IN THE COURT OF APPEALS OF THE STATE OF NEVADA

HEATHER SMITH, AN INDIVIDUAL, Appellant, vs. KATHLEEN PAUSTIAN, AN INDIVIDUAL, AS PERSONAL REPRESENTATIVE OF ROBERT RAY PAUSTIAN, Respondent.	No. 86961-COA
HEATHER SMITH, AN INDIVIDUAL, Appellant, vs. KATHLEEN PAUSTIAN, AN INDIVIDUAL, AS PERSONAL REPRESENTATIVE OF ROBERT RAY PAUSTIAN, Respondent.	No. 87975-COA

ORDER DISMISSING APPEAL (DOCKET NO. 86961-COA) AND AFFIRMING IN PART, REVERSING IN PART AND REMANDING (DOCKET NO. 87975-COA)

Heather Smith appeals from a judgment on a jury verdict and a post-judgment order concerning prejudgment interest in a tort action. Eighth Judicial District Court, Clark County; Mark R. Denton, Judge.

On March 6, 2015, respondent Robert Ray Paustian was acting as a designated driver and operating a non-party's motor vehicle. Paustian had never been issued a driver's license and had received no formal driver's training. Paustian allegedly failed to stop at a red traffic signal and collided with appellant Heather Smith's vehicle. Smith was injured in the collision. A few days after the accident an insurance adjuster contacted Paustian by telephone and took a recorded statement from him. Paustian stated that he

did not have a valid driver's license because his license was suspended when he was a kid. He also stated that his girlfriend, who was a passenger in the vehicle, was hurt in the collision.

In March 2017, Smith filed a negligence action against Paustian. Smith did not take Paustian's deposition until November 2019, more than two years later. During his deposition, Paustian testified that he did not recall giving a recorded statement to an insurance adjuster. Paustian testified that his father taught him how to drive when he was younger, but that he did not have any formal driver's training "through the DMV." In direct conflict with what Paustian told the insurance adjuster in his recorded statement, Paustian testified that because of his lack of training, he did not currently hold, nor had he ever held, a driver's license. He also testified he had only driven a few times on Nevada roads and that someone had always been in the car with him. In his deposition, Paustian also denied that anyone was injured in the collision, contrary to what he reported to the insurance adjuster.

Prior to trial, Paustian admitted liability for the collision and that he had never held a valid driver's license or participated in formal driver's training. In light of these admissions, the only issues left for trial were the amount of compensatory damages to which Smith was entitled, and whether Smith was also entitled to punitive damages due to Paustian's decision to drive without a driver's license and without the requisite training.

In October 2020, Paustian served Smith with an offer of judgment pursuant to NRCP 68 in the amount of $75,000, exclusive of costs allowed by NRS 18.005 and prejudgment interest. Smith implicitly rejected the offer under NRCP 68(e) by failing to respond.

In February 2022, Paustian pleaded guilty to, and was put on probation for, an unrelated criminal charge. He was ordered to serve his original sentence of 60 months at Southern Desert Correctional Center in September 2022 for violating probation. It is unclear based on the record when

Paustian's counsel in this case learned of Paustian's incarceration, and Paustian's counsel could not recall at oral argument.

Approximately three weeks before the April 2023 trial, the parties filed a joint pretrial memorandum. In the memorandum, both Smith and Paustian listed Paustian as a witness they expected to call at trial. Neither party noted any issues with Paustian appearing at trial, nor did they mention Paustian's incarceration.

Five days after filing the joint pre-trial memorandum, Smith moved for Paustian to be produced as a witness pursuant to NRS 50.215 and NRS 174.325 and requested that the motion be heard on an order shortening time. In her motion, Smith stated that she recently discovered Paustian's incarceration and that the parties had been unable to reach an agreement regarding Paustian appearing to testify at trial. She also attached a declaration detailing the nature of the action or proceeding, the testimony expected from Paustian, and the materiality of Paustian's anticipated trial testimony. The district court did not set Smith's motion for hearing until April 13, four days before trial commenced on April 17.

