IN THE COURT OF APPEALS OF THE STATE OF NEVADA

FREDDIE CONLEY, INDIVIDUALLY; AND DEBRA CONLEY, INDIVIDUALLY.
Appellants,
vs.
ELDORADO RESORTS CORP., A FLORIDA CORPORATION; AND THYSSENKRUPP ELEVATOR CORPORATION, A FOREIGN CORPORATION,
Respondents.

No. 78486-COA

FILED

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ELIZABETH A. BROWN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

FREDDIE CONLEY, INDIVIDUALLY; AND DEBRA CONLEY, INDIVIDUALLY,
Appellants,
vs.
ELDORADO RESORTS CORP., A FLORIDA CORPORATION; AND THYSSENKRUPP ELEVATOR CORPORATION, A FOREIGN CORPORATION,
Respondents.

No. 78856-COA

ORDER OF AFFIRMANCE

Freddie and Debra Conley appeal from an order granting summary judgment and the denial of two related post-judgment motions. They appeal from the amended final judgment and a special order after final judgment denying a motion for relief under NRCP 60(b), and from an order denying a motion to alter or amend a judgment under NRCP 59. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Freddie and Debra Conley were guests at the Grandview Las Vegas, a timeshare resort owned and operated by respondent Eldorado Resorts Corporation (Eldorado), when Freddie became trapped in an

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elevator purportedly installed and maintained by respondent Thyssenkrupp Elevator Corporation (TKE). Freddie allegedly sustained injuries during the incident.[1] Subsequently, the Conleys filed a complaint against respondents on February 3, 2017, with Freddie alleging negligence, res ipsa loquitur (as a separate cause of action), and products liability (as to TKE alone), and Debra alleging loss of consortium.

Thereafter, the Conleys, who were unrepresented at the time, failed to answer respondents' requests for admission pursuant to NRCP 36 (2018).[2] TKE moved for summary judgment on November 6, 2018, which Eldorado joined, on the basis that the requests for admission were deemed admitted and were dispositive of the case. In the alternative, respondents argued that the Conleys would be unable to prove breach of duty or damages for their negligence claims as they failed to disclose any expert witnesses. Notably, TKE failed to serve the motion for summary judgment on the Conleys, as TKE mailed the motion to an incorrect address. Eldorado,

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[1]We do not recount the facts except as necessary to our disposition.

[2]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). As pertinent here, the requests for admission were served prior to March 1, 2019, and the district court entered its order granting motion for summary judgment before March 1, 2019. Therefore, we designate the date where the prior version of the NRCP applies. However, the orders on the post-judgment motions were entered after March 1, 2019, and so we cite to the amended NRCP where applicable herein.

however, properly mailed its joinder to the Conleys in accordance with NRCP 5 (2018).

At some point in November 2018, Debra became aware of the pending summary judgment motion, and discovered that the motion was set for a hearing in January 2019. On December 21, 2018, the Conleys retained counsel to represent them in this matter. Meanwhile, TKE filed a notice of non-opposition with the district court on December 20, 2018.

The district court thereafter vacated the January 2019 hearing, and upon considering the motion for summary judgment as unopposed, advanced the motion for decision on its December 24, 2018, chambers calendar. The district court, in a minute order, granted the motion for summary judgment due to no opposition being filed pursuant to EDCR 2.20, and further granted the motion on the basis that the requests for admission were deemed admitted, as well as the Conleys' failure to disclose expert witnesses in support of their case. On January 2, 2019, the Conleys' new counsel filed a "Plaintiffs' Motion to Extend Discovery and Set Aside Grant of Summary Judgment." This motion was set for hearing on February 7, 2019. Before ruling on this motion, however, the district court entered its written "Findings of Fact, Conclusions of Law, and Order of Dismissal" on January 14, 2019, granting respondents' motion for summary judgment.

