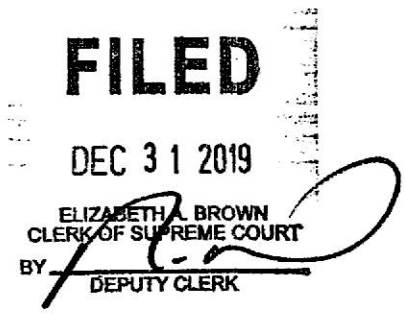
IN THE COURT OF APPEALS OF THE STATE OF NEVADA

CYNTHIA PICKETT, MSW, LCSW, LADC, INC., N/K/A CYNTHIA PICKETT, MSW, LCSW, LADC, PC,
Appellant,
vs.
MCCARRAN MANSION, LLC, A NEVADA LIMITED LIABILITY COMPANY,
Respondent.

No. 77124-COA



ORDER OF REVERSAL AND REMAND

Cynthia Pickett appeals from a district court order granting summary judgment in a breach of contract action. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Cynthia Pickett, a mental health therapist, brought claims against respondent McCarran Mansion, LLC, for breach of covenant of quiet enjoyment, breach of contract, breach of implied covenant of good faith and fair dealing, and attorney fees. Pickett rented an office for her practice in the McCarran Mansion. As part of the lease, McCarran was required to provide a receptionist for all tenants when the building reached 80 percent occupancy. Pickett alleges that, after the building reached the requisite occupancy level in 2013, McCarran never hired a receptionist. Instead, the employee of an attorney—who was a co-tenant—occupied the receptionist area. Pickett alleges that this employee was hostile towards her emotionally vulnerable patients, causing Pickett to lose some of them as clients. As a result, Pickett contends that her practice suffered economic losses until the attorney and the receptionist vacated the building in December 2014.

Pickett filed an amended complaint in March 2015, alleging (1) breach of covenant of quiet enjoyment, (2) breach of contract, (3) breach of covenant of good faith and fair dealing, and (4) attorney fees. In February 2016, the district court excluded evidence of Pickett's damages from 2015, as well as an expert opinion as to her damages. In two separate orders, the district court granted partial summary judgment and then complete summary judgment in favor of McCarran on all of Pickett's claims. Pickett appealed, and this court decided the case. *See Pickett v. McCarran Mansion*, Docket No. 70127 (Order Affirming in Part, Reversing in Part and Remanding, Ct. App., Aug. 8, 2017).

This court affirmed the district court's decision to exclude certain witnesses and emails that Pickett proffered after the discovery deadline. *Id.* at *4-5. This court, however, reversed (1) the entry of summary judgment as to Pickett's breach of covenant of quiet enjoyment claim and concluded this issue presented a question of fact that must be decided by a jury, (2) the grant of the motion in limine excluding Pickett's evidence of damages from 2015 because the evidence was relevant and was not excluded under the duty-to-mitigate damages doctrine, (3) the grant of the motion in limine excluding Pickett's economic loss expert because the district court did not consider the proposed testimony by applying the *Hallmark*[1] factors, and (4) the entry of summary judgment on Pickett's other claims. *Pickett*, Docket No. 70127 at *3-10.

Upon remand, Pickett moved to reopen discovery at a status conference. The district court expressed concern with Pickett's motion on the ground that the parties might incur additional expenses, and that the case

[1]*See Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008).

was ripe for settlement.[2] Also, the district court did not reconsider Pickett's expert testimony under the *Hallmark* factors, or allow Pickett to add evidence of her damages from 2015. McCarran moved for summary judgment, which the district court granted on all of Pickett's claims. Pickett appeals, arguing that the district court abused its discretion by denying her motion to reopen discovery. We agree.

"[D]iscovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *MEI-GSR Holdings, Inc. v. Peppermill Casinos, Inc.*, 134 Nev. 235, 240-41, 416 P.3d 249, 255 (2018) (internal quotation marks omitted). However, "[w]here an essential element of a party's case can be easily and readily established by reopening the case, refusal to allow the case to be reopened will most often constitute an abuse of discretion." *Andolino v. State*, 99 Nev. 346, 351, 662 P.2d 631, 634 (1983). "In order that justice be done, district courts should freely grant leave to amend and reopen." *Ford v. Ford*, 105 Nev. 672, 676, 782 P.2d 1304, 1307 (1989).

Also, "[a]n abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law." *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016); *see also Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 82, 319 P.3d 606, 616 (2014) (noting that the district court abuses its discretion when it "fail[s] to apply the full, applicable legal analysis"). "Where there is no evidence in support of the lower court's

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[2]After the brief discussion regarding discovery at the status conference, the district court issued a scheduling order that ruled—without explanation—that discovery would not be reopened. The court did not address whether the expert report could be supplemented.

findings, they are clearly erroneous and may be reversed." *Pink v. Busch*, 100 Nev. 684, 688, 691 P.2d 456, 459 (1984). Also, under NRCP 52(a)(3), "[t]he court should . . . state on the record the reasons for granting or denying a motion." The majority disposition of the court serves as the law. *See Forrester v. S. Pac. Co.*, 36 Nev. 247, 281, 134 P. 753, 763 (1913). Further, a disposition serves as mandatory authority in subsequent stages of a case. NRAP 36(c)(2).

