representing the person or the employer of that attorney.'' Here, the documents before us indicate that Tannery was appointed to represent Davis on August 25, 2011, and the State faxed the grand jury notice to Tannery's office that day.[1] Although Tannery may have discovered the grand jury notice at a later time, that circumstance is irrelevant because the notice was properly served upon facsimile transmission that satisfies NRS 178.589(1). And while Davis argues generally that the unreliability of facsimile service makes that method inadequate, nothing in his submissions indicates that the facsimile machine was not operational.

[Headnote 9]

As to Davis's contention that the grand jury notice was deficient because it failed to inform him of the date, time, and place of the grand jury hearing, we disagree. NRS 172.241(2)(b) provides that a grand jury target may testify before the grand jury if he ''submits a written request to the district attorney and includes an address where the district attorney may send a notice of the date, time and place of the scheduled proceeding of the grand jury.'' Therefore, the State is not required to include date, time, and place in the grand jury notice but must forward that information only upon the grand jury target's written request.

Because we conclude that the district court did not manifestly abuse its discretion or exercise its discretion in an arbitrary or capricious manner by denying Davis's motion to dismiss the indictment, we deny the petition.

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FRANK MILFORD PECK, APPELLANT, *v.*
LESLIE ELLEN CROUSER, RESPONDENT.

No. 59258

February 28, 2013 295 P.3d 586

Proper person appeal from a district court order dismissing a complaint and from a post-judgment district court order declaring appellant a vexatious litigant. Second Judicial District Court, Washoe County; Patrick Flanagan, Judge.

After plaintiff brought civil action against defendant and civil action was dismissed, the district court declared plaintiff to be a vexatious litigant. Plaintiff appealed. On issues of apparent first

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[1]To the extent Davis argues that the grand jury notice was deficient because he did not receive it from the State or Tannery, his claim lacks merit as the notice may be served on counsel. *See* NRS 172.241(2)(a).

impression, the supreme court, GIBBONS, J., held that: (1) post-judgment vexatious litigant order was not appealable special order entered after final judgment, and (2) vexatious litigant order was not appealable order granting injunction.

**Dismissed.**

*Frank Milford Peck*, Indian Springs, in Proper Person.

*Leslie Ellen Crouser*, Reno, in Proper Person.

1. COSTS; INJUNCTION.
   In order to deter conduct in repeatedly filing frivolous lawsuits, the supreme court has approved of the use of sanctions, including limiting by order a vexatious litigant's right to access the courts.
2. INJUNCTION.
   Restrictions imposed by vexatious litigant orders may include prohibiting the litigant from filing future actions against a particular party or barring the litigant from filing any new action without first demonstrating to the court that the proposed case is not frivolous.
3. APPEAL AND ERROR.
   The supreme court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule.
4. APPEAL AND ERROR.
   Post-judgment vexatious litigant order did not constitute a special order entered after final judgment, and therefore the supreme court lacked jurisdiction to review the district court's post-judgment vexatious litigant order, where vexatious litigant order inhibiting party's ability to submit court filings without particular restrictions did not affect the party's rights arising out of a final judgment as the party's right of access to the courts did not arise out of a final judgment in an action, but instead, arose out of the federal and state constitutions, case authority, statutes, and court rules. NRAP 3A(b)(8).
5. APPEAL AND ERROR.
   An appealable ''special order entered after final judgment'' is an order affecting the rights of some party to the action, growing out of the final judgment previously entered; it must be an order affecting rights incorporated in the judgment. NRAP 3A(b)(8).
6. APPEAL AND ERROR.
   Post-judgment vexatious litigant order did not constitute an order granting an injunction, and therefore the supreme court lacked jurisdiction to review the district court's post-judgment vexatious litigant order, where vexatious litigant order was not subject to rule governing the procedure for seeking an injunction and the form that an order granting an injunction was required to take. NRAP 3A(b)(3); NRCP 65.
7. COURTS.
   Writ relief is the appropriate vehicle to review vexatious litigant orders because review of such orders will involve whether the district court manifestly abused its discretion, such as where the district court fails to follow the clearly established procedures for imposing a vexatious litigant order.

Before the Court EN BANC.

## OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether this court has jurisdiction to review an appeal from a post-judgment district court order declaring a party to be a vexatious litigant. Because we conclude that we do not have jurisdiction over such an order, and because this appeal appears untimely as to the final judgment, we dismiss this appeal.

### *PROCEDURAL BACKGROUND*

In the district court, appellant Frank Milford Peck filed a civil complaint, which respondent Leslie Ellen Crouser moved to dismiss. Respondent also filed a motion for an order declaring appellant a vexatious litigant. The district court granted the motion to dismiss on June 10, 2011, and the district court docket sheet shows that notice of entry of the dismissal order was filed on the same day. No notice of appeal was filed at that time.

The district court subsequently entered an order on August 30, 2011, declaring appellant to be a vexatious litigant and ordering that appellant must submit for court review any future proposed filings seeking relief against respondent. Notice of entry of that order was served on September 2, 2011. Appellant's notice of appeal was then filed on September 21, 2011. The notice of appeal was therefore untimely as to the order of dismissal, but timely as to the vexatious litigant order. *See* NRAP 4(a)(1). As a result, we must determine whether the vexatious litigant order is substantively appealable.[1] In doing so, we first briefly discuss the purpose and effect of vexatious litigant orders before turning to whether this court is authorized to review such orders on appeal.

### *DISCUSSION*

*Vexatious litigant orders generally*

[Headnotes 1, 2]

A ''vexatious litigant'' is one ''who repeatedly files frivolous lawsuits.'' *Black's Law Dictionary* 952 (8th ed. 2004). In order to deter such conduct, this court has approved of the use of sanctions, including limiting by order a vexatious litigant's right to access the courts. *See Jordan v. State, Dep't of Motor Vehicles*, 121 Nev. 44, 58-60, 110 P.3d 30, 41-42 (2005), *abrogated on other grounds by Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228 n.6,

[1]This court may consider jurisdictional issues sua sponte. *Landreth v. Malik*, 127 Nev. 175, 179, 251 P.3d 163, 166 (2011).

181 P.3d 670, 672 n.6 (2008). Restrictions imposed by vexatious litigant orders may include prohibiting the litigant from filing future actions against a particular party or barring the litigant from filing any new action without first demonstrating to the court that the proposed case is not frivolous. *See id.*

[Headnote 3]

While we have previously reviewed the propriety of interlocutory vexatious litigant orders challenged in the context of an appeal from a final judgment, *see Jordan*, 121 Nev. 44, 110 P.3d 30, we have not yet addressed our jurisdiction to consider an appeal from a post-judgment vexatious litigant order. This court has jurisdiction to consider an appeal only when the appeal is authorized by statute or court rule. *Taylor Constr. Co. v. Hilton Hotels*, 100 Nev. 207, 209, 678 P.2d 1152, 1153 (1984). NRAP 3A(b) sets forth the judgments and orders that are subject to appeal in this court. Our review of NRAP 3A(b) reveals two types of appealable orders that could arguably provide a basis for this court to exercise jurisdiction over post-judgment vexatious litigant orders: special orders entered after final judgment, *see* NRAP 3A(b)(8), and orders granting injunctions.[2] *See* NRAP 3A(b)(3). We address each of these in turn.

*Basis for this court to exercise jurisdiction over post-judgment vexatious litigant orders*

*Special order entered after final judgment*

[Headnotes 4, 5]

An appealable special order entered after final judgment is ''an order affecting the rights of some party to the action, growing out of the judgment previously entered. It must be an order affecting rights incorporated in the judgment.''[3] *Gumm v. Mainor*, 118 Nev. 912, 920, 59 P.3d 1220, 1225 (2002); *see also* NRAP 3A(b)(8). Vexatious litigant orders inhibiting a party's ability to submit court filings without particular restrictions do not affect the party's rights arising out of a judgment because the party's right of access to the

[2]While an appeal from a judgment or order not identified in NRAP 3A(b) may be authorized by statute, *see, e.g.*, NRS 340.210(1) (permitting an appeal from certain interlocutory orders entered in eminent domain actions), no such statute provides authority for this court to exercise jurisdiction over an appeal from a vexatious litigant order.

[3]When *Gumm* was decided, special orders made after final judgment were appealable under NRAP 3A(b)(2). Effective July 1, 2009, NRAP 3A was reorganized, such that special orders entered after final judgment are now appealable under NRAP 3A(b)(8). ADKT No. 381 (Order Amending the Nevada Rules of Appellate Procedure, December 31, 2008). No substantive alteration was made to NRAP 3A in the 2009 amendment. *Id.*

courts does not arise out of a judgment in an action, but instead, arises out of the United States and Nevada Constitutions, case authority, statutes, and court rules. *See, e.g.*, NRCP 2 (providing for a civil action); *Jordan*, 121 Nev. at 55-56, 110 P.3d at 39 (discussing the constitutional right of access to the courts). Thus, a post-judgment vexatious litigant order is not appealable under NRAP 3A(b)(8) as a special order entered after final judgment. *See Gumm*, 118 Nev. at 920, 59 P.3d at 1225.