On January 31, 2019, following entry of the order granting summary judgment, the Conleys timely filed the first of two post-judgment motions requesting relief under EDCR 2.24 (reconsideration), NRCP 59(e), and NRCP 60, arguing manifest injustice under NRCP 59, and inadvertence or excusable neglect under NRCP 60. This motion was initially set for hearing on March 5, 2019.

At the February 7 hearing on the motion to extend discovery and set aside judgment, the district court advanced the first post-judgment motion set in March, and heard both motions at the same time. The district court denied the motion to continue discovery and set aside judgment, and also denied the first post-judgment motion to reconsider its decision granting summary judgment. The court resolved the first post-judgment motion under NRCP 60, and stated that reconsideration "would be futile" given the Conleys' failure to respond to the requests for admission. The Conleys timely appealed from this order denying reconsideration and relief under NRCP 60(b) in Docket No. 78486.

Shortly thereafter, the Conleys filed their second post-judgment motion also brought under EDCR 2.24, NRCP 59(e), and NRCP 60, which for the first time included the declaration of Debra Conley, which purports to explain why the Conleys did not oppose summary judgment or otherwise participate in discovery. It appears that this motion was primarily brought under NRCP 59(e) as a request to reconsider both the summary judgment order as well as the denial of NRCP 60(b) relief requested in the first post-judgment motion. The district court denied the second post-judgment motion, and the Conleys filed an amended notice of appeal based on that denial in Docket No. 78856.[3]

The Conleys present three main arguments in their consolidated appeals. First, the Conleys argue that summary judgment based upon the admitted requests for admission under NRCP 36 was inappropriate, as respondents' requests for admission were sent to the incorrect address, and the requests for admission were objectionable in their

[3]The Supreme Court of Nevada later consolidated these appeals.

own right. Second, the Conleys argue that the district court's grant of summary judgment based on their lack of expert witnesses was inappropriate where they pleaded a res ipsa loquitur theory of negligence. Third, the Conleys argue that the district court erred in granting the motion for summary judgment because TKE mailed the motion to an incorrect address and the Conleys were not properly served with the motion.[4] Respondents argue that the admissions were properly served, expert witness testimony was required to prove both liability and damages, and the Conleys had actual notice of the summary judgment motion and the opportunity to address it during multiple post-judgment hearings.

Standard of review

A district court's decision to grant summary judgment is reviewed de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other

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[4]Additionally, Eldorado raises a jurisdictional argument in its answering brief, and asks this court not to consider the order granting summary judgment on appeal. After a review of the notices of appeal relevant to this consolidated case, we conclude that this argument is without merit and also conclude that we have adequate jurisdiction to consider the district court's findings of fact, conclusions of law and order of dismissal regarding the motion for summary judgment on appeal. *See* NRAP 4; *see also Abdullah v. State*, 129 Nev. 86, 90, 294 P.3d 419, 421 (2013) (stating that "[t]he notice of appeal is not . . . intended to be a technical trap for the unwary draftsman" (alteration and omission in original) (internal quotation marks omitted)); *Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 320 n.1, 890 P.2d 785, 787 n.1 (1995) (construing a notice of appeal to contain plain intent to appeal from both the underlying judgment and from the order of the district court denying a motion for new trial where the appellants only named the order denying a motion for new trial in their notice of appeal), *superseded on other grounds by statute as stated in RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 110 P.3d 24 (2005).

evidence on file demonstrate that no genuine issue of material fact exists "and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted). All evidence "must be viewed in a light most favorable to the nonmoving party." *Id.*

This court reviews a district court's decision to deny an NRCP 60(b) motion for an abuse of discretion. *Ford v. Branch Banking & Tr. Co.*, 131 Nev. 526, 528, 353 P.3d 1200, 1202 (2015). Likewise, this court reviews an order denying an NRCP 59 motion for an abuse of discretion. *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). "An abuse of discretion occurs when the district court's decision is not supported by substantial evidence," which is evidence that "a reasonable mind might accept as adequate to support a conclusion." *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013) (internal quotation marks omitted).

