge could reach a similar conclusion under the same circumstances," *Leavitt*, 130 Nev. at 509, 330 P.3d at 5.

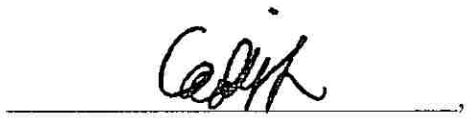
Challenges to Lora White, NP

Last, Lathbury's central argument is that the district court erred in allowing "a family practice nurse practitioner defense expert to testify as to subjects wholly outside her qualification on . . . pain management," when "she clearly lacks the required expertise under *Hallmark*." *Hallmark*'s qualification requirement asks whether an individual is qualified in an area of "scientific, technical, or other specialized knowledge." *See* 124 Nev. at 499, 189 P.3d at 650. Some factors that bear on whether a proposed expert is qualified include their "(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training." *Id.* These qualifications can inform the scope of their permissible testimony. *See* NRS 50.275; *see also Williams v. Eighth Jud. Dist. Ct.*, 127 Nev. 518, 528, 262 P.3d 360, 367 (2011).

We perceive no reversible error in the district court's decision to permit White's testimony. It is true that some narrow portions of White's testimony may have extended beyond her qualifications as a life-care planner and nurse practitioner. However, White's testimony ultimately bore on an issue of damages that the jury did not reach because it found no negligence. We are also not persuaded that this damages testimony was

intertwined with the issue of liability so as to create reversible error.[5] On balance, we therefore deem any testimony that extended beyond White's area of specialized knowledge harmless. *See Wyeth*, 126 Nev. at 465, 244 P.3d at 778.[6] Accordingly, we

ORDER the judgment of the district court AFFIRMED.



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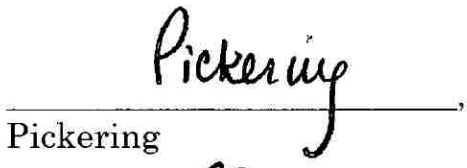

_____, J.
Pickering

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Bell

cc: Hon. Connie J. Steinheimer, District Judge
Jonathan L. Andrews, Settlement Judge

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[5]We note that the cases Lathbury cites for this proposition are distinguishable from the case at hand. *See Verner v. Nev. Power Co.*, 101 Nev. 551, 554, 706 P.2d 147, 150 (1985) (reversing and remanding for a new, non-bifurcated trial where the district court had bifurcated the trial as to liability and damages); *Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 193, 42 P.3d 808, 809 (2002) (reversing for a new trial as to both liability and damages when the district court had an ex parte communication with jurors).

[6]Insofar as the parties present other arguments that are not specifically addressed in this order, we have considered these positions and conclude that they either do not present a basis for relief, lack cogent argument, or need not be reached given the disposition of this appeal.

Breeden & Associates, PLLC
Lemons, Grundy & Eisenberg
Washoe District Court Clerk