*Injunction*

[Headnote 6]

An injunction is ''[a] court order commanding or preventing an action.'' *Black's Law Dictionary* 800 (8th ed. 2004). Because vexatious litigant orders restrict a party's conduct, courts in other jurisdictions have treated such orders as injunctions and found them to be appealable on this basis. *See In re Oliver*, 682 F.2d 443, 445 (3d Cir. 1982); *Riffin v. Baltimore County*, 985 A.2d 612, 620, 623 (Md. Ct. Spec. App. 2010); *Pandozy v. Beaty*, 254 S.W.3d 613, 618 (Tex. App. 2008). In Nevada, however, injunctions are governed by NRCP 65, which sets forth the procedure for seeking an injunction and the form that an order granting an injunction must take. Because vexatious litigant orders are not subject to the provisions of NRCP 65, they are not injunctions appealable under NRAP 3A(b)(3).

## *CONCLUSION*

[Headnote 7]

As vexatious litigant orders are not independently appealable under NRAP 3A(b) or any statutory provision, we lack jurisdiction to review an appeal from such an order. *See Taylor Constr. Co.*, 100 Nev. 207, 678 P.2d 1152. Thus, we conclude that post-judgment vexatious litigant orders may only be challenged by filing an original petition for writ relief pursuant to NRS Chapter 34. *Cf. Pengilly v. Rancho Santa Fe Homeowners*, 116 Nev. 646, 649, 5 P.3d 569, 571 (2000) (explaining that, because no statute or rule authorizes an appeal from an order of contempt, such orders must be challenged through a petition for writ relief). We further conclude that writ relief is the appropriate vehicle to review vexatious litigant orders because review of such orders will involve whether the district court manifestly abused its discretion, such as where the district court fails to follow the clearly established procedures for imposing a vexatious litigant order, *see Jordan*, 121 Nev. at 58-62, 110 P.3d at 41-44 (outlining the procedures for imposing vexatious litigant orders and providing that this court reviews such orders for an abuse of discretion); *see also* NRS 34.160; *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556,

558 (2008) (''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' (footnotes omitted)), or to prevent the district court from acting in the absence of jurisdiction. *See* NRS 34.320; *Smith v. District Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) (recognizing that a writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the district court's jurisdiction).

Because we lack jurisdiction over this appeal, we dismiss it.

PICKERING, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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IN THE MATTER OF PARENTAL RIGHTS AS TO A.G.

WASHOE COUNTY DEPARTMENT OF SOCIAL SERVICES, APPELLANT, *v.* KORY L.G., RESPONDENT.

No. 60071

February 28, 2013 295 P.3d 589

Appeal from a district court order denying a petition to terminate the parental rights as to a minor child. Second Judicial District Court, Family Court Division, Washoe County; Deborah Schumacher, Judge.

County department of social services appealed from order of the district court denying petition to terminate father's parental rights as to child. The supreme court, DOUGLAS, J., held that: (1) father was not required to comply with case plan and accept services for purposes of reunification; and (2) presumptions favoring termination of parental rights, which arose from child being placed outside home in dependency proceeding, did not apply to father.

**Affirmed.**

*Richard A. Gammick*, District Attorney, and *Janice Anne Hubbard*, Deputy District Attorney, Washoe County, for Appellant.

*Jeffrey Friedman*, Reno, for Respondent.

1. CONSTITUTIONAL LAW.
   Due process requires that each parent is entitled to a hearing before being deprived of the custody of his or her child. U.S. CONST. amend. 14.
2. INFANTS.
   Presumptions, establishing parental fault and that child's best interest would be served by termination of parental rights, are rebuttable, and once

established, the burden shifts to the parent to overcome the presumptions. NRS 128.105, 128.109.

3. CONSTITUTIONAL LAW.
   Termination of parental rights implicates fundamental liberty interests of a parent's relationship with his or her child. U.S. CONST. amend. 14; NRS 128.109.
4. INFANTS.
   Procedures for terminating parental rights and granting custody of a child to a nonparent must be fundamentally fair. NRS 128.109.
5. CONSTITUTIONAL LAW.
   Even when the fairness of the procedures afforded to the parents in proceeding to terminate parental rights is not called into question, substantive due process nevertheless demands that the government have a basis for subjecting the parents to the procedures in the first instance. U.S. CONST. amend. 14; NRS 128.109.
6. INFANTS.
   It is presumed that fit parents act in the best interest of their children.
7. INFANTS.
   As long as parents adequately care for their children, *i.e.*, they are fit, there is ordinarily no reason for the State to inject itself into the private realm of the family in order to further question the ability of the parents to make best decisions as to rearing their children.
8. INFANTS.
   Father of child placed into State custody and made the subject of dependency proceeding, based on neglectful actions of mother, was not required to comply with case plan and accept services for purposes of reunification; father could not be compelled to comply with case plan for reunification with child when father was not responsible for child's removal from home, father had never been found to have abused or neglected child, and petition for neglect was dismissed as to father by agreement of parties. NRS 432B.560.
9. INFANTS.
   Presumptions of token efforts and failure of parental adjustment, which arose from child being placed outside home in dependency proceeding due to neglectful actions of mother, did not apply to support termination of parental rights of father, who was ''nonoffending'' party; presumptions arose from child's lengthy placement in foster care, child was removed from home because of mother's actions, and county department of social services never substantiated findings that father had neglected child. NRS 128.109.
10. INFANTS.
    County department of social services failed to establish by clear and convincing evidence that termination of father's parental rights was warranted; child was placed outside home in dependency proceeding due to neglectful actions of mother, there was no evidence that father had abused or neglected child or that father's drug use rendered him unable to provide safe and caring home for child, and, although child had bonded with maternal grandmother, child still had love and emotional ties with father and father had resources, ability, and desire to care for child's physical, mental, and emotional growth and development. NRS 128.105, 128.106, 128.108.

Before the Court EN BANC.

## OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider whether a parent of a child placed into state custody and made the subject of a dependency proceeding, based on the neglectful actions of the other parent, is required to comply with a case plan and accept services under NRS 432B.560 for purposes of reunification, when that parent has not been found to have neglected the child (nonoffending parent).[1] In connection with these circumstances, we must also determine whether presumptions that arose in the dependency proceeding should operate against the parent in a subsequent action to terminate his parental rights.

We conclude that keeping the child from the custody of the parent who is not the subject of the dependency proceeding violates the parent's fundamental constitutional rights to parent his child, when the child was not removed from the home because of his conduct, there were no substantiated findings that he had neglected the child, and the petition for neglect was dismissed as to him. Therefore, the presumptions favoring termination of parental rights under NRS 128.109, which arose from the child being placed outside the home in the dependency proceeding, do not apply to respondent, and the district court correctly concluded that appellant failed to establish parental fault and that terminating respondent's parental rights is in the child's best interest. Accordingly, we affirm the district court's order.

### *FACTS*

This case comes to us after two-year-old A.G. was placed into the protective custody of appellant Washoe County Department of Social Services in May 2009, after the child was found at a campsite with her mother Rachael L., who was extremely intoxicated. This was not the family's first involvement with Social Services.

Social Services had previously been contacted by the maternal grandmother over concerns that she had for A.G. because of Rachael's drug use. At a meeting with Rachael around one week before the night in question, the social worker noted that Rachael was unemployed, her food stamps had run out, and her drug screen had come back positive for methamphetamine and marijuana. The social worker scheduled a follow-up home visit with Rachael to discuss the drug screen and possible services.

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[1]Nonoffending parent doctrine. Vivek S. Sankaran, *Parens Patriae Run Amuck: The Child Welfare System's Disregard for the Constitutional Rights of Nonoffending Parents*, 82 Temp. L. Rev. 55, 73-74 (2009).

The night before the scheduled home visit, however, Rachael took A.G. to a camping party at Pyramid Lake. Rachael had a history of drug and alcohol use as well as suicidal thoughts, and she had made statements to relatives that she believed A.G. was going to be taken into custody the following day, and she wanted to spend one last night with her and ''show her a good time.'' Based on concerns over Rachael and A.G.'s welfare, the maternal grandmother called authorities. In responding to the call, the police found A.G. with Rachael at the campsite.

A.G.'s father, respondent Kory L.G., was not present at the time of this incident, and was in no way involved in the events that led to A.G's removal from Rachael's custody. In fact, Kory and Rachael were separated at the time. Kory primarily cared for A.G. since the child's birth, and she had been well cared for. At the time of A.G.'s placement in protective custody, however, she had been in Rachael's care for about a month because Rachael had obtained a temporary protective order (TPO) against Kory in April 2009. Kory and Rachael's relationship had been tumultuous at best, and the TPO was based on an alleged physical altercation that occurred between Kory and Rachael in front of the child, when Kory went to retrieve A.G. after a visit with Rachael. The TPO initially prohibited Kory from having contact with Rachael and A.G.

Despite Kory's lack of involvement in the events leading to A.G.'s removal, shortly after the child was removed from Rachael's custody, but before the protective custody hearing and the appointment of counsel for Kory, Social Services required Kory to submit to a drug test, for which he complied and tested positive for marijuana and methamphetamine.