Requests for admission

The Conleys argue that summary judgment based upon the admitted requests for admission was inappropriate on the basis that the requests were initially served to the wrong address. Respondents contend that the requests were properly served, and that the Conleys failed to object or otherwise respond to the admissions below.[5] We agree with respondents.

NRCP 5 governs the service of all pleadings and papers following proper service of the complaint and summons. *See* NRCP 5(a)

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[5]We note that the Conleys' only argument on appeal is that the requests for admission were mailed to Alabama and, as discussed below, the record does not support this on appeal. *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.")

(2018) (requiring "every paper relating to discovery" to be "served upon a party unless the court otherwise orders"). Under NRCP 5(b)(2)(B), service may be made upon a party by: "[m]ailing a copy to the attorney or the party at his or her last known address. Service by mail is complete on mailing . . . ." Generally, "nonreceipt or nonacceptance of the papers by the person to be served . . . does not affect the validity of the service." 4B Charles Alan Wright, Arthur R. Miller & Adam N. Steinman, *Federal Practice and Procedure* § 1148 (4th ed. 2015). Additionally, "[p]roof of service may be made by certificate of an attorney or of the attorney's employee, or by written admission, or by affidavit, or other proof satisfactory to the court. Failure to make proof of service shall not affect the validity of service." NRCP 5(b)(4) (2018).

Under NRCP 36(a), once a request for admission is served, "[t]he matter is admitted unless, within 30 days after service of the request, . . . the party to whom the request is directed serves upon the party requesting the admission a written answer or objection addressed to the matter, signed by the party." NRCP 36(a) (2018). Courts consider any matter admitted under NRCP 36 to be "conclusively established unless the court on motion permits withdrawal or amendment of the admission." NRCP 36(b) (2018). Moreover, "[i]t is well-settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment." *Estate of Adams v. Fallini*, 132 Nev. 814, 820, 386 P.3d 621, 625 (2016).

Throughout their opening brief, the Conleys assert that respondents failed to mail the requests for admission and other written discovery to the proper address. However, this statement is belied by the record, as it appears that the discovery requests were sent via U.S. Mail to

the Conleys' correct address in Arkansas. Indeed, the only evidence that the Conleys include in support of this assertion is the declaration of Debra Conley. However, even this declaration does not conclusively state that respondents sent the requests for admission to the incorrect address. Instead, Debra admits in her declaration that she is "not disputing the fact that [she and Freddie] at some point receive[d] the Request for Admission," but that they "do not know when it arrived or if it was past the return date when it actually came to the post office and picked up by [Freddie]."

Under NRCP 5(b)(2)(B) (2018), service is complete upon mailing. Here, the record indicates that respondents mailed the requests for admission to the correct address in June 2018,[6] and, therefore, we must conclude that service was effective on those dates in accordance with NRCP 5. The mere fact that the requests may have been left at the post office for an extended period of time does not negate the fact that the requests were properly served. Likewise, the fact that the Conleys had difficulties retaining counsel, were acting in pro se, and may not have understood the legal effect of the requests does not negate their failure to respond, or the consequences thereof. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 659, 428 P.3d 255, 259 (2018) ("While district courts should assist pro se litigants as much as reasonably possible, a pro se litigant cannot use his alleged ignorance as a shield to protect him from the consequences of failing to comply with basic procedural requirements."), *holding modified on other grounds by Willard v. Berry-Hinckley Indus.*, 136 Nev., Adv. Op. 53, 469

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[6]Eldorado served its requests on June 8, 2018, and TKE served its requests on June 22, 2018. Under NRCP 6(a) (2018), which excluded weekends and holidays, and allowing three days for service via mail, the Conleys' answers or objections were due on or around July 26, 2018, and August 9, 2018, respectively.