At the April 13 hearing, Smith asserted that Paustian's trial testimony was necessary for impeachment purposes and to support her claim for punitive damages. Paustian argued that Smith only wanted him to testify to show that he made prior inconsistent statements and that he had a felony conviction, which he maintained was irrelevant to the issues that remained for trial because he had conceded liability. Paustian further argued that requiring him to testify in the courtroom "in shackles" or from prison would be unfairly prejudicial.[1] Finally, Paustian argued that NDOC had not been notified at

[1]Notably, despite his argument that his appearance in prison clothes or from prison would be prejudicial, Paustian's counsel twice mentioned

least seven business days in advance of the trial date that Paustian's appearance was required at trial to give testimony, in violation of NRS 50.215(4). The district court denied Smith's motion in part without oral or written findings and ordered that Smith could not call Paustian in her case-in-chief but might be permitted to call him in her rebuttal if warranted. As an alternative, Smith orally moved to take Paustian's "trial deposition," meaning that she sought to depose Paustian a second time.[2] The district court also summarily denied that motion.

During the five-day trial, Smith read portions of Paustian's deposition into evidence, and the parties presented testimony from their expert witnesses regarding Smith's damages. Smith also sought to introduce Paustian's recorded statement to the insurance company into the record, for impeachment purposes. Paustian objected, arguing that because he was not testifying at trial, he could not be impeached by any prior inconsistency contained in the recorded statement. The district court excluded Paustian's recorded statement based on his arguments and permitted Smith to remove any references to facts contained in Paustian's deposition that were inconsistent with his recorded statement before reading the deposition to the jury. Both parties agreed to this procedure.

Following the conclusion of his case-in-chief, Paustian moved for judgment as a matter of law pursuant to NRCP 50 on Smith's claim for punitive damages, arguing that there was no evidence by which the jury could conclude

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Paustian's incarceration voluntarily at trial—once during jury selection and once in closing argument.

[2]We note that Nevada does not recognize a distinction between discovery and trial depositions as "[t]he examination and cross-examination of a deponent proceed as they would at trial under Nevada law of evidence, except NRS 47.040-47.080 [admissibility at trial] and NRS 50.155 [exclusionary rule]." *See* NRCP 30(c)(1).

that Paustian's driving without a driver's license and formal driver's training rose to the level of conscious disregard for Smith's safety. Smith argued in response that Paustian's lack of training and licensure, and his conduct in getting behind the wheel, showed "his conscious disregard for the health and safety of others." The district court granted Paustian's motion, and the jury was not instructed on punitive damages.

In her closing argument, Smith requested damages in the amount of $1,821,455.19. The jury returned a verdict in favor of Smith, awarding her a total of $35,318.70 in compensatory damages. The district court entered judgment on the jury verdict, and Smith appeals that judgment in Docket No. 86961-COA.

In post-judgment proceedings, as relevant to these consolidated appeals, both parties moved for awards of interest. Since Smith had rejected an NRCP 68 offer of judgment that was a higher amount than what she recovered at trial, the district court awarded Paustian post-offer prejudgment interest on his recovered costs at the rate of 5.25 percent annual interest accrued between service of the offer of judgment and entry of the judgment on the jury verdict. The court awarded Smith post-judgment interest on the judgment at the rate of 9.5 percent interest accrued until satisfaction of judgment. Smith appeals that order in Docket No. 87975-COA, challenging the district court's award of prejudgment interest to Paustian, and the court's failure to award her prejudgment interest for the period between the date of service of the first amended complaint and the date of Paustian's offer of judgment.

The appeals in Docket Nos. 86961-COA and 87975-COA have been consolidated. While the consolidated appeals were pending before this court, Paustian passed away.[3]

Docket No. 86961-COA

On appeal from the judgment entered on the jury verdict, Smith contends that the district court erred when it refused to allow Paustian to be produced as a witness at trial, denied her alternative request to depose Paustian a second time, refused to admit Paustian's recorded statement to the insurance adjuster as a prior inconsistent statement, and refused to instruct the jury on punitive damages. Paustian argues that the district court did not err by denying Smith's request to produce him as a witness at trial or by excluding his recorded statement for impeachment purposes. Additionally, Paustian contends that Smith was not entitled to punitive damages as a matter of law. In addition to these arguments, we consider whether Paustian's death renders this appeal moot.