An initial protective custody hearing was conducted before a juvenile master to determine whether A.G. was a child in need of protection. At the hearing, the master found that there was reasonable cause to believe that it was contrary to A.G.'s welfare to remain in Rachael's home because of her intoxication while caring for A.G. It was further determined that the child could not be placed with Kory because of the TPO. The master granted Social Services the discretion to temporarily place A.G. with appropriate relatives or in foster care. The child was placed in foster care.[2]

Social Services subsequently filed a petition for a hearing against both parents, alleging that A.G. was in need of protection from neglect under NRS Chapter 432B. An adjudicatory hearing was conducted during which Rachael submitted to the allegations, which included her drug use, that her home was not in a suitable condition for the child, that she was unable to provide for A.G.'s

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[2]Sometime after A.G.'s placement in protective custody, Kory divorced Rachael and sought custody of A.G. At the termination trial, Rachael testified that she was willing to relinquish her parental rights, and she is not a party to this appeal.

needs, and that she was intoxicated at the time of A.G.'s removal. The allegations as to Kory included only the TPO. Through counsel, Kory denied the allegations of neglect. The master sustained the allegations as to Rachael and found that A.G. was a child in need of protection and set a dispositional hearing as to Rachael. Because Kory had denied the allegations, the court set the matter for an evidentiary hearing as to him.

In July 2009, before the evidentiary hearing, Kory and Social Services met and reached an agreement to dismiss the petition for a hearing as to Kory. The stipulation to dismiss was placed on the record, and the master filed findings and recommendations reciting the stipulation and vacating the evidentiary hearing. Nevertheless, Social Services filed a case plan and service agreement, which Kory did not sign. Because Kory had tested positive in a drug screening, the case plan included requirements that Kory submit to random drug screens and submit to a substance abuse evaluation and that he undergo a domestic violence evaluation. That same month, a dispositional hearing was held for Rachael, during which Kory requested that A.G. be placed with him. By this time, the TPO against Kory had been modified to allow Kory to have contact with A.G., and he argued that he had challenged the sufficiency of the TPO and that the matter was pending in another court.

Following the stipulation to dismiss the petition between Social Services and Kory, and the dispositional hearing for Rachael, the master found that A.G. was a child in need of protection under NRS 432B.330 as to Rachael. The master further denied the child's placement with Kory, approved A.G.'s placement in family foster care, and recommended that legal custody of A.G. remain with Social Services. The master also recommended that Kory comply with his case plan and ordered him to pay child support. Kory did not file an objection to these recommendations. Ultimately, the juvenile court adopted the master's recommendations by order on July 29, 2009. Kory was granted supervised visitation with A.G., which he exercised on a regular basis. In August 2009, the TPO was dismissed based on insufficient evidence.

With the TPO and the petition for a hearing having both been dismissed, Kory filed a motion in the juvenile court to terminate Social Services' action and return the child to him or begin reunification with unsupervised home visits. After a hearing in October 2009, the master denied the motion, recommending that A.G. remain in the physical and legal custody of Social Services. The master found that although the TPO had been dismissed, there was still an obligation to determine whether Kory was a safe placement for A.G. The master stated that the primary issue preventing unsupervised visits was its inability to determine the extent of Kory's drug use and whether he could abstain from substance use while

caring for A.G. The master noted that Kory had recently tested negative in a September 2009 drug screen but the master could not determine Kory's abstinence between May and September 2009, because Kory had not taken drug tests during that time. Although the master recommended that Kory's motion for immediate placement be denied, the master concluded that A.G. could be safely placed with Kory if he was not actively using drugs, and recommended that Kory submit to a substance abuse evaluation and continue to submit to drug screens. Kory did not file any objection to the recommendations, and the juvenile court entered an order affirming and adopting the master's recommendations. Social Services retained custody of A.G., she was moved from foster care to live with her maternal grandmother, and Kory continued supervised visits.

Six months later, a permanency hearing was held, and the master approved a ''permanency plan of reunification with Kory . . . together with a concurrent plan of termination of parental rights followed by adoption.'' The master was persuaded by Kory's argument that his progress on the case plan had been impeded by a lack of communication and specificity regarding the services he was expected to complete. The master ordered Kory to enter into a revised case plan with Social Services, which included more detailed terms regarding visitation, weekly drug testing, counseling services and monitoring, and communications. Social Services filed an objection challenging the master's authority to rework Kory's case plan; the juvenile court denied the objection and remanded the case to the master for further proceedings. On remand, the master ordered Kory to comply with the revised terms of the case plan.

Another six months passed, and a second permanency hearing was conducted, after which the master found that despite extensive modification to Kory's case plan, he had not been in compliance with the plan because he failed his drug test, failed to communicate with Social Services, and failed to attend any counseling or substance abuse treatment. The master did find that Kory had maintained a fairly consistent visitation schedule with A.G. The master recommended A.G.'s continued placement with the maternal grandmother, approved a permanency plan of termination of parental rights followed by adoption, and recommended that Social Services be relieved of providing further reunification efforts with the parents. Kory objected to the recommendation for termination of parental rights. He argued that he had provided good care to A.G. before her removal from Rachael's custody and that Social Services had not shown that he used drugs to an extent that would render him unable to responsibly and capably care for A.G. Not persuaded by Kory's arguments, the juvenile court affirmed the

master's findings and recommendation for termination of Kory's parental rights.

Social Services then filed a petition in the district court to terminate Kory's parental rights to A.G. At that point, A.G. had been in the custody of Social Services for 18 months and Kory had not substantially complied with his case plan. This triggered the presumptions for termination under NRS 128.109, where the child has been out of the home for 14 of any 20 consecutive months and where the parent has failed substantially to comply with services for reunification within 6 months. Thus, Social Services argued that it must be presumed that Kory had provided only token efforts and had failed to adjust his conduct, and that termination was in A.G.'s best interest. In addition to the presumptions, Social Services further argued that the facts affirmatively established parental fault and that the child's best interest would be served by termination.

Following a three-day bench trial, the district court denied the petition, finding that the presumptions did not apply and that Social Services had otherwise failed to demonstrate parental fault or that termination was in A.G.'s best interest. The court explained that its decision was based on Kory's status as a nonoffending parent, which it noted is an issue that this court has not previously addressed. Social Services now appeals from the order denying its petition to terminate Kory's parental rights.

## *DISCUSSION*

### *Legal presumptions*

The action to terminate Kory's parental rights was preceded by the separate dependency proceeding instituted by Social Services under NRS Chapter 432B to protect A.G. from abuse or neglect by the person responsible for the child's care, in this case Rachael. Because events that occurred in that dependency proceeding gave rise to certain legal presumptions under both the abuse and neglect statutes, NRS Chapter 432B, and the termination of parental rights statutes, NRS Chapter 128, which were applied against Kory in the case to terminate his parental rights, we begin by briefly reviewing the legal framework of the dependency proceeding and how the presumptions arose.

#### *Dependency proceedings*

[Headnote 1]

In Nevada, the juvenile court has exclusive jurisdiction in proceedings concerning a child who is or may be a child in need of protection. *See* NRS 432B.410(1); *see also* NRS 432B.050; NRS 62A.180. A child is in need of protection if, among other things,

''[t]he child has been subjected to abuse or neglect by a person responsible for the welfare of the child.'' NRS 432B.330(1)(b). An agency that provides child welfare services must file a petition in the juvenile court alleging that a child is in need of protection. *See* NRS 432B.490; NRS 432B.510. When the petition alleges abuse or neglect by only one parent, the other parent nonetheless has constitutional protections and must be treated individually. *See* NRS 432B.457 (requiring that each parent be notified of any plan for the child's temporary or permanent placement); NRS 432B.510(4)(c) (stating that the petition for hearing must include the names of the child's parents); NRS 432B.520(1) (requiring that the parent be notified of the hearing on the petition if the child is in the custody of a nonparent). Due process requires that each parent is entitled to a hearing before being deprived of the custody of his or her child. *See Stanley v. Illinois*, 405 U.S. 645 (1972); *cf. In re Doe*, 465 A.2d 924, 931 (N.H. 1983) (noting that fundamental liberty interests prohibit imputing one parent's conduct to terminate the parental rights of the other parent).

Shortly after the child is placed into protective custody, the court conducts an adjudicatory hearing and, if the allegations in the petition are denied by the person responsible for the child, an evidentiary hearing on the petition must be conducted. *See* NRS 432B.530. ''If the court finds that the allegations in the petition have not been established, it shall dismiss the petition'' and order the child's immediate release from protective custody. NRS 432B.530(5). If the juvenile court finds that the child is in need of protection, the court may make a number of dispositions, including allowing the child to remain with a parent or placing the child with a nonparent. *See* NRS 432B.530(5); NRS 432B.550. If the child is placed outside the home, the agency must make reasonable efforts to reunify and preserve the family of the child, with the child's health and safety being a paramount concern. *See* NRS 432B.393(1) and (2). The agency must submit a plan concerning placement of the child, including a description of services to be provided to the person responsible for the child and to the child in order to facilitate reunification or to ensure a permanent placement for the child. NRS 432B.540(2)(b). The juvenile court may also order ''[t]he child, a parent or the guardian to undergo such medical, psychiatric, psychological, or other care or treatment as the court considers to be in the best interests of the child.'' NRS 432B.560(1)(a).

