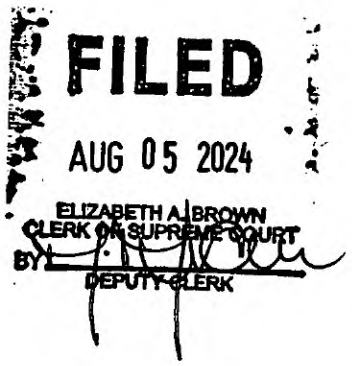
IN THE SUPREME COURT OF THE STATE OF NEVADA

STATE OF NEVADA EX REL. SOUTHERN NEVADA ADULT MENTAL HEALTH SERVICES dba RAWSON-NEAL PSYCHIATRIC HOSPITAL,
Petitioners,
vs.
THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE,
Respondents,
and,
JAMES FLAVY COY BROWN; TERRY BARTON; DIMITRIA SIMMONS; DENNIES HARDEMAN; AND JUAN QUEZEDA,
Real Parties in Interest.

No. 85990



ORDER GRANTING PETITON FOR A WRIT OF PROHIBITION

Original petition for a writ of certiorari or, in the alternative, prohibition challenging a district court order denying a motion to dismiss in a civil action.

Petitioner Southern Nevada Adult Mental Health Services (SNAMHS) was not named as a defendant in claims brought by Real Party in Interest, and class representative, James Flavy Coy Brown for negligence and negligence per se. Brown's underlying complaint contained allegations that SNAMHS engaged in illegal patient-dumping by discharging indigent, mentally ill patients, and placing those patients on Greyhound buses bound out-of-state, with no place to stay and no plan for continuing care. We recounted the facts underlying the lengthy litigation in full in our prior

consideration of this case. *See Southern Nevada Adult Mental Health Services v. Brown*, No. 78770, 2021 WL 5370820 (Nev. Nov. 17, 2021) (Order of Reversal) (*Brown I*). We were and remain deeply troubled by the factual allegations raised against SNAMHS in this complaint.

Nevertheless, in *Brown I*, this court recognized the complaint contained a fundamental pleadings defect and that Brown, at trial, made insufficient proof of damages. In our order, we made clear Brown had not named SNAMHS as a defendant to their negligence claims and we reversed the district court's judgment against SNAMHS because "the district court abused its discretion when it kept SNAMHS in the case after it issued its order granting summary judgment on all claims asserted against it." *Brown I*, 2021 WL 5370820 at *3. We also held, "[e]ven if Brown had properly pleaded his negligence claims against SNAMHS, we [ ] conclude that Brown failed to establish the damages element for these claims" and further, that "[d]uring trial, the parties stipulated to awarding each class member the same amount of damages awarded to Brown as the class representative." *Brown I*, 2021 WL 5370820 at *1, 4.

After remittitur issued in *Brown I*, the district court allowed Brown to amend the pleadings to name SNAMHS in the negligence claims in the complaint and denied SNAMHS's motion to dismiss. In its December 2, 2022, order, the district court also set aside the stipulation finding that "[s]tipulating to the amount of damages was not the same as stipulating to the underlying basis for the existence of damages." SNAMHS sought extraordinary writ relief from this court, asking us to order the district court to enter judgment in its favor.

A writ of prohibition is appropriate to arrest a tribunal's proceedings if the district court exceeds its jurisdiction and no plain, speedy,

and adequate remedy in law exists. NRS 34.320, .330. SNAMHS lacks an adequate remedy to end the proceedings absent extensive relitigation. We therefore grant SNAMHS's petition for a writ of prohibition because the district court lacked the power to allow Brown to amend his pleadings after a full trial and appeal that did not contemplate further proceedings.[1]

Specifically, we determine the district court's actions are contrary to the law-of-the-case doctrine and NRCP 15. *See Cerminara v. Eighth Jud. Dist. Ct.*, 104 Nev. 663, 665, 765 P.2d 182, 184 (1988) (granting a writ of prohibition enjoining a district court from granting a motion for a new trial); *see also Tulelake Horseradish, Inc. v. Third Jud. Dist. Ct.*, No. 71805, 2017 WL 1251101, at *1 (Nev. Apr. 3, 2017) (Order Granting Petition for Writ of Prohibitions) (using writ review as the proper mechanism to prohibit a district court's actions contrary to appellate instruction). The law-of-the-case doctrine refers to a family of rules establishing the proposition that a court involved in a later phase of litigation should not re-open previously decided questions. *See Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014). We grant this petition to ensure the district court properly recognizes and complies with the binding nature of our prior ruling in this case. *See Estate of Adams v. Fallini*, 132 Nev. 814, 818, 386 P.3d 621, 624 (2016) (reviewing application of the law-of-the-case doctrine de novo).