Here, the district court abused its discretion by failing to allow the expert report to be supplemented under the NRCP. Pursuant to NRCP 16.1(a)(2)(F)(i), a party "must supplement [an expert] disclosure[ ] when required under Rule 26(e)." In turn, Rule 26(e)(2) provides that "any additions or other changes to [expert testimony] must be disclosed by the time the party's disclosures under Rule 16.1(a)(3) . . . are due." Rule 16.1(a)(3)(B)(i) requires that, unless the court orders otherwise, "these [expert] disclosures must be made at least 30 days before trial." Thus, we conclude that, because it was 30 days before trial, Pickett was required to supplement her expert report, and that she timely moved to do so without the need to reopen discovery.

Additionally, even if this issue is analyzed as the denial of a motion to reopen discovery, the district court abused its discretion. The only possible basis that the district court gave for denying Pickett's motion to reopen discovery was that the parties might incur additional expense. Pickett, however, only sought to supplement her completed expert report with evidence of her revenues since 2015, and James Proctor was the only designated expert in the case. In addition, McCarran did not originally

depose Proctor and did not suggest it would need to reopen discovery.[3] *See Pink*, 100 Nev. at 688, 691 P.2d at 459. Furthermore, the district court's written order gave no reasons for denying the reopening of discovery. *See* NRCP 52(a)(3). Thus, it abused its discretion in refusing to reopen discovery or allow the report to be supplemented.[4]

We also note that the district court failed to follow this court's first order, which was mandatory authority. *See* NRAP 36(c)(2); *Forrester*, 36 Nev. at 281, 134 P. at 763. This court's previous order—with respect to the admissibility of evidence—instructed the district court to (1) consider the testimony of Pickett's expert pursuant to the *Hallmark* factors, and (2) allow evidence of Pickett's damages from 2015. *Pickett*, Docket No. 70127 at *5-8. In denying Pickett's motion to reopen discovery, the district court did not allow Pickett to supplement the evidence of her damages from 2015. In

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[3]It appears that the district court also misinterpreted this court's order when it stated, upon remand, that "the court [of appeals] actually found that this [district] court did not abuse its discretion in concluding that there was not substantial justification for being untimely, so your supplemental [report] is correctly out at this juncture." This court, however, affirmed the exclusion of *witnesses and emails* that Pickett disclosed after the discovery deadline, but not any proposed testimony or reports from James Proctor, CPA, Pickett's expert. *See Pickett*, Docket No. 70127 at *4-5. In fact, this court's order ruled that Proctor's report was improperly excluded because no analysis was completed under the *Hallmark* factors. *Id.* at *6-7. Thus, upon remand, the district court must consider Proctor's proposed testimony under the *Hallmark* factors after his report is supplemented.

[4]We further note that Pickett moved to reopen discovery specifically so that she could introduce evidence of causation. To accomplish this, she only needed to supplement the expert report she had already completed by using her revenues after 2015. Therefore, the record shows that Pickett could "easily and readily" establish essential elements of her claims by reopening discovery. *See Andolino*, 99 Nev. at 351, 662 P.2d at 634. Thus, the district court abused its discretion in refusing to reopen discovery.

addition, no consideration was given to the proposed expert testimony with respect to the *Hallmark* factors. Finally, this court held that Pickett's claim for breach of covenant of quiet enjoyment involved a triable question of fact. The district court, therefore, disregarded controlling law. *MB Am.*, 132 Nev. at 88, 367 P.3d at 1292. This constitutes an abuse of discretion, which warrants reversal. *Peppermill*, 134 Nev. at 240-41, 416 P.3d at 255.

Accordingly, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court for proceedings consistent with this order.[5]

_____, C.J.
Gibbons

_____, J.
Bulla

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[5]Pickett also contends that the district court erred in granting summary judgment as to her claims for breach of contract and breach of implied covenant of good faith and fair dealing. Because we are reversing and remanding on the ground that Pickett's motion to reopen discovery was improperly denied and she should have been allowed to supplement her expert's report, we reverse the order granting summary judgment as to all four of Pickett's claims, including attorney fees. *Cf. Tom v. Innovative Home Sys., LLC*, 132 Nev. 161, 177, 368 P.3d 1219, 1230 (Ct. App. 2016) ("Because of our conclusion that summary judgment was inappropriate in this case, the award of attorney fees is necessarily vacated . . . ."). We further emphasize that the majority order of this court serves as binding authority in subsequent stages of the same lawsuit. NRAP 36(c)(2); *see also Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014) ("[A] court involved in later phases of a lawsuit should not re-open questions decided (*i.e.*, established as law of the case) by that court or a higher one in earlier phases." (internal quotation marks omitted)); *accord Arizona v. California*, 460 U.S. 605, 618 (1983) ("[W]hen a court decides upon a rule of law, that decision should continue to govern the same issues in subsequent stages in the same case.").

TAO, J., concurring in judgment:

I concur in the judgment, but on entirely different grounds.