P.3d 176, 180 n.6 (2020). Accordingly, we conclude that the requests were mailed to the correct address in accordance with NRCP 5, and therefore were properly served.

Because the requests for admission were served on the Conleys, we also conclude that the district court properly deemed those requests for admission admitted when the Conleys failed to respond. Therefore, the matters contained in the requests for admission are considered conclusively established, "even if the established matters are ultimately untrue." *Smith v. Emery*, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993).

Consequently, no genuine issues of fact remained due to the Conleys' admissions and, therefore, we perceive no error in the district court's grant of summary judgment in respondents' favor. *Wood*, 121 Nev. at 729, 121 P.3d at 1029; *see also Estate of Adams*, 132 Nev. at 820, 386 P.3d at 625; *Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 631, 572 P.2d 921, 923 (1977) (holding that where admissions left no room for conflicting inferences and were dispositive of the case, summary judgment was appropriate).

We likewise perceive no abuse of discretion in the district court's denial of the Conleys' post-judgment motions for reconsideration and for relief from the judgment. The district court has broad discretion in deciding motions under NRCP 59, and equally broad discretion in deciding whether to grant or deny an NRCP 60(b) motion to set aside a judgment, and this court will not disturb that decision absent an abuse of discretion. *AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197 (NRCP 59); *Cook v. Cook*, 112 Nev. 179, 181–82, 912 P.2d 264, 265 (1996) (NRCP 60). And where, as here, the Conleys failed to establish that their failure to answer the requests for admission was the result of excusable neglect, we conclude

it was not an abuse of discretion to deny the motion. We note that the Conleys, with or without counsel, could have timely moved to withdraw or set aside the admissions pursuant to NRCP 36 and failed to do so.

Expert witnesses

The Conleys argue that the district court erred when it granted summary judgment based upon their lack of expert witnesses, because "the District Court failed to recognize that Plaintiffs' Complaint included a *res ipsa loquitur* theory of negligence and liability." To the contrary, respondents contend that (1) the Conleys cannot establish the standard of care as elevator maintenance is outside the knowledge of lay people, and (2) the Conleys cannot establish that res ipsa loquitur applies to their case without an expert.

"It is well established that to prevail on a negligence claim, a plaintiff must establish four elements: (1) the existence of a duty of care, (2) breach of that duty, (3) legal causation, and (4) damages." *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). The theory of "[r]es ipsa loquitur is an exception to the general negligence rule, and it permits a party to infer negligence, as opposed to affirmatively proving it, when certain elements are met." *Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001).

To infer negligence under res ipsa loquitur, the plaintiff must show the following: (1) the event is of a kind which ordinarily does not occur in the absence of someone else's negligence, (2) the event is caused by an agent or instrumentality within the exclusive control of the defendant, (3) the plaintiff's negligence is not greater than that of the defendant, and (4) the defendant has superior knowledge or is in a better position to explain the accident for res ipsa loquitur to apply. *Id.* at 188-89, 18 P.3d at 321.

Application of the res ipsa loquitur doctrine is not automatic, i.e., simply naming the doctrine in a complaint or other pleading is not enough to invoke its effects. *See id.* at 189, 18 P.3d at 321 ("Whether sufficient evidence supports an inference of negligence under res ipsa loquitur is a question for the jury; however, the district court must first determine whether sufficient evidence has been adduced at trial to support the consideration of a res ipsa loquitur instruction . . . .").

We first observe that the Conleys' negligence and res ipsa loquitur theories would not survive summary judgment due to their failure to answer the requests for admission, wherein they admitted that they suffered no damages and had further admitted they had no evidence to suggest that respondents failed to maintain the elevator. Accordingly, summary judgment is appropriate on these grounds alone. *See Wagner*, 93 Nev. at 631, 572 P.2d at 923 (holding that where admissions left no room for conflicting inferences and were dispositive of the case, summary judgment was appropriate).