Brown I does not contemplate further proceedings

We conclude the district court exceeded our mandate in allowing Brown to amend the complaint after a trial and appeal in *Brown I* that disposed of all remaining questions necessary for the entry of

[1]Since we grant SNAMHS's petition for a writ of prohibition, we decline to consider SNAMHS's argument in favor of a writ of certiorari.

judgment. "Where a judgment is reversed by an appellate court, the judgment of that court is final upon all questions decided and those questions are no longer open to consideration." *LoBue v. State* ex rel. *Dep't. of Highways*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976) (quoting *Schulenburg v. Signatrol, Inc.*, 226 N.E.2d 624, 628 (1967)). In *Brown I*, this court dispositively determined that Brown had failed to name SNAMHS in its negligence claims and that "the district court abused its discretion when it kept SNAMHS in the case after it issued its order granting summary judgment on all claims asserted against it." *Brown I*, 2021 WL 5370820 at *3. After remittitur issued, the district court took even more extreme action to keep SNAMHS in the case by allowing amendment to the complaint to name SNAMHS as a party nearly seven years after the initial filing. This was contrary to our holdings in *Brown I*, which clearly contemplate SNAMHS's dismissal from the case, and violated the law-of-the-case doctrine.

Our concurring colleague suggests *LoBue* does not articulate the relevant rule, instead relying on our case law from *Guisti v. Guisti*, 44 Nev. 437, 441, 196 P. 337, 338 (1921) and *Canepa v. Durham*, 63 Nev. 245, 246-47, 166 P.2d 810, 810 (1946) to suggest, notwithstanding the substance of our prior order, that because we only "reversed" the judgment, the district court was not required to enter judgment for SNAMHS. *Guisti* and *Canepa* addressed cases that returned to this court after we expressly contemplated further proceedings in the prior appeal by reversing the denial of a motion for new trial. In those cases, we considered the scope of any further litigation and whether leave to amend the complaint could be granted by the district court within that scope. *Guisti*, 44 Nev. at 440-41, 19 P. at 337-38; *Canepa*, 63 Nev. at 246-47, 166 P.2d at 810. But, unlike *Guisti* or

Canepa, no motion for a new trial was before this court in *Brown I* and we certainly did not rule that a new trial should be granted. Thus, these cases are inapplicable here and announce no per se rule regarding post-remittitur action by the district court after reversals.

A reversal of a denial of a motion for a new trial plainly contemplates a new trial. Likewise, a reversal of an entry of judgment with no further instruction plainly contemplates the entry of a final judgment conforming to our appellate order. While we recognize we could have been more precise in our language formally disposing of the case, this does not change the substance or binding nature of the law we previously announced.[2]

The district court erred in not giving effect to *Brown I*'s determination that Brown's failure to name SNAMHS warranted SNAMHS's dismissal from the case.

NRCP 15(b) does not allow amendment

Still, Brown argues that despite *Brown I*'s holding, the district court has broad powers to amend a complaint when justice requires, which it exercised here, allowing Brown to amend the complaint to add SNAMHS as a named party to the negligence claims after trial. NRCP 15(b) governs amendments proposed during and after trial. It constrains appropriate post-trial amendment to (1) issues "[b]ased on an objection at trial" or (2) "[f]or issues tried by consent." NRCP 15(b). Brown does not attempt to amend the pleadings based on an objection at trial, nor to conform the

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[2]Neither SNAMHS's failure to renew its motion for judgment as a matter of law post-verdict, nor the alleged instructional dispute identified by our dissenting colleague were raised before this court in *Brown I*, precluding relief on those grounds. Nor have these arguments been raised whatsoever in the present appeal so we decline to address them.