Within 12 months after the initial removal of the child from the home, and annually thereafter, the juvenile court must conduct a dispositional hearing to review the plan for permanent placement of the child and to determine whether the agency has made reasonable efforts to finalize the child's permanent placement.

NRS 432B.590(1)(a) and (3); *see also* NRS 432B.553(1). The court may consider whether the child should be returned to the parents or whether termination of parental rights proceedings should be instituted under NRS Chapter 128, so that the child can be placed for adoption. NRS 432B.590(3)(b). If the child has been placed outside of the home for 14 of any 20 consecutive months, ''the best interests of the child must be presumed to be served by the termination of parental rights.'' NRS 432B.590(4).

*Termination of parental rights proceedings*

[Headnote 2]

If a parental termination proceeding is instituted against a parent, the petitioner must establish by clear and convincing evidence that parental fault exists and that the child's best interest would be served by termination of parental rights. NRS 128.105. Parental fault can be established by findings that the parent's conduct constitutes abandonment, neglect, unfitness, failure of parental adjustment, risk of injury, or token efforts. NRS 128.105; *Matter of Parental Rights as to D.R.H.*, 120 Nev. 422, 428-33, 92 P.3d 1230, 1234-37 (2004). In addition to affirmative findings, certain presumptions can arise to establish parental fault and that the child's best interest would be served by termination. In this regard, when a child has been placed outside his or her home under NRS Chapter 432B for 14 of any 20 consecutive months, ''it must be presumed that the parent or parents have demonstrated only token efforts to care for the child.'' NRS 128.109(1)(a). These token efforts demonstrate parental fault and give rise to the presumption that termination of the parent's parental rights is in the child's best interest. NRS 128.109(1)(a) and (2). Another presumption, failure of parental adjustment, arises when the parent fails to substantially comply ''with the terms and conditions of a plan to reunite the family within 6 months after the date on which the child was placed or the plan was commenced, whichever occurs later.'' NRS 128.109(1)(b); NRS 128.105(2)(d). These presumptions are rebuttable and once established, the burden shifts to the parent to overcome the presumptions. *Matter of Parental Rights as to J.L.N.*, 118 Nev. 621, 625-26, 55 P.3d 955, 958 (2002). It is these presumptions that are at issue in this case.

In denying the petition to terminate Kory's parental rights, the district court recognized that because Kory was not responsible for A.G.'s removal from the home and Kory had never been found to have abused or neglected A.G., he had a constitutionally protected right to the custody of his child as a nonoffending parent. The district court defined a nonoffending parent as ''an individual against whom no allegations of abuse, neglect or unfitness have been substantiated, and whose only proven 'fault' is to have had a

child in common with a parent from whom the child was removed.'' Thus, the district court concluded that the child's removal from the home and Kory's failure to comply with the case plan could not be used as a basis for presuming parental fault in the termination proceeding and that Social Services otherwise failed to carry its burden of establishing that termination was in A.G.'s best interest.

On appeal, Social Services argues that once a child is found to be a child in need of protection based on the conduct of only one parent, the juvenile court may take jurisdiction over that child even if there is a noncustodial parent available to take custody. Social Services asserts that it has an obligation to ensure the health and safety of the child, and to investigate a proper placement, and that Kory was not a proper placement in this case. According to Social Services, the juvenile court may require the parent to comply with services under NRS 432B.560 to determine whether the parent is fit for placement and to facilitate reunification, and that Kory's failure to timely comply with his case plan gives rise to the presumptions for parental termination under NRS 128.109. Social Services argues that the presumptions arising from the neglect proceeding should have applied in this case to establish parental fault by Kory and that termination was in A.G.'s best interest.

While neither Nevada's statutes nor caselaw addresses the rights of the nonoffending parent, we take this opportunity to clarify the constitutional rights of a parent whose child is the subject of a dependency proceeding based on the conduct of the other parent, and against whom no allegations of abuse or neglect have been substantiated.

*A parent's constitutionally protected parental rights*

[Headnotes 3-5]

This court has consistently recognized that severing the parent-child relationship is an extreme measure and an exercise of awesome power. *Parental Rights of J.L.N.*, 118 Nev. at 625, 55 P.3d at 958; *Matter of Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000). Termination of parental rights implicates fundamental liberty interests of a parent's relationship with his or her child. *Parental Rights of D.R.H.*, 120 Nev. at 426-27, 92 P.3d at 1233. The procedures for terminating parental rights, and granting custody of a child to a nonparent, must be fundamentally fair. *Id.*; *Santosky v. Kramer*, 455 U.S. 745 (1982). Even when the fairness of the procedures afforded to the parents is not called into question, substantive due process nevertheless demands that the government have a basis for subjecting the parents to the procedures in the first instance. *Licari v. Ferruzzi*, 22 F.3d 344, 347 (1st Cir. 1994) (recognizing that substantive due process tenet, which

ensures that government action is not arbitrary, regardless of whether the procedures afforded were fair).

[Headnotes 6, 7]

The United States Supreme Court has held that parents have a fundamental liberty interest in the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 65 (2000); *Stanley v. Illinois*, 405 U.S. 645, 651 (1972); *see also In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012). This liberty interest is protected by the Due Process Clause of the Fourteenth Amendment. *Troxel*, 530 U.S. at 65. It is presumed that fit parents act in the best interest of their children. *Id.* As long as parents adequately care for their children, there is ordinarily ''no reason for the State to inject itself into the private realm of the family to further question the ability of that parent to make the best decisions concerning the rearing of that parent's children.'' *Id.* at 68-69. These substantive due process rights prohibit the government from depriving parents of the custody of their children without a finding of parental unfitness. *Stanley*, 405 U.S. 645 (holding that parents are constitutionally entitled to a hearing on parental fitness before children are removed from their custody).

In applying these constitutional principles to custody determinations that arise in dependency proceedings, other courts have recognized a preference for placing the child with a fit parent, where the child was removed from the home based on the conduct of the other parent. *See, e.g.*, *In re D.S.*, 52 A.3d 887 (D.C. 2012) (recognizing a parental preference in neglect proceedings in the absence of evidence that the parent is unfit or that granting custody to that parent would be detrimental to the children's best interest); *In Interest of M.M.L.*, 900 P.2d 813 (Kan. 1995) (recognizing that a parent's fundamental right to the care of his or her child may not be disturbed absent a finding of parental unfitness or substantial endangerment to the child's welfare); *Matter of Cheryl K.*, 484 N.Y.S.2d 476 (N.Y. Fam. Ct. 1985) (holding that when the child was removed from the home because of the father's actions, the mother, who had never been adjudicated an unfit parent, had a superior right to custody as against third parties). This preference is rooted in these constitutionally protected parental rights, as well as statutory dependency provisions that express a preference for keeping the child with his or her family. *See In re D.S.*, 52 A.3d at 894; *see also* NRS 432B.393(1) (providing that the agency shall make reasonable efforts to preserve and reunify the family). Additionally, the state's interest in protecting the welfare of children is served because, in the absence of findings of parental unfitness, a parent is presumed to make decisions in the best interest of his or her child. *See Troxel*, 530 U.S. at 65; *see also* NRS 432B.393(2)

(stating that the child's health and safety is a paramount concern in reunifying the family).

This leads us to the case at hand and whether Kory was afforded his constitutionally protected rights as a parent in this case. Nevada's statute requires a finding that the child has been abused or neglected only by ''a person'' responsible for the child's welfare, before the court can assume jurisdiction over the child. NRS 432B.330(1)(b). It does not require a finding that both parents have abused or neglected the child. Thus, in this case, the juvenile court properly had jurisdiction over A.G. based on the mother's neglectful conduct.

[Headnote 8]

The problem arose, however, when the juvenile court required Kory to comply with a case plan for reunification after the petition for neglect had been dismissed as to him and denied his request to have the child returned to his care. That decision also resulted in the child being outside of Kory's home for 14 of any consecutive 20 months, and because Kory failed to complete the case plan, gave rise to the presumptions under the termination statute that parental fault existed and that it was in A.G.'s best interest to terminate Kory's parental rights. Social Services argues that, in light of its concerns over Kory's substance abuse, the juvenile court had authority to order Kory to complete a case plan under NRS 432B.560, which provides that the court may order ''a parent . . . to undergo such medical, psychiatric, psychological, or other care or treatment as the court considers to be in the best interests of the child.'' While NRS 432B.560 may allow the juvenile court to order services for a parent, it does not allow the court to require the noncustodial parent to complete a case plan for reunification under the circumstances presented here.

In this case, A.G. was taken into protective custody because of the mother's neglect and not because of any neglect by Kory. Kory had been the primary caretaker to A.G. for most of her life, and she had been well cared for. Although A.G. could not be immediately placed with Kory because of the TPO, the protective order was quickly modified to allow contact between Kory and A.G., and was later dismissed altogether for lack of evidence. Thus, the predicate for the neglect petition as to Kory no longer existed. Aside from the TPO, the petition contained no other allegations of neglect by Kory, and Social Services never substantiated any. Indeed, Social Services agreed to dismiss the neglect petition as to Kory within two months after it was filed.