Further, even assuming arguendo that the Conleys were able to meet the elements of res ipsa loquitur, their negligence claim would still not survive, as they did not provide any experts or other evidence to prove their damages in this case, so as to prevent summary judgment. *See Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (noting a party seeking damages must provide "an evidentiary basis" upon which the court may calculate damages); *see also Rodriguez v. Primadonna Co., LLC*, 125 Nev. 578, 584, 216 P.3d 793, 798 (2009) (holding summary judgment is proper where an "element[ ] of the plaintiff's prima facie case is clearly lacking as a matter of law" (internal quotation marks omitted)). Accordingly, we conclude that the district court did not err when it granted

summary judgment on the alternative grounds that the Conleys did not disclose any expert witnesses, and also conclude that the district court did not abuse its discretion when denying the post-judgment motions on the same grounds.

Service of the summary judgment motion

We now turn to the Conleys' argument that TKE's motion for summary judgment was served via U.S. Mail to the incorrect address and, therefore, summary judgment is inappropriate. In response, Eldorado asserts that because it properly served its joinder on the parties, summary judgment should stand as to Eldorado. TKE, who admits that it mailed the motion to the incorrect address, argues that the Conleys had actual notice of the hearing, and that summary judgment was nevertheless appropriate based on the Conleys' admissions and failure to disclose expert witnesses. We agree.

NRCP 56 governs motions for summary judgment. Here, TKE filed its motion for summary judgment in November 2018, and notice of entry of order was served on January 15, 2019. Thus, the summary judgment motion falls outside of the updated NRCP that went into effect in March 2019. The former NRCP 56(c) (2018), provided that "[t]he motion shall be served at least 10 days before the time fixed for the hearing." Failure to comply with the formal requirements of NRCP 56 is subject to harmless error review. *Exeber, Inc. v. Sletton Constr. Co.*, 92 Nev. 721, 733, 558 P.2d 517, 524 (1976).[7]

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[7]*Cf.* NRCP 61 (providing that courts must disregard harmless error); *Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (providing that in order to establish that an error is prejudicial and therefore warrants a reversal, "the movant must show that the error affects the party's

Motions for summary judgment under NRCP 56 are also subject to the service provisions of NRCP 5. *See* NRCP 5(a) (2018) (requiring "written motion[s] other than one which may be heard ex parte" to be "served upon a party unless the court otherwise orders"). Under NRCP 5(b)(2)(B) (2018), service may be made upon a party by "[m]ailing a copy to the . . . party at his or her last known address. Service by mail is complete on mailing."

Here, it is apparent that TKE failed to serve its summary judgment motion in accordance with NRCP 5, as the document was mailed to an incorrect address in Alabama, rather than Arkansas. As a result, it appears that TKE failed to serve its summary judgment motion within 10 days of the hearing as required by NRCP 56(c) (2018). Nonetheless, we conclude that this failure was harmless error: (1) even though the Conleys were not properly served with the motion, they had actual notice of the motion and when the hearing would take place; (2) the matters deemed admitted in the requests for admission are "conclusively established," NRCP 36(b), and dispositive of the case; and (3) the Conleys were able to present a defense to the summary judgment motion during their successive post-judgment motions requesting relief under EDCR 2.24, NRCP 59(e), and NRCP 60(b).

Our position is not without precedent. In *McKinnie v. Roadway Express, Inc.*, 341 F.3d 554 (6th Cir. 2003), the United States Court of Appeals for the Sixth Circuit held that the defendants' failure to serve pro se plaintiffs in accordance with FRCP 5 did not require reversal of summary judgment. In *McKinnie*, a civil rights action under Title VII, the plaintiffs

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substantial rights so that, but for the alleged error, a different result might reasonably have been reached").