pleadings to an issue tried by consent as SNAMHS repeatedly contested its status as defendant in this case. Instead, Brown attempts to amend the pleadings based on an unfavorable appellate ruling that settled the case. NRCP 15 does not allow this. The district court's powers to allow amendment, while broad, are not absolute and the district court cannot extend that power beyond the language of NRCP 15(b) to circumvent prior appellate holdings, especially at this late stage of litigation. *See Ennes v. Mori*, 80 Nev. 237, 243, 391 P.2d 737, 740 (1964) (holding that there is no absolute entitlement to amend and that there are some instances where leave should not be granted); *State, Univ. & Comty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987-88, 103 P.3d 8, 18-19 (2004) (concluding the district court did not abuse its discretion in denying a motion to amend made "after the close of evidence, during arguments over jury instructions and after the court's refusal to give an instruction regarding waiver"). NRCP 15 does not allow parties to use amendment to seek relief from the existing law of the case.

Moreover, it is well established that leave to amend should not be granted when such amendment would be futile. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Even if it was within the district court's discretion to add SNAMHS as an additional named party at this stage of the case, this court announced in *Brown I* an additional ground warranting reversal of the judgment entered for Brown. We held that Brown failed to demonstrate recoverable damages on a theory of emotional distress as a matter of law. We also recognized the stipulation that other class members would be awarded only the amount awarded to Brown and thus, because of the stipulation, "Brown's failure to present evidence of any emotional distress *he* suffered cannot be cured by evidence presented as to the other class members' emotional distress." *Brown I*, 2021 WL 5370820 at *5 n.9.

When a court offers two independent grounds for judgment, "the adjudication is effective for both." *Commonwealth of Massachusetts v. United States*, 333 U.S. 611, 623 (1948); *see also United States v. Title Ins. & Trust Co.*, 265 U.S. 472, 486 (1924) (holding "where there are two grounds, upon either of which an appellate court may rest its decision, and it adopts both" neither ground is dicta). Thus, even if the district court had the power to allow Brown to amend the pleadings to name SNAMHS, *Brown I* also addressed that situation: Brown should be awarded $0 in damages and the parties stipulated to awarding all class members the same. The district court was not free to disregard this court's interpretation of the stipulation to find that "[s]tipulating to the amount of damages was not the same as stipulating to the underlying basis for the existence of damages." *See LoBue*, 92 Nev. at 532, 554 P.2d at 260 ("The Court to which the cause is remanded can take only such proceedings as conform to the judgment of the appellate tribunal." (quoting *Schulenburg,* 226 N.E.2d at 628)). The district court was therefore required to effectuate the existing stipulation, as interpreted by this court, and grant SNAMHS's motion to dismiss the amended complaint independently from Brown's failure to name, as Brown was unable to establish damages as a matter of law.

Brown's proposed amendments, therefore, do not cure the fundamental damages defect and are futile in addition to being untimely. *See Lopez v. Gen. Motors Corp.*, 697 F.2d 1328, 1332 (9th Cir. 1983) (finding a fortiori a plaintiff's failure to timely identify a defendant precluded amendment). Brown's amendment is therefore forbidden by both the law-of-the-case doctrine and application of NRCP 15(b). Accordingly, we vacate the district court's order granting Brown leave to amend the complaint and the second amended complaint. We also reverse the district court's order

denying SNAMHS's motion to dismiss and order the district court to enter judgment for SNAMHS as to all remaining claims asserted against it.[3]

_____, C.J.
Cadish

_____, J.
Stiglich

_____, J.
Herndon

_____, J.
Parraguirre

BELL, J., with whom LEE, J. agrees, concurring:

I concur with the majority's conclusion that the district court exceeded the bounds of its mandate in allowing the case to continue after remittitur issued. In *Brown I*, this court dispositively concluded plaintiffs could establish no damages meaning Brown could never prove a negligence cause of action. I write separately to address whether a bare reversal from this court, with no further instructions, is the functional equivalent to a reversal and remand for entry of judgment.