Despite that dismissal, Social Services submitted a case plan for Kory, and over the next 18 months, the court required Kory to comply with the identified services based upon concerns over

Kory's drug use. These concerns, however, were unrelated to the initial basis for the neglect petition against Kory (*i.e.*, the TPO), but instead, arose because of a drug screen given to Kory before the protective custody hearing and even before Kory had counsel. For months thereafter, A.G. was kept from Kory's custody not because of any findings of neglect by Kory, but because the juvenile court could not determine the nature and extent of Kory's drug use or whether it would affect his ability to parent the child based upon Kory's inconsistent compliance with the drug screening and the other terms of the case plan—a case plan that Kory should not have been required to complete in the first place.

While we recognize that the child's health and safety is a paramount concern in the government's efforts to preserve and reunify the family unit, it must be balanced with the protection of a parent's constitutional rights. NRS 432B.393(1) and (2); *see Matter of Parental Rights as to N.J.*, 116 Nev. 790, 801-02, 8 P.3d 126, 133-34 (2000) (recognizing that in parental termination proceedings, the fundamental liberty interest of parents must be balanced with society's interest in protecting the welfare of children). Social Services has an obligation to ensure the safety and well-being of the child, and it has the authority under NRS Chapter 432B to determine whether it is safe to place the child with the parent who was not responsible for the abuse or neglect that brought the child into Social Services' purview. Thus, if Social Services had concerns over Kory's drug use and its effect on his ability to care for A.G., Social Services should have maintained a petition for neglect as to Kory and sought to substantiate allegations of Kory's neglect. *See* NRS 432B.330. As the district court correctly recognized, requiring Social Services to maintain a petition and prove neglect by Kory protects the due process rights of the parent's relationship with his child, while also serving the government's interest in protecting the child's welfare if there is an adequate basis for concern. A parent's fundamental liberty interest in the care, custody, and control of his child does not ''simply evaporate'' because the parent has not been a model parent or may have lost temporary custody of his child to Social Services. *Stantosky*, 455 U.S. at 753.

[Headnote 9]

Because of the constitutional violation that kept A.G. from Kory's custody in the dependency proceeding, we conclude that the presumptions of token efforts and failure of parental adjustment under NRS 128.109 cannot apply against Kory in the parental termination case. Those presumptions arose because A.G. was placed outside of the home for 14 out of 20 consecutive months, NRS 128.109(1)(a) and (2), and because Kory failed to comply with the case plan within six months, NRS 128.109(1)(b), but these cir-

cumstances would not have occurred if it were not for him being subjected to the case plan. Applying those presumptions here would be fundamentally unfair.

A.G. was removed from the home because of the mother's actions, and Social Services never substantiated findings that Kory had neglected A.G. When a parent did not cause the child's removal and was never found to have neglected the child, the statutory presumptions cannot apply to support the termination of the parent's rights. Thus, the district court properly concluded that these presumptions should not apply to terminate Kory's parental rights.

*Termination was not established by clear and convincing evidence* [Headnote 10]

In the absence of any presumptions, the district court also found that Social Services failed to establish by clear and convincing evidence that termination of Kory's parental rights was warranted. *In re Parental Rights as to C.C.A.*, 128 Nev. 166, 169, 273 P.3d 852, 854 (2012); *see also Santosky*, 455 U.S. at 769. The district court found that Social Services did not prove parental fault on any of the grounds alleged, including parental unfitness, failure of parental adjustment, and the demonstration of only token efforts. *See* NRS 128.105(2). The district court further found no evidence that Kory had abused or neglected A.G., or that Kory's drug use rendered him unable to provide a safe and caring home for A.G. *See* NRS 128.106. The district court found that Kory should never have been required to comply with the case plan; and to the extent that he ever orally agreed to comply or partially performed some of the plan's components to facilitate reunification, such an agreement had a coercive element and was an improper basis for termination.

As for the child's best interest, the district court took into account the comparative analysis between the child's family and the foster family, when the child has been living in a foster home, as well as A.G.'s attachment to Kory and her maternal grandmother. *See* NRS 128.105; NRS 128.108. The district court found that while A.G. had bonded with her maternal grandmother, A.G. still had ''considerable love, affection, and emotional ties'' with Kory. The court further found that Kory ''has the resources, ability, and desire to care for [A.G.]'s proper physical, mental, and emotional growth and development.'' We conclude that the district court's decision is supported by substantial evidence and that termination of Kory's parental rights is not in A.G.'s best interest. *See Matter of Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 763 (2006) (recognizing that the district court's decision to termi-

nate parental rights will be upheld by this court if it is supported by substantial evidence).

*CONCLUSION*

We conclude that Kory had constitutionally protected rights in the dependency proceeding and could not be compelled to comply with a case plan for reunification with A.G. when Kory was not responsible for her removal from the home, Kory had never been found to have abused or neglected A.G., and the petition for neglect was dismissed as to Kory by agreement of the parties. Thus, the presumptions that arose from A.G.'s lengthy placement in foster care could not be used against Kory (nonoffending parent) in the parental termination proceeding to establish either parental fault or that the child's best interest would be served by termination. Further, Social Services otherwise failed to demonstrate that termination of Kory's parental rights was warranted. Accordingly, we affirm the district court's order denying the petition to terminate Kory's parental rights.

PICKERING, C.J., and GIBBONS, HARDESTY, PARRAGUIRRE, CHERRY, and SAITTA, JJ., concur.

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I. COX CONSTRUCTION COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY, APPELLANT, *v.* CH2 INVESTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; JIM HARWIN, AN INDIVIDUAL; AND SAFE SHOT, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 58393

March 7, 2013 296 P.3d 1202

Appeal from a district court order expunging a mechanic's lien. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

Contractor sued premises owner and tenant to foreclose mechanic's lien. Tenant petitioned to remove lien. The district court ordered lien released as untimely. Contractor appealed. The supreme court, PICKERING, C.J., held that: (1) contractor gave implied consent to trial on merits of lien issue, and (2) tenant's soundproofing did not enlarge period for filing lien.

**Affirmed.**

*Holland & Hart LLP* and *Jerry M. Snyder*, Reno, for Appellant.

*Robison Belaustegui Sharp & Low* and *Mark G. Simons*, Reno, for Respondent CH2 Investments, LLC.

*Jim Harwin*, Reno, in Proper Person.

*Safe Shot, LLC*, Reno, in Proper Person.

1. APPEAL AND ERROR.
   The supreme court reviews questions of statutory construction and the district court's legal conclusions de novo.
2. STATUTES.
   In interpreting a statute, the supreme court will look to the plain language of its text and construe the statute according to its fair meaning and so as not to produce unreasonable results.
3. MECHANICS' LIENS.
   Mechanic's lien statutes are remedial in nature and should be liberally construed to protect rights of claimants and promote justice. NRS 108.221 *et seq*.
4. MECHANICS' LIENS.
   Claimants under mechanic's lien statute must substantially comply with its requirements. NRS 108.221 *et seq*.
5. MECHANICS' LIENS.
   Scope and duration of ''improvement'' under mechanic's lien statute is question of fact for the district court to determine. NRS 108.226, 108.22188.
6. MECHANICS' LIENS.
   The supreme court will not set aside the district court's factual findings on issue of ''improvement'' under mechanic's lien statute unless those findings are clearly erroneous. NRS 108.226, 108.22188.
7. MECHANICS' LIENS.
   Regardless of whether tenant, in action to foreclose mechanic's lien, challenged timeliness of lien, contractor gave implied consent to trial of the merits, where contractor first questioned tenant regarding scope of ''work of improvement,'' and, although contractor later questioned whether timeliness had been waived, it did not press the point, instead arguing the issue extensively on the merits. NRS 108.226, 108.22188; NRCP 15(b).
8. MECHANICS' LIENS.
   The district court's finding that soundproofing installed by tenant, after construction of shooting range was largely finished and contractor had left, was not ''work of improvement,'' enlarging period for contractor to file mechanic's lien, was supported by evidence that neither party contemplated soundproofing as part of the project, but that it was added in response to complaints from other tenants about noise. NRS 108.226, 108.22188.
9. MECHANICS' LIENS.
   Permissive nature of statute allowing the district court to reduce notice of lien if amount noticed is excessive does not require the district court to determine appropriate amount for lien it deems excessive. NRS 108.2275(6)(b).

Before PICKERING, C.J., HARDESTY and SAITTA, JJ.

## OPINION

By the Court, PICKERING, C.J.:

Mechanics' liens provide a security interest in property for those who contribute labor or materials to construction projects. A lien must be timely filed, within 90 days of the completion of the ''work of improvement,'' to be valid. We have not interpreted ''work of improvement'' since before the Legislature revised the mechanic's lien statutes. Here, the primary questions are whether the district court erred in relying on *Vaughn Materials v. Meadowvale Homes*, 84 Nev. 227, 438 P.2d 822 (1968), to define the scope of a contract for a work of improvement and in determining a lien was untimely. Because the district court did not err in relying on *Vaughn*, and its findings were not clearly erroneous, we affirm.

### I.

Respondents Jim Harwin and Safe Shot, LLC (together, Harwin) hired appellant I. Cox Construction Company, LLC, to construct a shooting range. Cox originally estimated the cost at approximately $37,000 but informed Harwin that that number would change as Cox ascertained actual costs and additional expenses. Harwin approved construction, and Cox prepared plans, which included a number of additional items not included in the original cost estimate, and then began work. The parties did not have a written agreement.