After discovery closed, Pickett sought leave to do two things: first, to re-open discovery and, second, to supplement the expert report of her causation and damages expert, James Proctor. The district court denied both requests. Subsequently, McCarran filed a motion for summary judgment asserting lack of causation, which Pickett opposed in part with an affidavit from Proctor that substantially tracked his proposed (and rejected) supplemental expert report. The district court refused to give any weight to the affidavit and granted summary judgment, reasoning that Pickett should not be permitted to defeat summary judgment by relying upon expert opinions that were not within a properly disclosed expert's report and thus could not be introduced at trial. It further concluded that, because the district court denied leave to supplement Pickett's report, the opinions set forth in the affidavit would not be permitted at trial. From this, Pickett appeals.

Buried within this relatively short narrative are three overlapping issues that the parties incorrectly argue (and, following their arguments, the majority consequently analyzes) as only two issues. The three issues are: whether the district court properly denied Pickett's request to re-open discovery; whether the district court properly denied Pickett's request to supplement Proctor's expert report; and whether the district court properly granted summary judgment against Pickett once it refused to consider Proctor's affidavit.

The parties treat the latter two arguments as one, assuming that once the district court denied leave to amend Proctor's affidavit, summary judgment was inevitable as, without the supplement, Pickett had no way to prove causation. But it wasn't inevitable at all. Indeed, properly dividing

the issues reveals this appeal to be more interesting than the parties and district court thought.

I.

As to the first issue — whether or not the district court properly denied Pickett's request to re-open discovery — I diverge from the majority and would affirm. The majority reverses, concluding that the district court abused its discretion by failing to set forth intelligible reasons for the denial. I don't think those reasons are as necessary as the majority does.

When ruling on non-dispositional motions, district courts should state their reasons on the record. NRCP 52(a)(3). But on appeal, it's not our job to simply grade the district court's reasons and reverse if we disagree with those particular reasons. Rather, a "bedrock principle upon which our appellate review has relied is that the appeal is not from the opinion of the district court but from its judgment. We review judgments, not statements in [written or oral] opinions." *United States v. Rivera*, 613 F.3d 1046, 1051 (11th Cir. 2010) (internal quotation marks and citations omitted).

Thus, when we review a district court's ruling under the deferential "abuse of discretion" standard, what we review is whether the district court reached a result that was correct under any conceivable reason which the district court reasonably could have proffered under the circumstances, not whether the particular reason it chose was the right one or not. *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). This is why it's long-settled that we "will affirm a district court's order if the district court reached the correct result, even if for the wrong reason." *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010). Thus, under "abuse of discretion" review, it is the result, not the reason, that

matters.[6] *American Sterling Bank v. Johnny Mgmt. LV*, 126 Nev. 423, 428, 245 P.3d 535, 539 (2010). To take any other approach would require us to reverse judgments that are not erroneous in any substantive way and that every other district judge facing the problem would also have entered, except that this particular district judge used the wrong magic words. In effect, we'd reverse judgments that every reasonable judge would agree were not substantively wrong but only articulated less than perfectly, which seems to me to be a tremendous waste of resources that would require cases to be disposed of on something other than their ultimate intrinsic merits, and would hold district courts to a standard of perfection in phrasing (but not result) that I doubt very many judges (including the ones on this court) could ever meet.

Applying these principles to the appeal at hand, it seems irrelevant to me that the district court only orally recited one particular reason for denying Pickett's request to re-open discovery (namely, the associated cost of doing so), or that it recited none in its final written order. The majority specifically cites these reasons or non-reasons to conclude that the district court "abused its discretion," but I consider them to be non-sequiturs. What matters is only whether the district court acted within its discretion in reaching the result that it reached regardless of whatever reasons it gave or did not give: the focus is on its ultimate judgment and not the contents of its written opinion. *See Rivera*, 613 F.3d at 1051. Because re-opening discovery many months after it previously formally closed is a matter well within the district court's discretion to refuse, I would conclude

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[6]Except in those limited circumstances where the district court's factual findings are themselves at issue, as in an appeal from a bench trial, an appeal from a post-verdict award of attorney fees, or other similar proceedings.

that no abuse of discretion occurred here. *See MEI-GSR Holdings, Inc. v. Peppermill Casinos, Inc.*, 134 Nev. 235, 240-41, 416 P.3d 249, 255 (2018) ("[D]iscovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has *clearly* abused its discretion." (emphasis added)).

Accordingly, I would affirm on this issue. But as I explain below, it really doesn't matter much because by itself this issue doesn't fully dispose of the appeal.

II.

The second issue here is whether the district court erred in refusing to grant Pickett leave to supplement Proctor's report, the majority concluding that the denial constituted an abuse of discretion. I'll discuss this in more detail below but, whether the majority is correct or not, I don't particularly agree with my colleagues that we have already decided either that motion, or any other issue raised in this appeal, in our prior order. "[B]y its nature, the judicial power does not act on issues in the abstract." *Wright v. Spaulding*, 939 F.3d 695, 700 (6th Cir. 2019). Judicial opinions are binding only insofar as they articulate a "legal conclusion that is necessary to the judgment" rendered in the case and the court "considered the issue and consciously reached a conclusion about it." *Id.* at 701-02. Anything else the opinion might contain is dicta. The prior appeal in this case arose from an appeal from a summary judgment decision that did not involve either a motion to re-open discovery or a motion for leave to supplement an expert report, as those things had never been filed in the case when we resolved the prior appeal, and were not filed by either party until long after we resolved that prior appeal. There's no basis to conclude that our prior opinion somehow resolved not-yet-filed motions that the district court never had occasion to consider until well after our appellate jurisdiction expired.