The district court abused its discretion by not allowing Paustian to testify at trial

Smith argues that the district court abused its discretion when it refused to allow Paustian to be produced as a witness at trial, either in-person or by audiovisual means, or in the alternative, by denying her request to take his deposition a second time. Smith argues that Paustian should have been produced as a trial witness under NRS 50.215 because she complied with the statute. Specifically, she argues that she filed a motion for Paustian's appearance at trial and submitted the required declaration describing the nature of the action, identifying the anticipated testimony she expected to elicit

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[3]Paustian's mother, Kathleen Paustian, was substituted into these appeals in place of her son as his personal representative. In our order, we refer to the respondent in this matter as Paustian.

from Paustian, and establishing the materiality of Paustian's testimony at trial. She argued that Paustian's testimony was material to the disputed issues in the case because, without his testimony, she was unable to challenge his credibility and develop his state of mind concerning his knowledge of the risk of injury by driving without a license and without formal driver's training. Smith contends that this testimony would support allowing the jury to consider an award of punitive damages.

Conversely, Paustian argues that the district court did not abuse its discretion by denying Smith's request to produce him as a witness at trial because his testimony was irrelevant to the jury's determination of whether the accident caused Smith's injuries because Paustian had admitted liability, and the evidence establishing that he drove without a license and formal driver's training would be admitted regardless of his trial testimony.

This court reviews the district court's determinations regarding witness testimony and the admission of evidence for an abuse of discretion. *Hallmark v. Eldridge*, 124 Nev. 492, 499, 189 P.3d 646, 650 (2008) (witness testimony); *FGA, Inc. v. Giglio*, 128 Nev. 271, 283, 278 P.3d 490, 497 (2012) (admission of evidence). However, this court reviews issues involving statutory interpretation de novo. *Educ. Freedom PAC v. Reid*, 138 Nev. 513, 516, 512 P.3d 296, 300 (2022). When a statute's language is clear and unambiguous, we give effect to the ordinary meaning of the plain language of the text without turning to other rules of statutory construction. *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019).

The plain language of NRS 50.215(1) allows for a person imprisoned in the state prison system to be examined as a witness in the district court, but only on a motion of a party supported by an affidavit. The affidavit must show the nature of the action or proceeding, the testimony expected from the witness, and its materiality. *Id.* In *Maxwell v. Rives*, the Nevada Supreme Court considered the predecessor to NRS 50.215(1)—Nev.

Compiled Laws §§ 1459-61 (1873)—which is substantially similar to the present version of the statute. 11 Nev. 213, 218-19 (1876). There, the supreme court warned that the affidavit requirement "*was never designed for the protection of the prisoner*, but only to prevent improper and unnecessary interference with the custody of prisoners." *Id.* at 219 (emphasis added). Thus, the supreme court explained that "[a] judge is not bound to make an order [for the production of an incarcerated person], and ought not to do so unless the ends of justice require it." *Id.* But the supreme court further held that the only evidence needed to establish that an incarcerated person's production is necessary is an "affidavit setting out the testimony that is expected from the prisoner and its materiality." *Id.*

Here, the declaration accompanying Smith's motion expressly described the nature of the proceeding. The declaration also described that the testimony expected from Paustian would address the nature of the collision, including the force of the crash; statements made by parties at the time of the crash; and an acknowledgement of Paustian's lack of a driver's license and any formal driver's training. And it described that the testimony expected would be used for impeachment purposes based on "his false statements about the same."