Harwin paid Cox's bills as the construction continued through the summer and fall of 2009. By September, Cox had billed $48,810. Harwin paid $46,000 by October 8 without complaint, but then refused to pay anything further. Cox worked through October, then left the project. By this point the project was largely finished, and Harwin opened Safe Shot for business soon after. Harwin received complaints from other tenants about the noise and, in late 2009 and early 2010, installed soundproofing and made other improvements to the building.[1]

In March 2010—more than 90 days after Cox had left the project but less than 90 days after Harwin installed the soundproofing—Cox recorded its mechanic's lien. In August, Cox filed a complaint against Harwin and Harwin's landlord, respondent CH2 Investments, LLC, claiming the project had cost in excess of $86,000 and seeking to foreclose on the property to recover over $40,000

[1]Harwin also installed some glass in January 2010, but Cox does not rely on this fact in his appeal.

in damages and costs. Harwin petitioned the court to remove the lien, and Cox opposed removal. The district court heard argument on December 21, 2010, and January 11, 2011. Relying on *Vaughn*, the district court held that Cox could not ''tack'' the soundproofing to the ''work of improvement'' of constructing a shooting range. Accordingly, the district court held the lien was not timely and was therefore frivolous, and that the lien was excessive, and it ordered the lien released. Cox appealed.

II.

Cox argues that it was improper for the district court to consider the timeliness issue because Harwin did not raise that issue prior to the hearing; that the district court erred in determining, under *Vaughn*, that the soundproofing was not part of the ''work of improvement''; and that the district court erred in finding the lien was both frivolous and excessive.

[Headnotes 1, 2]

This court reviews questions of statutory construction and the district court's legal conclusions de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008); *California Commercial v. Amedeo Vegas I*, 119 Nev. 143, 145, 67 P.3d 328, 330 (2003). In interpreting a statute, this court will look to the plain language of its text and construe the statute according to its fair meaning and so as not to produce unreasonable results. *Harris Assocs. v. Clark County Sch. Dist.*, 119 Nev. 638, 641-42, 81 P.3d 532, 534 (2003).

[Headnotes 3-6]

The mechanic's lien statutes are remedial in nature and should be liberally construed to protect the rights of claimants and promote justice. *Peccole v. Luce & Goodfellow*, 66 Nev. 360, 370-71, 212 P.2d 718, 723-24 (1949). However, claimants must substantially comply with the statutes' requirements. *Id.* at 370, 212 P.2d at 723. The scope of an ''improvement'' is a question of fact for the trial court to determine, *Schultz v. King*, 68 Nev. 207, 214, 228 P.2d 401, 404 (1951), and this court will not set aside the district court's factual findings unless those findings are clearly erroneous, *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 381, 240 P.3d 1033, 1043 (2010).

A.

As a preliminary matter, Cox argues that the district court erred by determining the lien's timeliness because Harwin did not raise the issue prior to hearing and then misled the court by stating the

issue had been previously raised as an affirmative defense when it had not.

[Headnote 7]

NRCP 15(b) allows a court to hear an issue not raised in the pleadings when the issue is tried with the express or implied consent of the parties. *E.g.*, *Elliot v. Resnick*, 114 Nev. 25, 30, 952 P.2d 961, 964-65 (1998). Here it can be fairly inferred that the district court found Cox had impliedly consented to the issue being heard. Cox broached the issue first, early in the December 21 hearing, by questioning Harwin regarding the scope of the ''work of improvement.'' Furthermore, although Cox later questioned whether timeliness had been waived, it did not press the point, instead arguing the issue extensively on the merits at both hearings. Cox therefore gave implied consent and the district court did not err in addressing timeliness.

Harwin's inaccurate statement that he challenged timeliness in his answer does not change this analysis. Cox joined issue on timeliness before Harwin made the statement, and it was incumbent on Cox, if it intended to claim waiver, to verify the record. A party cannot raise an issue, argue it on the merits at two separate hearings, and then, after the party loses on the issue, claim that it should not have been heard.

B.

Cox disputes the district court's reliance on *Vaughn Materials v. Meadowvale Homes*, 84 Nev. 227, 438 P.2d 822 (1968), to determine the soundproofing was not part of the ''work of improvement.'' The district court found that the ''work of improvement'' had been completed before the need for soundproofing arose and relied on *Vaughn* to determine Cox could not enlarge the time for filing a lien by ''tacking'' the soundproofing to the work of completing a shooting range.[2] Because it found the ''work of improvement'' concluded more than 90 days before Cox filed the lien, it held the lien was untimely and therefore dismissed it as frivolous.

*Vaughn* was decided under the since-repealed NRS 108.060, which read:

> Every person claiming the benefit of NRS 108.010 to 108.220, inclusive, shall, not earlier than 10 days after the completion of his contract, or the delivery of material by him, or the performance of his labor, as the case may be, and

[2]In *Vaughn*, this court prevented a lien claimant from ''tack[ing]'' certain projects or contracts together to extend a ''work of improvement'' and enlarge the filing period. 84 Nev. at 229, 438 P.2d at 823-24.

> in each case not later than 30 days after the completion of the contract and the recording of the completion notice by the owner as provided in NRS 108.090, and in all other cases 90 days after *the completion of the contract, or the delivery of material, or the performance of his labor,* as the case may be . . . .

NRS 108.060 (1967), *repealed by* 1969 Nev. Stat., ch. 467, § 3, at 824 (emphasis added). Cox argues that former NRS 108.060 limited the ''work of improvement'' to work done by the lien claimant and that, in contrast, current statutes NRS 108.226 and NRS 108.22188 define ''work of improvement'' more broadly to include work done by other parties.

NRS 108.226 reads:

> **Perfection of lien: Time for recording notice of lien . . . .**
>
> 1. To perfect a lien, a lien claimant must record a notice of lien . . .
>
> (a) Within 90 days after the date on which the latest of the following occurs:
>
> (1) *The completion of the work of improvement*;
>
> (2) The last delivery of material or furnishing of equipment *by the lien claimant* for the work of improvement; or
>
> (3) The last performance of work *by the lien claimant* for the work of improvement . . . .

(Emphasis added.) NRS 108.22188, a companion statute to NRS 108.226, defines ''[w]ork of improvement'':

> ''Work of improvement'' means the entire structure or scheme of improvement as a whole, including, without limitation, all work, materials and equipment to be used in or for the construction, alteration or repair of the property or any improvement thereon, whether under multiple prime contracts or a single prime contract . . . .

NRS 108.226 and former NRS 108.060 are similar if not effectively identical regarding the 90-day filing deadline. Both give three similar trigger dates for when the deadline begins to run: first, from ''the completion of the contract'' under former NRS 108.060, or ''[t]he completion of the work of improvement'' under NRS 108.226—both referencing a general event not specifically tied to the claimant's work; second, from the date of the delivery of material for the project; and third, from the completion of the claimant's own labor on the project. Significantly, neither statute requires that the 90-day filing period begin to run from the time the claimant completes its own work, although both list that as one possibility.

NRS 108.22188 defines ''work of improvement'' to include more than the particular claimant's work. However, this broad definition existed before *Vaughn*. For example, this court in 1949 looked at the scope of ''work of improvement'' and noted that the law at the time defined ''improvement'' to broadly encompass ''the *entire structure or scheme of improvement as a whole*.'' *Peccole*, 66 Nev. at 378, 212 P.2d at 727. It further noted that separate contracts would still come together under the definition of ''work of improvement'' if that work were continuous. *Id*.

Thus, although the mechanic's lien statutes have been revised since *Vaughn*, the analysis of what constitutes a ''work of improvement'' has remained unchanged. The district court did not err by relying on *Vaughn*.

[Headnote 8]

Neither did the district court abuse its discretion in finding that the soundproofing fell outside the scope of the ''work of improvement.'' As noted, the scope and duration of the ''work of improvement'' is a fact for the district court to determine. *Schultz v. King*, 68 Nev. 207, 214, 228 P.2d 401, 404 (1951). Here, the district court heard significant testimony and argument regarding the purpose of and impetus for the soundproofing, including evidence that neither party contemplated the soundproofing as part of the project, neither the building nor the operating permits required soundproofing, and the project was completed such that Harwin opened for business before the need for soundproofing arose. Therefore, the district court's finding that the ''work of improvement'' was complete before Harwin installed the soundproofing is not clearly erroneous.

Moreover, to adopt Cox's definition of ''work of improvement'' would enlarge the statute to unreasonably extend the time during which a ''work of improvement'' is ongoing. Harwin may not have become aware of the need for soundproofing for months, years, or even decades after opening for business. Were that the case, it would be unreasonable for the court to find that the ''work of improvement'' was still ongoing simply because Harwin suddenly had to install soundproofing. This interpretation would enable any number of unforeseen and unforeseeable projects or repairs to continue the ''work of improvement.'' Such an interpretation is far too broad.