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[3] We do not address the parties' arguments regarding NRCP 50(e) because they are unnecessary to our conclusion. *See Western Cab Company v. Eighth Jud. Dist. Ct.*, 133 Nev. 65, 67, 390 P.3d 662, 667 (2017).

The majority articulates a general rule for reversal from *LoBue v. State* ex rel. *Dep't. of Highways*, 92 Nev. 529, 532, 554 P.2d 258, 260 (1976). There is, however, a more relevant authority on this issue. *See Guisti v. Guisti*, 44 Nev. 437, 441, 196 P. 337, 338 (1921). In *Guisti*, this court considered the impact of a bare reversal on subsequent proceedings, stating:

> [w]e are now called upon to determine whether a simple judgment of reversal is a bar to further proceedings in the same suit. The question is one of first impression in this court, and we have given it the attention its importance deserves, and our conclusion, in brief, is that the general order of reversal was to leave the litigation in the situation it was prior to the entry of the judgment.

Id.; *see also Canepa v. Durham*, 63 Nev. 245, 246-247, 166 P.2d 810, 810 (1946) (affirming the district court's grant of a new trial pursuant to *Guisti* to determine damages after the Nevada Supreme Court "reversed" the judgment above). Neither case limits this rule to a particular procedural posture.

LoBue did not consider *Guisti* and justified its holding only against the persuasive authority of similar California cases. *See LoBue*, 92 Nev. at 532, 554 P.2d at 260. *LoBue* appears to apply more general law-of-the-case principles to resolve the controversy before it. *LoBue* speaks of limitations to a district court's actions when a cause is "remanded" despite the fact that the underlying case, did not remand the cause. *See LoBue v. State ex rel Dep't of Highways* (*LoBue I*), 87 Nev. 372, 375, 487 P.2d 506, 508 (1971) ("[T]he summary judgment was improvidently granted, and it must be reversed. It is so ordered."). Without addressing the differences between a reversal with remand and a bare reversal, *LoBue* is better read as an application of general law-of-the-case doctrine principles on the

specific facts before the court in *LoBue*. *See LoBue*, 92 Nev. at 532, 554 P.2d at 260 ("Upon reading our opinion in [*LoBue I*], it is abundantly clear that the only question to be decided on remand was the amount of damages, if any, owed to LoBue by the State."). Here, no such clear mandate is apparent to me.

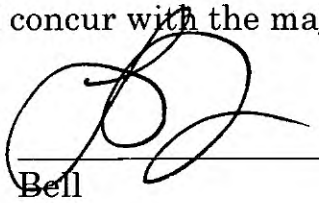
Accordingly, I would find that *Guisti* articulates the relevant rule: when an appellate court enters an order of reversal, without remand, the matter returns to its state prior to the now-vacated judgment's entry below. In *Brown I*, whatever the court's implicit intentions, we did not order an entry of judgment. The district court was therefore free to continue the litigation, absent further limitations, pursuant to its inherent equitable powers. *See* NRCP 15(b)(1) ("The court should freely permit an amendment when doing so will aid in presenting the merits and the objecting party fails to satisfy the court that the evidence would prejudice that party's action or defense on the merits.").

Under the doctrine of stare decisis, "a question once deliberately examined and decided should be considered as settled." *Stocks v. Stocks*, 64 Nev. 431, 438, 183 P.2d 617, 620 (1947). *Guisti* unambiguously answered the question currently before this court, this court has never been confronted with any reasons to depart from its holding, and, in fact, has never abrogated it. Here, the majority ignores the still-binding *Guisti* to hold that our prior "reversal" in *Brown I* was actually a reversal and remand for entry of judgment. I would apply our law that a bare appellate reversal functions to vacate a judgment and returns parties to their pre-judgment positions, nothing more. After a reversal, district courts must conduct any necessary further proceedings, including the final entry of judgment.