In any event, whether the supplemental report should have been permitted or not doesn't matter that much in the end, because excluding the supplemental report is a very different question than whether summary judgment was properly granted. One doesn't necessarily lead to the other.

III.

The real question in this appeal is whether, after denying Pickett's motions to re-open discovery and supplement Proctor's report, the district court nonetheless might still have erred anyway in granting summary judgment.

Under NRCP 56, summary judgment is proper if the moving party can demonstrate that there exist no genuine disputes of material fact, and the absence of those genuine disputes entitles the moving party to judgment as a matter of law. *See* NRCP 56(e); *see also Wood v. Safeway Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). In opposing McCarran's motion for summary judgment, Pickett relied largely upon an affidavit of Proctor whose contents contested the question of causation. The affidavit closely tracked (in places word for word) the opinions contained in the supplemental report that Pickett tried to submit but the district court refused to allow into the case. But the district court concluded that Pickett could not rely upon the affidavit because, once it denied Pickett's request to supplement Proctor's expert report, the affidavit contained opinions that fell outside the scope of the only expert report (Proctor's original report submitted many months previously) that then permissibly existed in the case. Without the affidavit Pickett could not show that any genuine disputes of fact existed regarding causation, so the district court granted summary judgment against Pickett.

The district court assumed that because the opinions contained within Proctor's summary judgment affidavit were outside the scope of

Proctor's original expert report, it could ignore those opinions when resolving the merits of the summary judgment motion. Was that correct?

It's well-settled that district courts have at least some inherent power to decide what materials are proper to be considered in support of or in opposition to a summary judgment motion. For example, it's established that summary judgment can only be granted or denied based upon things that would be admissible at trial under the rules of evidence. *See* NRCP 56(e) (affidavits in support of or in opposition to summary judgment shall "set out facts that would be admissible in evidence"); *see also Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 301, 662 P.2d 610, 621 (1983) (evidence in support of or in opposition to summary judgment must be evidence that would be admissible at trial); *Schneider v. Cont'l Assur. Co.*, 110 Nev. 1270, 1273-74, 885 P.2d 572, 575 (1994) ("The district court thus erred in relying solely on inadmissible evidence to grant summary judgment."); *Adamson v. Bowker*, 85 Nev. 115, 119, 450 P.2d 796, 799 (1969) ("[E]vidence that would be inadmissible at the trial of the case is inadmissible on a motion for summary judgment."). Consequently, courts must intrinsically have the power to refuse to give weight to anything submitted in opposition to summary judgment that violates the Nevada rules of evidence.

But here, the district court didn't discount Proctor's affidavit because it contained opinions that could not meet the rules of evidence. It discounted those opinions because they supposedly failed to comply with the rules of discovery. At issue here is non-compliance with NRCP 16.1(a)(2)(B) and 26(e), rather than non-compliance with the rules of evidence.

I presume that, in some situations, district courts possess some general power to refuse to consider summary judgment affidavits even if they comply with the rules of evidence but not with the rules of procedure and discovery. For example, if the court finds that an affidavit constituted a

"sham" produced for the sole purpose of falsely circumventing summary judgment, it can ignore the affidavit. *See e.g., Nutton v Sunset Station, Inc.*, 131 Nev. 279, 294-95, 257 P.3d 966, 976-77 (Ct. App. 2015). In such situations, the court can find an affidavit to be a sham if it contains assertions that directly contradict other assertions previously made by that same witness during discovery and the contradiction cannot otherwise be legitimately reconciled as anything but manufactured. *Id.*

Similarly, a district court has the power to refuse to consider affidavits that violate other procedural rules, such as affidavits filed belatedly in violation of the deadlines set forth in the NRCP or in any local rules of practice, or affidavits that do not meet the content requirements set forth in Rule 56(e), such as affidavits that are unsigned or lack an oath. It likely also has the power to ignore an affidavit produced after the close of discovery from a brand-new witness never before identified anywhere in the case in violation of rules governing the identification of witnesses.

But in other situations, a district court's power to ignore affidavits simply because they contain matters not disclosed during discovery is more circumscribed. Motions for summary judgment may be filed before discovery has even commenced, much less been completed. *See* pre-2019 version of NRCP 56(a) (permitting the filing of a motion for summary judgment "any time after the expiration of 20 days from the commencement of the action"). When a motion is filed early in the action, just about anything that the other party produces in opposition will be something that has not yet been disclosed during discovery. (In response, the opposing party could oppose summary judgment under NRCP 56(f), and I imagine most parties would, but they are not required to — they could just submit substantive affidavits). Consequently, it's overly simplistic to conclude that a court can

always ignore a summary judgment affidavit merely because it contains matter not previously subjected to discovery.

So which is the approach that governs here? The district court concluded that Proctor's affidavit was not worthy of consideration because it expressed opinions that he could not testify to at trial. At a theoretical level, I agree that the district court had some power to do something like this. If an expert would not be permitted to testify to a particular opinion at trial, it stands to reason that the expert ought not be permitted to defeat summary judgment based solely upon that very same inadmissible opinion. After all, the purpose of summary judgment is to determine whether a trial is necessary in the sense that there is some decision that the jury will have to make based upon the evidence presented, and no trial is necessary if one party can only win by basing its case upon opinions that the jury would never be permitted to consider. Logically, that should be true whether the opinion was excluded from trial as violating the rules of evidence, the rules of timeliness or form, or the rules governing expert reports. Consequently, at least at a high level of generality, the district court was correct that it possessed the inherent power to ignore the substance of an expert affidavit that might otherwise have created a genuine issue of material fact but would not have been admitted at trial.