had consented to electronic service through their counsel, who later withdrew from the case. *Id.* at 556. Defendants later filed a motion for summary judgment that was served electronically through the court's e-filing system. *Id.* Plaintiffs, who were now proceeding pro se, never signed up for e-filing, and thus were not served with the motion under FRCP 5. *Id.* at 557. Meanwhile, one of the plaintiffs filed a motion to stay the case, which the district court denied. *Id.* at 556. The district court denied the stay and ordered the plaintiffs to respond to the summary judgment motion. *Id.* Plaintiffs failed to oppose the summary judgment motion, and the district court granted summary judgment on the plaintiffs' claims. *Id.*

On appeal, the Sixth Circuit held that the violation of FRCP 5(b) did not provide a basis to reverse summary judgment:

> [W]hen a party is not properly served but nonetheless has actual notice of a summary judgment motion prior to its disposition, the district court's summary judgment decision should be affirmed unless the party who failed to oppose the motion demonstrates on appeal that the existence of a genuine issue of material fact precludes summary judgment as a matter of law.

Id. at 558.

Here, the Conleys had actual notice of the pending summary judgment motion it appears at least as far back as November 2018 when they received Eldorado's joinder to the summary judgment motion, and when Debra "saw the Request for Summary Judgment online . . . with a hearing scheduled for January 10, 2019," and "did research on the internet to find out what that meant to the case." We conclude that this gave adequate notice of the motion, as well as time for the Conleys to file an opposition, or otherwise inform the court that they had not been served with the motion for summary judgment, and request the opportunity to oppose

the motion after it was properly served. However, the Conleys failed to undertake any of these options.

Further, we also conclude that the Conleys' various post-judgment motions under EDCR 2.24, NRCP 59(e), and NRCP 60(b) presented the Conleys with an adequate opportunity to respond to the merits of the summary judgment motion, and specifically identify any issue of material fact that would make summary judgment inappropriate. Below, the Conleys fully briefed their post-judgment motions challenging the merits of the summary judgment motion and, as discussed above, the district court did not abuse its discretion in denying reconsideration of its summary judgment order.

Thus, even though the Conleys were not properly served with the motion, the grounds on which the district court entered summary judgment, i.e., the admitted requests for admission, are insurmountable on appeal and the Conleys are unable to present a genuine issue of material fact that would preclude summary judgment on appeal. *See Wagner*, 93 Nev. at 631, 572 P.2d at 923 (holding that where admissions left no room for conflicting inferences and were dispositive of the case, summary judgment was appropriate); *see also Gonzales v. Surplus Ins. Servs.*, 863 S.W.2d 96, 99 (Tex. App. 1993) (holding that where appellant failed to timely answer request for admissions that "support each element of [respondent's] motion for summary judgment, notice to appellant of any proceedings with regard to the motion for summary judgment would appear moot")

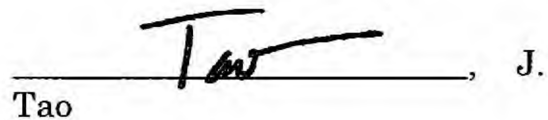
We therefore conclude that any error in failing to properly serve the motion for summary judgment was harmless. *Wyeth*, 126 Nev. at 465, 244 P.3d at 778. We likewise conclude that the district court did not abuse

its discretion in denying the Conleys' post-judgment motions for reconsideration. *See AA Primo Builders*, 126 Nev. at 589, 245 P.3d at 1197; *Cook*, 112 Nev. at 181-82, 912 P.2d at 265.[8]

Accordingly, we

ORDER the judgment of the district court AFFIRMED.

____________________, C.J.
Gibbons


____________________, J.
Tao

____________________, J.
Bulla

cc: Hon. Susan Johnson, District Judge
William Turner, Settlement Judge
Sharp Law Center
The Law Office of Dan M. Winder, P.C.
Cisneros & Marias
Rogers, Mastrangelo, Carvalho & Mitchell, Ltd.
Eighth District Court Clerk

[8]Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered them and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.