The majority also narrowly reads NRCP 15(b) regarding amendments during and after trial. The plain text of NRCP 15(b) does not limit post-trial amendments to only two categories. This court has never interpreted NRCP 15(b) to provide a substantive limitation on post-trial amendments, especially in cases, as here, where the late amendment can be excused by reliance on a prior district court ruling. Nor has this court previously held that after a certain point it is simply too late to amend. *See Grouse Creek Ranches v. Budget Fin. Corp.*, 87 Nev. 419, 427, 488 P.2d 917, 923 (1971) (affirming a late motion to amend the pleadings to conform to the evidence because, "[w]ithout passing on the timeliness of this motion, we need only point out that the record is abundantly clear in revealing that the issue . . . was raised and tried."); *Jeffree v. Walsh*, 14 Nev. 143, 147 (1879) ("We think the defendants were entitled to rely upon the ruling, and since a different view finally prevailed, that they should have an opportunity to obviate the defect in the pleadings, otherwise great injustice may result." (quoting *Carpentier v. Small*, 35 Cal. 346, 363 (1868)). Likewise, here, Brown relied on the district court's ruling that SNAMHS had been implicitly named a party to the negligence claim and litigated accordingly. In any case, on a plain reading of NRCP 15(b), amendment need not be based on a contemporaneous objection made by the moving party. NRCP 15(b)(1) discusses amendment based on "a party['s]" objection. SNAMHS repeatedly objected to its designation as a defendant in Brown's negligence claims, which the district court overruled. I would not prejudice Brown for relying on the district court's ruling and would allow amendment under NRCP 15(b)(1).

Because our bare reversal in *Brown I* returned the litigation to its pre-entry-of-judgment position, I would not conclude the district court

erred in allowing amendment to the underlying complaint and further proceedings. Still, I agree that under the facts of this case, *Brown I* disposed of the critical issue of damages and the district court lacked the power to upend that determination absent specific authority to do so. *See LoBue*, 92 Nev. at 532, 554 P.2d at 260 ("[T]he judgment of that [appellate] court is final upon all questions decided" (quoting *Schulenburg v. Signatrol, Inc.*, 226 N.E.2d 624, 628 (1967))). Given the existing stipulation of the parties that Brown's damages establish damages for the entire class, if Brown is unable to establish damages as a matter of law then all claims against SNAMHS must be dismissed, so I concur with the majority's judgment.



_____, J.
Bell

I concur:

_____, J.
Lee

PICKERING, J. dissenting:

In *Brown I*, we reversed the judgment on the jury's verdict that the district court had entered in favor of Brown and the plaintiff class and against SNAMHS. The reversal was "open"—that is, it did not direct the district court how to proceed once the case returned. Despite the open reversal, today's order holds that, because *Brown I* reversed the district court's denial of SNAMHS's motion for judgment as a matter of law (JMOL),

the district court had no choice but to enter judgment in favor of SNAMHS. It further holds that, because *Brown I* neither addressed nor directed the district court to address the possibility of a new trial, the district court violated the law of the case doctrine and its related mandate rule when it allowed Brown to amend the pleadings in furtherance of that end.

These holdings read *Brown I* and the law of the case doctrine too prescriptively. "An unqualified or 'open' reversal allows the lower court to hear and decide on remand 'any issues heretofore or hereafter properly presented to [it] which [the appellate court] did not decide.'" Chris Goelz et al., Rutter Group Practice Guide: Fed. Ninth Cir. Civ. App. Prac. ¶ 10.233 (2024) (quoting *Idaho First Nat'l Bank v. Comm'r of Internal Revenue*, 997 F.2d 1285, 1290 (9th Cir. 1993)). Thus, "a simple judgment of reversal" is not "a bar to further proceedings in the same suit." *Guisti v. Guisti*, 44 Nev. 437, 441, 196 P. 337, 338 (1921); *accord Canepa v. Durham*, 63 Nev. 245, 246, 166 P.2d 810 (1946). No doubt, "[w]hen an appellate court remands a case, the district court must proceed in accordance with the mandate and the law of the case as established on appeal." *State Eng'r v. Eureka Cnty.*, 133 Nev. 557, 559, 402 P.3d 1249, 1251 (2017) (internal quotation marks omitted). But the mandate rule and the related law of the case doctrine "require respect for what the higher court decided, not for what it did not decide." *Biggins v. Hazen Paper Co.*, 111 F.3d 205, 209 (1st Cir. 1997). For an appellate decision to mandate what the district court must do on remand "the appellate court must actually address and decide the issue explicitly or by necessary implication." *Recontrust Co. v. Zhang*, 130 Nev. 1, 8, 317 P.3d 814, 818 (2014) (*quoting Dictor v. Creative Mgmt. Servs.*, LLC, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010)).