The declaration also asserted that the testimony was material, emphasizing that factual disputes remained, including disputes about the impact of the crash, which was relevant to causation. *See Rish v. Simao*, 132 Nev. 189, 197, 368 P.3d 1203, 1209 (2016) ("[T]he nature of the impact [in a motor vehicle accident] is a factor for the trier of fact to consider in determining causation of the injuries that form the basis of the claim."). Moreover, Smith pointed to the issue of damages—specifically, her request for punitive damages—as an unresolved factual issue. Smith asserted that she needed Paustian's testimony to establish his state of mind at the time of the accident—a key requirement to support Smith's punitive damages claim. *See Garcia v.*

Awerbach, 136 Nev. 229, 232-34, 463 P.3d 461, 464-65 (2020) (explaining that a culpable state of mind is required to establish entitlement to punitive damages).

This showing in the declaration was sufficient to establish the materiality of Paustian's expected trial testimony. *See Material,* Black's Law Dictionary (12th ed. 2024) (defining "material evidence" as "having some logical connection with the consequential facts"); *Wyman v. State*, 125 Nev. 592, 608, 217 P.3d 572, 583 (2009) (adopting the Black's Law Dictionary definition of material evidence for purposes of Nevada's Uniform Act to Secure the Attendance of Witnesses from Without a State in Criminal Proceedings, codified in NRS 174.395 through NRS 174.445).

Thus, because Smith's affidavit described the nature of the action, identified the testimony expected from Paustian, and demonstrated that the testimony was material to her claims, she satisfied NRS 50.215(1)'s requirements for the production of an incarcerated person as a witness. *See Maxwell*, 11 Nev. 213, 218-19 (1876). Therefore, the district court abused its discretion in not permitting Paustian to be produced as a witness at trial pursuant to NRS 50.215(1).[4] Alternatively, the district court could have

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[4]We recognize that, in addition to NRS 50.215(1)'s requirements, NRS 50.215(4) states that the Nevada Department of Corrections (NDOC) must be provided with seven business days' notice before the incarcerated person is required to appear as a witness at trial. NRS 50.215(4)(a)(2) (requiring written notice no less than 7 business days before a scheduled appearance for a prisoner incarcerated in "a prison located not more than 40 miles from Las Vegas"). In the present case, by the time the district court heard Smith's motion, it was impossible to provide NDOC with the required seven business days' notice that it needed to transport Paustian to appear in person at trial to testify.

Nevertheless, NRS 209.274(2), which separately establishes rules for NDOC's transportation of prisoners to appear in court, provides that, even if NDOC has less than seven days' notice before an incarcerated witness's

required Paustian to be produced by audiovisual means or granted Smith leave to take a second deposition of Paustian prior to trial pursuant to NRCP 30(a)(2).[5]

However, this court is confined to ruling on actual controversies. *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). And when our legal determinations cannot affect the outcome of a case, a live controversy no longer exists, and the case is moot, *see In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 161, 87 P.3d 521, 523-24 (2004) ("[T]he duty of every judicial tribunal is to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions or abstract propositions, or to declare principles of law which cannot affect the matter in issue before it." (quoting *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981))).

Thus, while we conclude that the district court abused its discretion in not having Paustian produced for trial, Paustian's death during the pendency of this matter makes the remedy this court could have afforded Smith—a new trial where Paustian would be permitted to testify as a witness—impossible. *See Personhood*, 126 Nev. at 602, 245 P.3d at 574 (holding that a case that initially presents a live controversy may be rendered moot by subsequent events). Because we cannot grant this relief, the appeal is moot. *Cf. In re Guardianship of L.S. & H.S.*, 120 Nev. at 161, 87 P.3d at 523-24.

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scheduled appearance in court, it must transport the witness on the date scheduled for their appearance if it can do so "in the usual manner." If it is impossible to transport the witness in the usual manner, NRS 209.274(2) requires NDOC to make the witness available to testify through various alternative means upon court order.

[5]We note that neither party specifically addressed NRCP 30(a)(2), although Smith did request permission to take a second deposition.

The district court did not abuse its discretion in refusing to admit Paustian's recorded inconsistent statement at trial

As stated above, we review district court decisions regarding witness testimony and the admission of evidence for an abuse of discretion. *Hallmark*, 124 Nev. at 499, 189 P.3d at 650; *FGA*, 128 Nev. at 283, 278 P.3d at 497. We have held that the district court has considerable discretion in determining the admissibility of evidence, *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 804, 8 P.3d 126, 135 (2000), and thus this court will not interfere with such discretion "absent a showing of palpable abuse," *Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 408-09, 305 P.3d 70, 73 (2013) (internal citation omitted).