[Headnote 9]

In sum, the district court did not err in relying on *Vaughn* because the analysis of what constitutes a ''work of improvement'' remains the same today as it was then, despite revisions to the statute. The district court did not clearly err in finding that the

soundproofing was not within the scope of the ''work of improvement'' or finding that the lien was untimely and frivolous.[3] Because the lien was frivolous, NRS 108.2275(6)(a) required the court to expunge it. This conclusion resolves this appeal, making it unnecessary to address the additional finding of excessiveness.

We affirm.

HARDESTY and SAITTA, JJ., concur.

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STEPHEN STUBBS, AN INDIVIDUAL, APPELLANT, *v.*
TRACY STRICKLAND, AN INDIVIDUAL, RESPONDENT.

No. 58751

TRACY STRICKLAND, AN INDIVIDUAL, APPELLANT, *v.*
STEPHEN STUBBS, AN INDIVIDUAL, RESPONDENT.

No. 59145

March 14, 2013 297 P.3d 326

Consolidated appeals from a district court order dismissing an action for anti-SLAPP relief and from a post-judgment district court order denying attorney fees and costs. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

City councilwoman's husband filed libel suit against citizen after citizen gave a speech during city council meeting accusing councilwoman and her husband of not following municipal code requirements for licensure of their law firm and then posted speech on the Internet. Shortly thereafter, husband voluntarily dismissed suit. Citizen then filed suit against councilwoman's husband seeking damages and attorney fees under anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) law. Husband filed motion to dismiss. The district court granted motion, but denied husband's motion for attorney fees and sanctions. Both parties appealed.

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[3]Cox also argued the district court should have granted additional time for discovery and that the court erred by not determining an appropriate amount for the lien. These arguments are without merit. The district court did not err by failing to grant additional time for discovery because a district court may appropriately base its decision on affidavits and deposition testimony. *J.D. Construction v. IBEX Int'l Group*, 126 Nev. 366, 376, 240 P.3d 1033, 1040 (2010). The permissive nature of NRS 108.2275(6)(b) does not require the court to determine an appropriate amount for a lien it deems excessive. Moreover, Cox has the burden of proving the amount of the lien, and as the district court found Cox failed to meet this burden of proof, it was not under obligation to determine an appropriate amount. *J.D. Construction*, 126 Nev. at 369, 240 P.3d at 1036.

The supreme court, GIBBONS, J., held that: (1) anti-SLAPP suit for damages and attorney fees may not proceed unless the district court previously granted a special motion to dismiss, and (2) husband was not entitled to attorney fees as a sanction against citizen.

**Affirmed.**

*Hutchison & Steffen, LLC*, and *Michael K. Wall*, Las Vegas, for Stephen Stubbs.

*L.G. Strickland*, Boulder City, for Tracy Strickland.

1. APPEAL AND ERROR.
   An order granting a motion to dismiss for failure to state a claim is subject to a rigorous standard of review on appeal; the supreme court presumes all factual allegations in the complaint are true and draws all inferences in favor of plaintiff, and dismissal is appropriate when it appears beyond a doubt that plaintiff could prove no set of facts, which, if true, would entitle plaintiff to relief. NRCP 12(b)(5).
2. APPEAL AND ERROR.
   The supreme court, on review of an order dismissing a suit for failure to state a claim, reviews all legal conclusions de novo. NRCP 12(b)(5).
3. CONSTITUTIONAL LAW; PLEADING.
   A ''Strategic Lawsuit Against Public Participation'' (SLAPP) is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights. U.S. CONST. amend. 1.
4. PLEADING.
   When plaintiff files a Strategic Lawsuit Against Public Participation (SLAPP) against defendant, the anti-SLAPP statute allows defendant to file a special motion to dismiss in response to the action. NRS 41.660(1).
5. STATUTES.
   The supreme court construes a plain and unambiguous statute according to its ordinary meaning.
6. TORTS.
   An anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) for damages and attorney fees may not proceed unless the district court previously granted a special motion to dismiss; this special motion to dismiss functions as a motion for summary judgment and allows the district court to evaluate the merits of the alleged SLAPP claim. NRS 41.660(3), (4).
7. TORTS.
   Citizen, against whom city councilwoman's husband had filed libel suit, could not file an anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) for damages and attorney fees against councilwoman's husband after husband voluntarily dismissed libel suit, as husband voluntarily dismissed suit before citizen filed either an initial responsive pleading, or a special motion to dismiss pursuant to the anti-SLAPP statute, and the anti-SLAPP statute clearly conditioned citizen's ability to bring a separate action for damages and attorney fees in response to a SLAPP suit on the district court's grant of a special motion to dismiss. NRS 41.670(2); NRCP 41(a)(1)(i).

8. PRETRIAL PROCEDURE.
   Plaintiff may voluntarily dismiss an action at any time before service by adverse party of an answer or of a motion for summary judgment. After plaintiff files a notice of voluntary dismissal, the file is closed and defendant may not revive the action. NRCP 41(a)(1)(i).
9. TORTS.
   Defendant may not pursue an action for damages and attorney fees pursuant to the anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) statute when plaintiff voluntarily dismisses the alleged SLAPP suit before a special motion to dismiss is filed or granted. NRS 41.670(2); NRCP 41(a)(1)(i).
10. COSTS.
    The district court is required to make findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees; the district court is not required to make such findings when it denies a motion for attorney fees.
11. APPEAL AND ERROR.
    The supreme court reviews orders refusing to award attorney fees or issue sanctions for an abuse of discretion. NRS 7.085(1), 18.010(2)(b); NRCP 11.
12. PLEADING; TORTS.
    Citizen's complaint against councilwoman's husband, after husband voluntarily dismissed his libel suit against citizen for damages and attorney fees pursuant to the anti-Strategic Lawsuit Against Public Participation (anti-SLAPP), adequately incorporated relevant portions of anti-SLAPP statute, where citizen cited anti-SLAPP statute in its entirety, thus putting councilwoman's husband on notice of citizen's anti-SLAPP claims. NRS 41.670.
13. PLEADING.
    Nevada is a notice-pleading state.
14. APPEAL AND ERROR.
    Citizen did not waive, on appeal of dismissal of his anti-Strategic Lawsuits Against Public Participation (anti-SLAPP) seeking damages and attorney fees against councilwoman's husband, the issue of the proper interpretation of the anti-SLAPP statute, where citizen made statutory interpretation arguments at hearing on the motion to dismiss, in his opposition to motion for attorney fees filed by councilwoman's husband and during the hearing on the motion. NRS 41.670.
15. COSTS.
    Councilwoman's husband was not entitled to attorney fees as a sanction against citizen following dismissal of anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) that citizen brought against him, as citizen did not bring his complaint for an improper purpose in that he argued for a change or clarification in existing law and nothing in the record demonstrated that citizen made accusations he knew were untrue. NRS 7.085(1), 18.010(2)(b), 41.670.
16. COSTS.
    Councilwoman's husband failed to appropriately request Rule 11 sanctions against citizen following dismissal of citizen's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) against him, as he filed a motion for attorney fees that mentioned Rule 11, but did not file a separate motion for sanctions based on Rule 11, as he was required to do. NRCP 11(c)(1)(A).

17. COSTS.

Councilwoman's husband was not entitled to Rule 11 sanctions against citizen following dismissal of citizen's anti-Strategic Lawsuit Against Public Participation (anti-SLAPP) against him, as citizen made a good-faith argument for clarification or change to existing law and made a reasonable and competent inquiry before filing his claim for damages and attorney fees under the anti-SLAPP statute. NRS 41.670; NRCP 11.

Before the Court EN BANC.

## OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider whether a defendant can file an anti-SLAPP (Strategic Lawsuit Against Public Participation) suit after the plaintiff voluntarily dismisses the initial lawsuit. We conclude that if the plaintiff voluntarily dismisses the action before the defendant files either an initial responsive pleading or a special motion to dismiss pursuant to NRS 41.670, the defendant cannot file an anti-SLAPP suit against the plaintiff based on that action.

### *FACTS AND PROCEDURAL HISTORY*

In December 2010, Stephen Stubbs gave a speech during the public comment portion of a Boulder City Council meeting. In the speech, Mr. Stubbs accused Boulder City Councilwoman Linda Strickland and her husband, Tracy Strickland, of not following Boulder City Municipal Code requirements for the licensure of their law firm. Afterwards, Mr. Stubbs posted the speech on his website.

In January 2011, Mr. Strickland, represented by Councilwoman Strickland, filed a complaint against Mr. Stubbs for libel per se and negligent infliction of emotional distress based on the Internet posting. However, Mr. Strickland voluntarily dismissed the suit under NRCP 41(a) nine days after Mr. Stubbs received the complaint and before Mr. Stubbs filed an answer or any pleading in the case. Following the voluntary dismissal, Mr. Stubbs filed a separate complaint against Mr. Strickland, seeking damages and attorney fees pursuant to Nevada's anti-SLAPP statute. In response, Mr. Strickland filed an NRCP 12(b)(5) motion to dismiss the complaint. The district court granted Mr. Strickland's motion, finding that Mr. Stubbs had no standing to file his complaint under the anti-SLAPP statute once Mr. Strickland voluntarily dismissed his action. After prevailing on his motion to dismiss, Mr. Strickland moved for attorney fees and sanctions. The district court denied his motion without making any specific findings.