Brown I did not direct judgment in SNAMHS's favor or rule out, explicitly or by necessary implication, further proceedings looking ahead to a new trial. It reversed on two grounds: (1) the district court erred when it read the operative complaint to state negligence and negligence per se claims against SNAMHS; and (2) Brown failed to sufficiently prove the physical injury or "serious emotional distress" required to recover on those claims.

As to the first ground, I agree with the analysis in Justice Bell's concurrence: *Brown I*'s bare reversal did not prevent the district court from allowing Brown to amend the pleadings following remand. "Absent a mandate which explicitly directs to the contrary, a district court upon remand can permit the plaintiff to 'file additional pleadings, vary or expand the issues,'" *Nguyen v. United States*, 792 F.2d 1500, 1502 (9th Cir. 1986) (quoting *Rogers v. Hill*, 289 U.S. 582, 587–88 (1933)), and such leave should be freely given unless it would cause serious prejudice to the opposing party. *City of Columbia v. Paul N. Howard Co.*, 707 F.2d 338, 341 (8th Cir. 1983); *see* NRCP 15; 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1494 (3d ed. 2010) ("[Rule 15] permits the motion to be made throughout the entire period during which the action is in the district court, including . . . on remand following an appeal."). Brown relied on the district court's ruling that SNAMHS had been implicitly named a party to the negligence claims, so he did not need to seek leave to amend until *Brown I* reversed on that point. *See* Concurrence, *ante* at 4. And allowing post-remand amendment does not unfairly prejudice SNAMHS since it did not seek NRCP 54(b) certification of the partial summary judgment order, which would have started Brown's time to appeal running, and instead chose to remain in and defend the case through trial.

Brown and the class plaintiffs may or may not prevail in further pretrial and trial proceedings, but the pleading defect *Brown I* identified does not justify denying them the opportunity to try.

Brown I's second ground for reversal—insufficient proof of physical injury or serious emotional distress—likewise did not mandate judgment in favor of SNAMHS as opposed to a new trial (or proceedings in furtherance thereof). On this point, today's order refers to the record in *Brown I* as if SNAMHS properly filed a post-judgment motion for JMOL under NRCP 50(b) challenging the sufficiency of Brown's evidence of harm, *see* Majority Order, *ante* at 5, but this is not accurate. While SNAMHS orally moved for JMOL under NRCP 50(a) during trial based on insufficient evidence of harm, it did not renew the motion post-judgment under NRCP 50(b). Under FRCP 50(b), from which NRCP 50(b) is drawn, a post-judgment Rule 50(b) motion is required to obtain JMOL on appeal from a judgment on a jury verdict in a civil case based on insufficiency of the evidence. *See Ortiz v. Jordan*, 562 U.S. 180, 185 (2011) (explaining that without the verdict loser filing a post-judgment JMOL motion "the appellate forum [has] no warrant to reject the appraisal of the evidence by the judge who saw and heard the witnesses and had the feel of the case which no appellate printed transcript can impart") (internal quotation marks omitted). While a verdict loser can seek new trial on appeal in a civil jury case without having filed post-judgment motions for JMOL or a new trial, *see Rives v. Farris*, 138 Nev. 138, 142, 506 P.3d 1064, 1068 (2022), it is doubtful whether, contrary to *Ortiz*, a Nevada appellate court would reverse for entry of judgment in favor of an appellant based on a sufficiency-of-the-evidence challenge it did not first present to the district court in a post-judgment NRCP 50(b) motion.

Apart from SNAMHS's NRCP 50(b) default, there is another, more fundamental problem with reading *Brown I* to mandate the entry of judgment in its favor: The district court and *Brown I* used two different legal standards to evaluate SNAMHS's NRCP 50(a) sufficiency-of-the-evidence challenge. At trial, the district court instructed the jury as follows:

> You do not need to find physical injury in order to find a defendant liable for negligence if you find that the breach of duty was the proximate cause of harm to Plaintiff. "Harm" can be mental or emotional distress, exacerbation of pre-existing mental illness, and can include anxiety, fear, apprehension, or other emotions.