But, as is true in so many other contexts, the devil lies in the details. Even if we grant that the district court possessed the power to make such a decision, the question then becomes: did the district court apply that power correctly to Proctor's affidavit in this case?

IV.

NRCP 16.1(a)(2)(B)(1) requires parties who intend to present testimony from an expert witness to provide a "complete statement of all opinions the witness will express, and the basis and reasons for them."

Though the rule is apparently clear, much litigation has been fought over the words "complete" and "all" and whether an expert's testimony in a particular trial hews closely enough to the contents of a written report. The purpose of an expert report under NRCP 16.1(a)(2)(B) and 26(e) is to fully disclose the contents of the expert's opinions and anticipated trial testimony so that the opposing party is prepared to both counteract it in discovery and cross-examine it at trial. *See Washoe Cty. Bd. of Sch. Trs. v. Pirhola*, 84 Nev. 1, 5, 435 P.2d 756, 758 (1968) (quoting *Jeppesen v. Swanson*, 68 N.W.2d 649, 656-57 (Minn. 1955) (providing that the purpose of discovery is to prevent surprise at trial)). If an expert attempts to testify to matters not disclosed in his report, the trial judge can strike the trial testimony under NRS 50.275 as lying not "within the scope" of the expert's report, something known as the "limited scope requirement." *Hallmark v. Eldridge*, 124 Nev. 491, 492, 189 P.3d 646, 650 (2008). Unlike the question of whether an affidavit complies with the required form, or whether it was supplied on time — questions that can be answered without delving into the contents of the affiant's testimony — the question of whether an expert's testimony falls inside or outside the scope of an expert report is a fact-based one that depends upon a close comparison between the contents of both documents. And this comparison can be rife with pitfalls.

"Within the scope" doesn't mean "verbatim." Under NRCP 16.1(a)(2)(B), NRCP 26(e), and NRS 50.275, an expert's trial testimony need not be constricted to slavishly repeating, word for word, the exact opinions described in a prior report, and are not objectionable simply because they wandered slightly off-script from the report. The report need not be an exact literal transcript of the anticipated trial testimony, nor need it be an encyclopedic treatise covering every possible idea in the field that the expert's opinions might touch upon however remotely. Rather, all that is required is

that the trial testimony be "reasonably" disclosed in the report such that the report can be said to have fairly placed the opposing party on notice of the forthcoming testimony. Thus, an expert may testify to matters that were never expressly listed in the report but are inherently included within it, such as common foundational knowledge that would be readily known to anyone trained in the field, or any other unstated opinions that everyone working in the field would agree necessarily underlie the opinions expressly stated. For example, in *Khoury v. Seastrand*, 132 Nev. 520, 377 P.3d 81 (2016), the supreme court permitted an expert to opine that a plaintiff's symptoms were unrelated to a neck injury and explain why at length, even though all the expert's prior reports had said was that he disagreed with the plaintiff's experts. The court reasoned that expressing a disagreement sufficed to place the other party on notice that the expert would testify to a contrary opinion, and implicit within that testimony would be the reasons behind that disagreement, even though those reasons were not specifically set forth in any report.

Consequently, determining whether an expert's affidavit opinion was, or was not, properly disclosed in a prior report might not be as simple an exercise as placing the two documents side by side and looking for words and phrases in common and striking anything that appears not to match. Quite to the contrary, when the subject matter at issue is highly technical or scientific, the report and testimony may both contain opinions expressed in terms that a layperson might not understand at all or, worse, might misunderstand as different when they were actually the same. What may seem true to a layperson might be obviously not true to one versed in the field. In many cases, it might turn out that, if the expert is allowed to explain further, he or she might be able to explain that an apparent inconsistency between the testimony and the report is no inconsistency at all. Precisely for

this reason, when a party makes a "limited scope" objection to an expert's trial testimony, courts often permit the expert to be subject to voir dire examination (possibly outside the presence of the jury) in order to explore the nuances of the report and the trial testimony and investigate whether an apparent discrepancy was real or not. *See Hallmark*, 124 Nev. at 491, 189 P.3d at 650; *see also Wynn Las Vegas, LLC v. Nappa* (Order of Reversal and Remand, April 20, 2018), 2018 WL 2041523 at *2.

But the problem here is that no such mechanism exists in the context of a summary judgment motion. On summary judgment, all the court has before it are the affidavit and the report, and it cannot explore them further by asking additional questions of the expert. Sometimes the court might glean some additional insight when the apparent discrepancy was explored during the expert's deposition. But here, McCarran did not take Proctor's deposition, so there is no such insight anywhere apart from the documents themselves.

The larger point here is that it might sometimes appear that the contents of an affidavit fall outside the scope of a report; but at the same time it also might be true that, had the expert been permitted to explain (either during voir dire examination at trial or in a pre-trial deposition), the differences might have been easily reconciled and the testimony was not, in truth, outside the scope of the report. When there is no such opportunity to investigate and explain — as there frequently is not in a summary judgment motion like this one — district courts must be exceedingly careful in concluding that the expert's opinion truly was not previously disclosed in accordance with NRCP 16.1(a)(2)(b) and 26(e).