Throughout these proceedings, Smith has primarily argued that admission of the recording was necessary for impeachment purposes. Generally, a prior inconsistent statement is admissible for impeachment purposes. *Rugamas v. Eighth Jud. Dist. Ct.*, 129 Nev. 424, 432, 305 P.3d 887, 893 (2013). However, only a *witness* may be impeached. *See* NRS 50.075 ("The credibility of a witness may be attacked by any party, including the party calling the witness."); *see also Azbill v. State*, 88 Nev. 240, 250, 495 P.2d 1064, 1071 (1972) ("Impeachment is an attack upon the credibility of a *witness*." (Emphasis added)).

A "witness" is defined as "[s]omeone who gives testimony under oath or affirmation (1) in person, (2) by oral or written deposition, or (3) by affidavit." *Witness*, Black's Law Dictionary (12th ed. 2024). Based on the plain meaning of the term "witness," Paustian was a witness when he gave testimony under oath by oral deposition. *See id.*; *see also Jones v. Nev., State Bd. of Med. Exam'rs*, 131 Nev. 24, 28, 342 P.3d 50, 52 (2015) (recognizing that courts may look to dictionary definitions to determine the plain meaning of a term).

Although Paustian was a witness when he was deposed, and he could have been impeached at that time with his recorded statement, this did not occur. Even if Paustian had been impeached when he was deposed, a proper foundation would still have been required to separately admit the recorded statement as impeachment evidence at trial. *See Serpa v. Porter*, 80 Nev. 60, 65-66, 389 P.2d 241, 244 (1964) (providing that a party who has not been asked foundation questions cannot be impeached). In his deposition, Paustian testified that he did not remember speaking to an insurance adjuster, and Smith chose not to ask him about the recorded statement or impeach him with the statement during his deposition. Therefore, a proper foundation was not established at Paustian's deposition to admit the recorded statement into evidence at trial, *see id.*, and the district court did not abuse its discretion in excluding the statement as impeachment evidence given the circumstances at the time Smith argued for its admission.[6]

The district court did not err in granting a directed verdict on Smith's punitive damages claim

The district court has discretion to determine whether a defendant's conduct merits punitive damages as a matter of law. *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 451 (2006). Punitive damages may be awarded when the plaintiff proves by clear and convincing evidence that the defendant is "guilty of oppression, fraud or malice, express or implied." *Id.* at 581, 138 P.3d at 450-51 (internal quotation marks omitted). 'Malice, express or implied' means "conduct which is intended to injure a person or despicable conduct which is engaged in with a conscious disregard of the rights or safety of others." NRS 42.001(3). Conscious disregard is "the knowledge of the

[6]We note that, as Smith conceded at oral argument, she only moved to introduce Paustian's recorded statement for impeachment purposes and not based on other grounds.

probable harmful consequences of a wrongful act and a willful and deliberate failure to act to avoid those consequences." NRS 42.001(1); *Countrywide Home Loans, Inc. v. Thitchener*, 124 Nev. 725, 739, 192 P.3d 243, 252 (2008). Thus, in order to support an award of punitive damages, the defendant's state of mind must be considered. *See Garcia*, 136 Nev. at 233-34, 463 P.3d at 465 (noting that there is a "culpable state of mind required to prove a punitive damages claim"). Throughout these proceedings, Smith has only argued implied malice to support her punitive damages claim.