The district court approved this instruction over SNAMHS's objection. In doing so, it rejected the instruction SNAMHS proposed, which would have told the jury that, "In order to recover damages for emotional distress, the plaintiff has the burden to prove that either a physical impact to his person occurred or, in the absence of physical impact, proof of serious emotional distress causing physical injury or illness must be presented." When the district court denied SNAMHS's NRCP 50(a) motion, it did so based on the standard in the jury instruction it approved, stating:

> [t]he Court is satisfied that physical injury is not a required element of a negligence claim and that mental and emotional distress, exacerbation of symptoms, rehospitalization and other deleterious consequences which predictably result from the discharges of patients, via Greyhound Bus, to out-of-state locations without requisite arrangements made for them to be met upon arrival, to have housing available to them, and for follow-up care to be provided are sufficient to satisfy the requirement under Nevada law that plaintiffs suffer damages from Defendants' negligence in

> order to recover for the harm that negligence caused.

When *Brown I* reversed for insufficient evidence of harm, it did so under the more demanding standard SNAMHS proposed but the district court rejected and the jury did not address. *See Brown I*, 2021 WL 5370820, at *5 (reversing because "Brown did not present any evidence of physical injury" or "demonstrate that he actually suffered serious emotional distress").

Today's order holds that *Brown I* implicitly if not explicitly mandates entry of judgment in favor of SNAMHS, because SNAMHS did not move for a new trial based on insufficiency of the evidence. *See Majority Order*, *ante* at 5. But, as noted above, SNAMHS's failure to file an NRCP 50(b) motion makes an implicit mandate to grant JOML in SNAMH's favor unlikely, given *Ortiz*. By contrast, a Nevada appellate court can order a new trial or direct the district court to consider granting that relief without a motion therefor having been made. *See Rives*, 138 Nev. at 142, 506 P.3d at 1068. In the JMOL context, NRCP 50(e) expressly so provides: "If the appellate court reverses the judgment" in favor of the verdict winner on appeal from an order denying JMOL, "*it may order a new trial, direct the trial court to determine whether a new trial should be granted*, or direct the entry of judgment." (emphasis added). Its discretion is such that it may do so on its own motion, without a request therefor. *See Weisgram v. Marley Co.*, 528 U.S. 440, 451–52, (2000) (stating that, "if a court of appeals determines that the district court erroneously denied a motion for judgment as a matter of law, the appellate court may (1) order a new trial at the verdict winner's request *or on its own motion*, (2) remand the case for the trial court to decide whether a new trial or entry of judgment for the

defendant is warranted, or (3) direct the entry of judgment as a matter of law for the defendant.") (emphasis added).

Brown I's open reversal did not choose among the three available remand options and, on the record presented, it is unreasonable to read that reversal as a mandate to the district court to enter judgment in favor of SNAMHS. Brown sufficiently proved harm by the standards the district court deemed applicable; a unanimous jury and the district court both so held. And the district-court-approved standard was the standard in place when the parties stipulated that the members of the plaintiff class would receive the same damages as Brown. When subsequent appellate review determined that the sufficiency of the evidence of harm should have been judged by the different and stricter standard for which SNAMHS advocated, it fundamentally changed the ground rules upon which the parties had proceeded in district court. As in other cases where a judgment is reversed for instructional error, this change could and should have resulted in the grant of a new trial, or a remand to the district court to decide the course of future proceedings looking ahead to a new trial. Sufficient evidence exists to prove harm by the more demanding standard *Brown I* ruled appropriate; this is shown by the class members' testimony that *Brown I* noted but did not address. *See Brown I*, 2021 WL 5370820 at *5 n.9.

The district court properly construed the open reversal in *Brown I* to allow further proceedings on remand. I agree with its

assessment that, judging this case by the record, amendment of the pleadings and further proceedings looking ahead to a new trial are fair and appropriate. I therefore dissent.

Pickering, J.
Pickering

cc: Attorney General/Carson City
Allen Lichtenstein, Attorney at Law, Ltd.
Law Office of Mark E. Merin
Eighth Judicial District Court Clerk