Outside the context of summary judgment, a district court possess several options, both before and during trial, to resolve whether an expert's opinion is admissible under *Hallmark* or not. It may choose to

resolve it via a pre-trial motion in limine, a voir dire examination of the expert either before the jury or outside its presence, or during the examination and cross-examination of the expert during trial. But most of these options don't exist within a summary judgment motion. The only inquiry in a summary judgment motion is whether there exist some factual issues that warrant further proceedings (such as future motions in limine or a trial itself), rendering a summary judgment motion a poor mechanism for decisions like this, except in the most clear cases where no further information or explanation could conceivably be needed and the answer is unequivocal on its face.

What this all comes down to is this: I believe that the district court's decision to ignore Proctor's summary judgment affidavit can be affirmed as correct only if (a) the opinions set forth in that affidavit differed in substance so much from the opinions disclosed in his prior report that the report failed to give adequate notice of his later opinions, and (b) there exists no possible way for him to legitimately explain away the apparent differences had he been given the opportunity to do so during a hypothetical deposition or voir dire examination. As is self-evident, this must be a case-by-case fact-based inquiry. Moreover, the inquiry must be made carefully, because if done carelessly it can become circular and self-fulfilling: if the district court ignores the affidavit on the grounds that the discrepancy could not be explained away and thereby grants summary judgment, that very decision deprives the expert of the opportunity to potentially explain away the discrepancy later. As a general matter, courts ought to be careful to avoid such circular reasoning.

Moreover, whatever the district court decides, the decision should not rest solely upon the fact that Pickett first sought to supplement Proctor's report. It might seem superficially logical to conclude that, when a

party seeks to supplement a report under 26(e), the supplement will necessarily contain opinions that a prior report did not. After all, NRCP 26(e) requires supplementation when "a party learns that in some material respect the information disclosed is incomplete or incorrect." From this, one might argue that a supplement must contain material information that the prior reports did not, and therefore the district court could safely assume that, to the extent that Proctor's affidavit tracked the supplement, it must have been outside the scope of his prior report. But this is false logic. Merely because a party seeks to supplement a report cannot by itself be construed as an admission that the supplement necessarily must contain materially new information that necessarily lies outside the scope of the original report; the party might just have been "playing it safe" and seeking supplementation of information that was only arguably new (and perhaps not new at all) in order to avoid problems down the road at trial. Instead, the district court must actually decide whether the opinions were different, and cannot simply assume that to be true merely because a supplement was sought.

V.

There's another wrinkle at play here. The district court denied leave to supplement Proctor's report. But after that, Proctor's opinions surfaced another way when Pickett submitted them in an affidavit that was not an expert report pursuant to the rules of discovery, but rather an affidavit in opposition to McCarran's motion for summary judgment under NRCP 56. The issue therefore is not whether the district court possessed the power to exclude it as an untimely report non-compliant with the rules of discovery. Rather, the district court refused to consider the affidavit on the grounds that Proctor would not have been permitted to testify at trial to the opinions contained in the affidavit.

The question for us therefore becomes: if Proctor had attempted to testify to these same opinions at trial, would the district court have committed an abuse of discretion by refusing to permit that trial testimony? This is a question relating to the scope of permissible expert testimony at trial, not a question arising directly from the rules of discovery per se (only indirectly, in that the rules of discovery were the basis for permitting or excluding the trial testimony).

As I've mentioned above, it strikes me that a district court ought to have some power to refuse to grant or deny summary judgment based upon evidence that it could legitimately refuse to admit at trial for any reason, whether grounded in a rule of evidence or a rule of discovery or procedure. But there's a subtle and slight, and frequently overlooked, difference between evidence permitted in opposition to summary judgment, and evidence that would be admissible at trial. At trial, an affidavit would not be admissible as substantive evidence, as it constitutes hearsay. *See United States v. Glass*, 744 F.2d 460 (5th Cir. 1984) ("The affidavit is hearsay"). But affidavits are expressly permitted by NRCP 56(e) for summary judgment motions. An affidavit in support of summary judgment is really something of an exception to the ordinary rule that summary judgment may be based only upon evidence that would be admissible at trial. The idea is that an affidavit is not admissible as evidence at trial because it cannot be cross-examined and the jury cannot assess the credibility of an affiant who testifies on paper and not in person. *See United States v. Popenas*, 780 F.2d 545, 546-47 (6th Cir. 1985). But affidavits nonetheless work under NRCP 56 because credibility is not at issue on summary judgment. "[A] district court cannot make findings concerning the credibility of witnesses or weight of evidence in order to resolve a motion for summary judgment." *Borgerson v. Scanlon*, 117 Nev. 216, 220, 19 P.3d 236, 238 (2001). Rather, all "documentary evidence must

be construed in the light most favorable to the non-moving party. All of the non-movant's statements must be accepted as true and a district court may not pass on the credibility of affidavits." *Sawyer v. Sugarless Shops Inc.*, 106 Nev. 265, 267-68, 792 P.2d 14, 15-16 (1990).