The district court's consideration of Paustian's motion for a directed verdict on punitive damages included all the exhibits attached to the parties' motion practice, Paustian's unredacted deposition, and his recorded statement. Thus, before ruling on the directed verdict, the district court was aware that Paustian never held a driver's license, lacked appropriate driver's training, and chose to drive anyway.[7] The court was also aware of the potential inconsistent statements Paustian made by comparing his recorded statement with his deposition testimony, which would partially explain the reason for permitting the potential inconsistent statements to be redacted from his deposition transcript before it was read to the jury. Although preventing Paustian from testifying was an error, at the time the court heard arguments

[7]Insofar as Smith contends that she was entitled to punitive damages as a matter of law because Paustian was driving without a driver's license when he collided with her motor vehicle, we emphasize that although the Legislature has established that punitive damages are automatically available when a defendant causes an injury while driving under the influence, *see* NRS 42.010, the Legislature has not done so for driving without a license. Additionally, Smith has not cited any controlling authority that not having a driver's license or training entitles the jury to award punitive damages. *Cf. Hussey v. Tahira*, Docket No. 86223-COA, 2024 WL 1270399, at *4 (Nev. Ct. App., Mar. 22, 2024) (Order of Affirmance) (concluding that the appellant failed to provide sufficient evidence and authority that the negligent hiring of a driver without a Nevada driver's license merited punitive damages as a matter of law).

regarding a directed verdict, it did not have any other evidence before it in support of Smith's request for punitive damages—particularly as to Paustian's state of mind. Therefore, we cannot conclude that the district court abused its discretion in finding there was insufficient evidence to support an award of punitive damages based on the evidence presented at the time Paustian moved for a directed verdict.

Any other relief requested by Smith is also mooted by the circumstances

As discussed above, the primary relief Smith sought when this appeal was filed was a new trial in which Paustian would be produced as a witness to testify. While that request for relief is now moot due to Paustian's death, Smith argues in the alternative that despite Paustian's death, her appeal from the judgment on the jury verdict, as a whole, is not moot and should not be dismissed because this court could grant a new trial and direct the district court to permit the jury to consider Paustian's recorded statement for impeachment purposes, as well as his deposition testimony in its entirety.

Smith further contends that, if she was allowed to present Paustian's recorded statement and unredacted deposition testimony to the jury, she would be able to show the jury where he provided inconsistent statements and his state of mind at the time of the accident. According to Smith, the jury could then evaluate if punitive damages should be awarded based on all the evidence, particularly Paustian's inconsistent statements to the insurance adjuster, namely, that no one in his vehicle was hurt in the collision and he did not have a license because it was previously suspended.[8]

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[8]Smith further suggests that if Paustian's recorded statement and complete deposition testimony are admitted at a second trial, the amount of compensatory damages awarded may be affected in addition to the amount of punitive damages. However, Smith does not challenge the sufficiency of the compensatory damages award on appeal and fails to make a cogent argument as to how this evidence would affect a compensatory award. Thus, we decline

Thus, we next consider whether granting relief in the form of a new trial in which Paustian would not be testifying or providing additional deposition testimony, but where his recorded statement and complete deposition testimony would be admitted as evidence would be a viable remedy, or if this relief is also moot due to Paustian's death. Initially, with respect to the recorded statement, a proper foundation was not established during Paustian's deposition for his recorded statement to be admitted at a trial for impeachment purposes. Further Paustian's death while these appeals were pending prevents the required foundation from being established to allow the recorded statement to be introduced for impeachment purposes at another trial, which was the only ground for admissibility argued by Smith and foundation was not addressed. Therefore, under these unique circumstances, remanding this case for a new trial where Paustian's recorded statement would be admitted for impeachment purposes is not possible without Paustian being able to testify. Consequently, this request for alternative relief is moot. *See In re Guardianship of L.S. & H.S.*, 120 Nev. at 161, 87 P.3d at 523-24.