A summary judgment affidavit is thus a mere facial proffer of evidence, rather than truly evidence itself as normally defined in the rules of evidence, and a court must accept the proffer as true for purposes of summary judgment even though it might turn out at trial to be untrue, even so untrue as to be ultimately inadmissible. For example, a facially adequate affidavit proffer might fall apart upon trial cross-examination and be discredited by the jury. It might also turn out that cross-examination might render the testimony not merely unbelievable but actually inadmissible, such as if cross-examination reveals that the witness actually lacked the personal knowledge that he claimed on paper to have. But if cross-examination is needed to show this, then a trial is needed, and summary judgment is improper. The only decision on summary judgment is whether the proffer of evidence establishes a question of credibility or weight for the jury to decide, not whether the evidence if presented in person and cross-examined will turn out to be right, wrong, credible, or incredible.

Accordingly, the decision as to whether some evidence might be admitted at trial is not quite the same as deciding whether the proffer of that same evidence may be considered for purposes of summary judgment. A piece of evidence might well be appropriate to consider in the more limited context of a summary judgment motion but yet turn out later, when more is known about it, to be inadmissible at trial. In the case of expert testimony, a court may well decide that an expert's credentials or qualifications might facially meet the standards of *Hallmark*, but then after receiving more information through voir dire and cross-examination by the adverse party,

conclude that it really does not. For example, an expert might initially opine that his qualifications meet the standards, but upon withering cross-examination concede that he inflated his professional resume. The court can legitimately decide to exclude the expert's testimony at trial under *Hallmark*. But it cannot be excluded on summary judgment, because there is no mechanism for voir dire or cross-examination; the court is required to accept everything as true on its face and leave the rest for trial. Thus, in a narrow sense, in resolving summary judgment, despite the fact that NRCP 56(e) states that courts must base summary judgment upon evidence that would be admissible at trial, the reality is that courts must sometimes accept things to be true on summary judgment that they might later exclude from consideration at trial.

This appeal presents an interesting manifestation of that gap. Under the rules of procedure, a party must submit an expert report before the other party is required to submit any rebuttal expert report to that original report. Thus, under the sequence set forth in the NRCP, a party's expert report will never — indeed, could never — include any opinions that respond to the adverse party's rebuttal reports simply as a matter of chronology because rebuttal reports are always filed after initial reports.

But it does not follow that, if offered at trial or in opposition to summary judgment, any expert opinion that responds to the other party's rebuttal expert report will always necessarily fall outside the scope of that expert's initial report. If that were the case, then summary judgment would always have to be granted in any case involving dueling experts: all that the party seeking summary judgment needs to do is present its last rebuttal expert report in support of its summary judgment motion, and then claim that the other party cannot respond to it, because the other party's expert never previously opined in response to the rebuttal report and therefore any

response now would fall outside the scope of prior written expert reports and must be discounted. The NRCP does not provide for experts to offer rebuttal reports to adverse rebuttal reports, and then for the first party to offer still another rebuttal to that rebuttal to the initial rebuttal, and so on and so on, ad infinitum. At some point in time, one expert report or another will be the last one submitted, and whichever expert report is required to be submitted last in time will always stand as technically unrebutted by the adverse expert's previous written reports, even if the contents could have been responded to had an opportunity been given under the rules.

So in opposing summary judgment, experts may be permitted some range of freedom outside of the strict scope of their last written report to respond to recent developments that did not exist at the time the written report was submitted, specifically including responding to any new opinions outlined in the adverse party's last rebuttal report that could not otherwise be responded to under the chronology of the rules of discovery. Otherwise, summary judgment will always be inevitable in favor of the party who had the lucky advantage of having submitted the last rebuttal expert report in the case. And that is undeniably not how Rule 56 was designed to work.

VI.

Let's apply that approach to Proctor's affidavit and expert reports to see what we get.

Proctor's original expert report was dated October 23, 2015, at a time when discovery was still ongoing. The report specifically states that "discovery is continuing" and consequently "[t]he facts and conclusions in this report are based on the documents and information received in this case to date and are still incomplete." The report concludes that Pickett's estimated monetary damages for the calendar year 2014 ranged from $109,876 to $226,164, depending upon certain assumptions.

Proctor's supplemental expert report was dated February 18, 2016, after the close of discovery. It repeated the calculations made in the 2015 report, but provided more detail and now worked backwards to include the year 2013, concluding that Pickett's estimated damages for the years 2013-2014 included an additional $34,000 to $107,000 on top of the estimates provided in the previous report.

Proctor's summary judgment affidavit was dated June 6, 2018, three years after his supplemental report. It purports to "supplement" the prior reports, noting that "[a]dditional information from Pickett is available as several years have since transpired since the issuance of the previous reports," and that additional information includes "actual financial information subsequent to 2014 . . . through 2017." The affidavit contains additional estimates for damages alleged to have been suffered during those years. It also contains a detailed analysis of McCarran's contrary expert opinions contained in its own expert's "Rebuttal Report" prepared in December 2015, stating that McCarran's expert reports "make[ ] several assertions that are incorrect or misleading."