We next address Smith's request for a new trial so that Paustian's deposition testimony could be read to the jury without redaction. Even if Paustian's complete deposition testimony was admitted during a second trial, Smith has not established that a different outcome would occur regarding the punitive damages issue. As discussed above, the district court already determined that a directed verdict disallowing punitive damages was warranted after having the opportunity to review Paustian's unredacted

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to consider Smith's argument in this respect. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). Accordingly, we limit our discussion to Smith's assertion that this evidence would somehow change the outcome related to punitive damages.

deposition testimony together with his recorded statement, and we concluded that decision was not an abuse of discretion at the time the directed verdict was granted. Thus, reversing the judgment and requiring the district court to reconsider the same evidence it previously considered when it granted Paustian's directed verdict on punitive damages would not result in a different outcome. Without the ability to develop additional testimony from Paustian regarding his state of mind, which is impossible, this requested alternative relief is moot. *See id.*

As we are unable to grant any relief that would change the outcome of the underlying case in Docket No. 86961-COA due to Paustian's death, that appeal is moot, and we must dismiss it. *See Chittenden v. Justice Ct. of Pahrump Township*, 140 Nev., Adv. Op. 5, 544 P.3d 919, 926 (Ct. App. 2024) (recognizing that "mootness is an element of justiciability and raises a question as to our jurisdiction" (internal quotation marks omitted)). Accordingly, we order the appeal in Docket No. 86961-COA dismissed.

Docket No. 87975-COA

The district court erred in denying Smith pre-offer prejudgment interest

As discussed above, Smith's appeal in Docket No. 87975-COA challenges the post-judgment order awarding interest on costs. Smith initially argues that the district court erred in denying her pre-offer prejudgment interest from service of the first amended complaint and summons until service of the rejected offer of judgment at a rate of 10.5 percent. Paustian concedes that the district court's decision in this respect was erroneous. We agree with Smith in part.

Under NRS 17.130(2), a party who obtains a judgment is entitled to interest from the date of service of the summons and complaint until the judgment is satisfied. While NRCP 68(f)(1) limits the availability of such interest where a party rejects an offer of judgment and fails to obtain a more favorable judgment by barring the party from recovering post-offer pre-

judgment interest, its plain language includes no limitation on the party's ability to recover pre-offer prejudgment interest. *See Chandra*, 135 Nev. at 501, 454 P.3d at 743. Consequently, under NRS 17.130(2), Smith was entitled to pre-offer prejudgment interest from the date of service of the summons and first amended complaint to the date of service of the offer she rejected.

However, we disagree with Smith's contention that the correct interest rate to be applied is 10.5 percent. If no contract or law establishes the applicable rate of interest, and the rate is not otherwise specified in the judgment, then NRS 17.130(2) provides a specific formula to be applied to determine the applicable interest rate. The statute states that the judgment draws interest at a rate equal to the prime rate at the largest bank in Nevada on either January 1 or July 1 depending on which date *immediately proceeds* the judgment plus 2 percent. *Id.*

In arguing that pre-offer prejudgment interest should be calculated at 10.5 percent, Smith relies on the prime rate in effect on January 29, 2024, when the district court purported to enter an amended order incorporating the post-judgment awards of interest with the judgment on the jury verdict. However, the operative judgment is not the January 29, 2024, amended order, but rather the judgment on the jury verdict entered June 8, 2023. *See Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000) (holding that a final judgment is one that disposes of all the issues presented in the case and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney fees and costs); *see also Campos-Garcia v. Johnson*, 130 Nev. 610, 612, 331 P.3d 890, 891 (2014) ("When district courts, after entering an appealable order, go on to enter a judgment on the same issue, the judgment is superfluous."). The rate on January 1, 2023—the date immediately preceding the date of the judgment on the jury verdict—was 7.5 percent. *See Prime Interest Rate*, https://fid.nv.gov/uploadedFiles/fidnvgov/content/Resources/Prime%20Interest%20Rate%20July%201,%202024.pd

f (last visited March 19, 2025). Thus, the rate to be applied to the pre-offer prejudgment interest on Smith's judgment is 7.5 percent plus 2 percent, which is 9.5 percent. NRS 17.130.

In light of the foregoing, we reverse the order resolving the parties' motions for interest and we remand for the district court to calculate Smith's pre-offer prejudgment interest in accordance with this order.

The district court did not err in calculating Paustian's prejudgment interest

Smith further argues that the court erred in awarding Paustian pre-judgment interest on costs, regardless of when the costs were actually incurred. Paustian responds that he is entitled to prejudgment interest on the entirety of his awarded costs accruing from the time of the rejected offer to the time of the entry of the judgment pursuant to NRCP 68(f)(1)(B) and NRS 17.117(10)(b). We agree with Paustian.

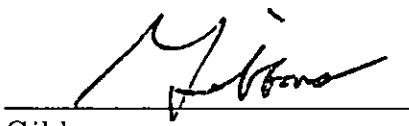
While Smith argues that *Gibellini v. Klindt* mandates that interest on costs should run only from the time when costs were incurred rather than the entire period between the rejected offer and the verdict, *Gibellini* is distinguishable from the present case. 110 Nev. 1201, 1209, 885 P.2d 540, 545 (1994). Indeed, *Gibellini* analyzed what a prevailing party was owed in costs rather than what costs and prejudgment interests should be awarded pursuant to NRCP 68. *See id.* at 1203, 885 P.2d at 541. NRCP 68(f)(1)(B) plainly states, "the offeree must pay the offeror's post-offer costs and expenses, including . . . applicable interest on the judgment *from the time of the offer to the time of entry of the judgment.*" (Emphasis added.)[9] *See*

[9]We also reject Smith's contention at oral argument that NRCP 68 was not intended to penalize parties for failing to accept an offer, but rather merely intended to encourage settlement. Indeed, Smith's contention is belied by the plain language of the title of NRCP 68(f), which is "Penalties for Rejection of Offer." *Cf. Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 230, 19 P.3d

Vanguard Piping v. Eighth Jud. Dist. Ct., 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013) ("Nevada's Rules of Civil Procedure are subject to the same rules of interpretation as statutes."). Thus, we conclude that the district court correctly calculated Paustian's post-offer prejudgment interest for the entire period between the time of the offer and the time of the entry of judgment, and we therefore affirm that portion of the post-judgment order resolving the parties' motions for interest.

It is so ORDERED.[10]

_____, C.J.
Bulla



_____, J.
Gibbons

WESTBROOK, J., concurring:

I concur with the majority's decision to dismiss the appeal in Docket No. 86961-COA as moot because Robert Paustian's death during the pendency of that appeal precludes us from granting any meaningful relief for the errors alleged. I also concur with the majority's decision to affirm in part, reverse in part, and remand in Docket No. 87975-COA. I write separately only to say that, in Docket No. 86961-COA, I would not reach the issue of whether

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245, 247, 250 (2001) (explaining that, when construing an ambiguous statute, its title may be considered to determine legislative intent).

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

the district court abused its discretion by refusing to allow Paustian to testify at trial during his incarceration.

"This court's duty is 'to decide actual controversies by a judgment which can be carried into effect, and not to give opinions upon moot questions.'" *Degraw v. Eighth Jud. Dist. Ct.*, 134 Nev. 330, 332, 419 P.3d 136, 139 (2018) (quoting *NCAA v. Univ. of Nev.*, 97 Nev. 56, 57, 624 P.2d 10, 10 (1981)). By extension, this court should avoid "declar[ing] principles of law which cannot affect the matter in issue before it." *NCAA*, 97 Nev. at 57, 624 P.2d at 10.

In this case, Smith has not demonstrated that an exception to the mootness doctrine exists that would allow this court to reach the merits of her argument that the district court erred in precluding Paustian from testifying at trial. *Cf. Bisch v. LVMPD*, 129 Nev. 328, 334, 302 P.3d 1108, 1113 (2013) (stating that the court may consider a moot case if it involves a "a matter of widespread importance capable of repetition, yet evading review"). Absent an exception to the mootness doctrine, I would not reach the merits of this issue. *See, e.g.*, *Mason v. Cuisenaire*, 122 Nev. 43, 52, 128 P.3d 446, 452 (2006) (declining, after death of the appellant, to consider the moot question of the appellant's military retirement and survivor benefits despite the parties' request that the court consider it "capable of repetition").

_____, J.
Westbrook

cc: Hon. Mark R. Denton, District Judge
Christian Morris Trial Attorneys
Messner Reeves LLP
Eighth District Court Clerk