Based on this, did the district court abuse its discretion in refusing to allow Proctor's supplemental report? I would conclude that the answer is no. The February 18, 2016 supplemental report added information to the October 23, 2015 report, but only information that pre-dated the October 23, 2015 report (namely, estimated damages for the year 2013) and therefore should have been included within it. The supplemental report contains no explanation regarding why information relating to the year 2013 was not included in the prior report filed on October 23, 2015, as the information pre-dated that report by two years. Consequently, I would conclude that the district court was well within its discretion to refuse to allow the supplemental report because it added only information that should

already have been included within the original report and should have been available at the time the original report was prepared. Though some judges might have permitted the supplement, it was within the district court's discretion not to.

So, how about the June 6, 2018 summary judgment affidavit? That affidavit clearly contains new information not included within either of the previous reports, specifically an estimate of additional damages for the years 2015-2017, as well as a detailed response to a rebuttal expert report prepared by McCarran's expert. Unlike the case with the February 18, 2015 supplemental report, this information did not exist at the time the original expert report was prepared. Proctor obviously could not have calculated actual damages for the years 2015-2017 in a report filed in 2015, and he also could not have responded to McCarran's December 2015 expert report which did not exist in October 2015.

I would conclude that the district court committed an abuse of discretion in refusing to consider Proctor's affidavit in opposition to summary judgment. As to the new opinions regarding McCarran's rebuttal report, the affidavit was not an obvious sham designed solely to improperly subvert summary judgment. *See Nutton*, 131 Nev. at 294-95, 357 P.3d at 976-77. Quite to the contrary, the affidavit contains a perfectly valid explanation why the new information had not been previously disclosed in any expert report — none of it existed when those reports were prepared. Proctor's newly-formed opinion of McCarran's rebuttal report constituted his own rebuttal evidence (not yet contained in any written report because he was not permitted to submit a rebuttal-in-response-to-a-rebuttal) in opposition to McCarran's summary judgment evidence, as it "tends to counteract new matters by the adverse party." *Morrison v. Air California*, 101 Nev. 233, 235-

36, 699 P.2d 600, 602 (1985) (quoting *McGee v. Burlington Northern, Inc.*, 571 P.2d 784, 792 (Mont. 1977)).

Because the affidavit was not a sham but merely arose from a gap in the rules, the district court should not have excluded it as falling outside the scope of Proctor's written reports. Had Proctor testified at trial, he almost certainly would have been permitted to opine about the contents of McCarran's rebuttal expert report despite not having been given an opportunity to write yet another report responding to it under the rules of discovery. He could not have addressed McCarran's rebuttal report in his original report filed October 23, 2015, as it did not exist until December 2015. But once it existed, McCarran was clearly on notice that the experts intended to disagree; indeed, McCarran's report was a direct point by point "rebuttal" to Proctor's initial expert report. At trial, McCarran could not plausibly claim surprise if Proctor was asked to opine about the contents of the rebuttal report that was designed as a direct response to Proctor's own expert report and to which the rules gave Proctor no chance to respond in any other way.

Similarly, as to Proctor's opinions regarding damages incurred after his written reports, the district court should have considered those as well. Throughout the case — in pleadings, motions, and discovery — Pickett repeatedly maintained that her damages were continuous and ongoing and did not cease to accrue at some time in the past. Thus, to the extent that Proctor's affidavit (and anticipated trial testimony) would have encompassed damages arising after the close of discovery until the time of trial, it would not have violated any rule of either discovery or evidence, as McCarran was clearly on notice at all times that Pickett's claim sought damages continuing throughout and including the time of trial. The only requirement is that Pickett disclose the mathematical basis for calculating any damages accruing during that interregnum between discovery and trial so that McCarran could

do the calculations for itself if it wanted to, and Proctor's report did. Indeed, courts routinely permit juries to award post-discovery damages through the time of trial whenever a plaintiff pleads and proves that the damages are ongoing. *See Drummond v. Mid-West Growers Co-Op. Corp.*, 91 Nev. 698, 712, 542 P.2d 198, 208 (1975) (jury erred in awarding insufficient amount for damages "incurred at the time of trial" and for "future expenses" that would accrue after trial). Moreover, had Pickett otherwise prevailed at trial, the jury would have committed error by refusing to award ongoing damages incurred after the close of discovery and through trial, so long as it concluded as a factual matter that such damages existed. *Id.*

Admittedly, the circumstances seem factually odd in this case because, unlike a typical case, the period of time between the close of discovery and the affidavit (and future trial) spanned an unusually lengthy period of time of three and almost four years because of the intervening appeal and remand. In a more typical case in which the period of time between the close of discovery and the trial might consist of only a few months, the amount of damages might be minimal or even nominal. Here, they were large (potentially hundreds of thousands of dollars). But merely because they are unusually large does not make them inadmissible or unawardable by the jury.

In sum, as there was no basis for McCarran to claim surprise or ambush at trial had Proctor tried to testify about either post-discovery damages or about the contents of McCarran's rebuttal expert report, there existed no basis for the district court to refuse the testimony had it been proffered at trial. Proctor's affidavit was not a sham on the discovery process. Consequently, there existed no basis for the district court to refuse to consider it in opposition to McCarran's summary judgment motion.

For these reasons, I concur in the judgment and would reverse the district court's grant of summary judgment.

Tao, J.

Tao

cc: Hon. Lynne K. Simons, District Judge
Carole Pope
Gunderson Law Firm
Washoe District Court Clerk