Mr. Stubbs now appeals the district court's order dismissing his anti-SLAPP action, arguing that such an action is permitted by NRS 41.670, regardless of whether Mr. Strickland voluntarily dismissed the original suit before Mr. Stubbs could file an answer. We disagree and therefore affirm the district court's order dismissing Mr. Stubbs's action.

Mr. Strickland appeals the district court's order denying his motion for attorney fees and sanctions, arguing that Mr. Stubbs filed his complaint without reasonable grounds, the complaint was not warranted under existing law, and Mr. Stubbs failed to argue for an extension of the law. We disagree and therefore affirm the district court's order denying Mr. Strickland's request for attorney fees and sanctions.

## *DISCUSSION*

### *The district court properly dismissed Mr. Stubbs's complaint because Mr. Strickland voluntarily dismissed the original suit before Mr. Stubbs filed an answer*

Mr. Stubbs argues that NRS 41.670(2) allows a defendant to bring a separate action for damages, attorney fees, and costs resulting from a SLAPP suit, even if the plaintiff filing the alleged SLAPP suit voluntarily dismisses the action before a defendant appears in the lawsuit or has the opportunity to file the special motion to dismiss. In response, Mr. Strickland argues that the statute allows a party to file a separate action for damages and attorney fees only if the district court grants a special motion to dismiss pursuant to NRS 41.660.

[Headnotes 1, 2]

An order granting an NRCP 12(b)(5) motion to dismiss ''is subject to a rigorous standard of review on appeal.'' *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008) (quotations omitted). This court presumes all factual allegations in the complaint are true and draws all inferences in favor of the plaintiff. *Id.* at 228, 181 P.3d at 672. Dismissal is appropriate when ''it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief.'' *Id.* We review all legal conclusions de novo. *Id.*

[Headnotes 3, 4]

A SLAPP suit is a meritless lawsuit that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights. *John v. Douglas County School District*, 125 Nev. 746, 752, 219 P.3d 1276, 1280 (2009). When a plaintiff files a SLAPP suit against a defendant, Nevada's anti-SLAPP statute allows the defendant to file a special motion to dismiss in response to the action. NRS 41.660(1). NRS 41.670(2) further

provides, ''If the court grants a special motion to dismiss filed pursuant to NRS 41.660 . . . [t]he person against whom the action is brought may bring a separate action to recover: (a) [c]ompensatory damages; (b) [p]unitive damages; and (c) [a]ttorney's fees and costs of bringing the separate action.''

[Headnotes 5-7]

We construe a plain and unambiguous statute according to its ordinary meaning. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). The plain language of NRS 41.670 clearly conditions a defendant's ability to bring a separate action for damages and attorney fees in response to a SLAPP suit on the district court's grant of a special motion to dismiss. Therefore, an anti-SLAPP suit for damages and attorney fees may not proceed unless the district court previously granted a special motion to dismiss. This special motion to dismiss functions as a motion for summary judgment and allows the district court to evaluate the merits of the alleged SLAPP claim. *See* NRS 41.660(3), (4); *John*, 125 Nev. at 753, 219 P.3d at 1281.

[Headnote 8]

In this case, a special motion to dismiss was neither filed nor granted before Mr. Strickland voluntarily dismissed the alleged SLAPP suit. A plaintiff may voluntarily dismiss an action ''at any time before service by the adverse party of an answer or of a motion for summary judgment.'' NRCP 41(a)(1)(i). After a plaintiff files a notice of voluntary dismissal, the file is closed and a defendant may not revive the action. *Harvey L. Lerer, Inc. v. District Court*, 111 Nev. 1165, 1170, 901 P.2d 643, 646 (1995) (citing *Federal Sav. & Loan Ins. Corp. v. Moss*, 88 Nev. 256, 259, 495 P.2d 616, 618 (1972)). Therefore, the anti-SLAPP suit remedy was unavailable to Mr. Stubbs after Mr. Strickland's voluntary dismissal.

Mr. Stubbs claims this interpretation of NRS 41.670(2) violates the public policy behind Nevada's anti-SLAPP statute, as it would allow a plaintiff to file a SLAPP suit and force a defendant to suffer expenses and intimidation, while also allowing the plaintiff to escape any penalty if he or she dismisses the action before the defendant has a chance to seek relief. However, ''[p]laintiffs have the freedom to reconsider the wisdom of their actions without penalty before defendants have incurred clearly identifiable and recoverable legal fees.'' *S.B. Beach Properties v. Berti*, 138 P.3d 713, 718 (Cal. 2006).

*S.B. Beach Properties* is instructive here. In reviewing facts similar to this instant case, the California Supreme Court acknowledged that legal actions, even those ultimately dismissed, are a burden on a defendant. *Id.* Nonetheless, it ruled that permitting plaintiffs to voluntarily dismiss their claims without penalty prior

to the filing of an anti-SLAPP special motion serves the dual purposes of allowing a plaintiff freedom of action and extracting a defendant from a lawsuit as quickly and inexpensively as possible. *S.B. Beach Properties*, 138 P.3d at 717-18. We agree with the California court and decline to penalize plaintiffs who opt to discontinue frivolous lawsuits.

[Headnote 9]

Therefore, we conclude that a defendant may not pursue an action for damages and attorney fees pursuant to NRS 41.670(2) when the plaintiff voluntarily dismisses the alleged SLAPP suit before a special motion to dismiss is filed or granted. As a result, the district court properly dismissed Mr. Stubbs's complaint.

*The district court did not abuse its discretion in refusing to award attorney fees or impose sanctions because Mr. Stubbs argued for a change or clarification in existing law*

[Headnote 10]

Mr. Strickland argues that the district court abused its discretion by refusing to award him attorney fees or other sanctions because Mr. Stubbs filed his complaint without reasonable grounds, the complaint was not warranted by existing law, and Mr. Stubbs failed to argue for an extension of the law.[1] Mr. Stubbs responds that he filed his complaint in good faith to either clarify the law or possibly change the law as it relates to a defendant's ability to bring a separate action for damages and fees under NRS 41.670(2). We agree with Mr. Stubbs.

[Headnote 11]

We review orders refusing to award attorney fees or issue sanctions under NRS 18.010(2)(b), NRS 7.085(1), and NRCP 11 for an abuse of discretion. *Baldonado v. Wynn Las Vegas*, 124 Nev. 951, 967, 194 P.3d 96, 106 (2008); *Bergmann v. Boyce*, 109 Nev. 670, 676, 856 P.2d 560, 564 (1993).

NRS 18.010(2)(b) permits a district court to award attorney fees to a prevailing party when the district court determines a claim of the opposing party was brought without reasonable

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[1]Mr. Strickland asserts that the district court made no specific findings when denying the motion for attorney fees and seems to suggest that this court should require district courts to articulate findings as to why attorney fees are not warranted. While we require a district court to make findings regarding the basis for awarding attorney fees and the reasonableness of an award of attorney fees, *see Argentena Consol. Mining Co. v. Jolley Urga*, 125 Nev. 527, 540 n.2, 216 P.3d 779, 788 n.2 (2009), this court has not required such findings when a district court denies a motion for attorney fees. Therefore, we conclude that Mr. Strickland's argument lacks merit.

grounds or to harass the prevailing party. NRS 7.085(1) also allows a district court to require an attorney to personally pay expenses and attorney fees relating to a case when the attorney filed or maintained an action that was not well-grounded in fact or existing law, did not provide a good faith argument for a change to existing law, or unreasonably extended the proceedings.

Mr. Strickland contends that Mr. Stubbs's complaint misrepresented the law by omitting pertinent portions of NRS 41.670 that condition a party's recovery of damages and attorney fees on the grant of a special motion to dismiss. Mr. Strickland also asserts that Mr. Stubbs's complaint was misleading because it relied upon a California appellate case, *ARP Pharmacy Services, Inc. v. Gallagher Bassett Services, Inc.*, 42 Cal. Rptr. 3d 256 (Ct. App. 2006), that did not support his position, while failing to distinguish *S.B. Beach Properties*, which was directly on point. Mr. Strickland also claims that Mr. Stubbs never raised statutory interpretation arguments before the district court and, therefore, waived this argument on appeal.

[Headnotes 12-14]

First, we conclude that Mr. Stubbs's complaint adequately incorporates the relevant portions of NRS 41.670, as Counts 2 and 3 of the complaint seek remedy under ''41.635 et seq.'' and Nevada is a notice pleading state. *See, e.g.*, *Hay v. Hay*, 100 Nev. 196, 198, 678 P.2d 672, 674 (1984). Second, we do not agree that Mr. Stubbs attempted to mislead the district court by arguing for application of *ARP Pharmacy Services*, as his argument did not suggest that case was directly on point with the circumstances of this case. Third, we do not agree that Mr. Stubbs waived his arguments regarding statutory interpretation, since he made similar statutory interpretation arguments at the hearing on the motion to dismiss, in his opposition to Mr. Strickland's motion for attorney fees, and during the hearing on the motion.

[Headnotes 15-17]

Mr. Strickland also asserts that Mr. Stubbs filed his pleading for an improper purpose, as Mr. Stubbs's claims focused on Councilwoman Strickland as an elected official rather than Mr. Strickland, who was the plaintiff in the original complaint. Mr. Stubbs argues that he mentioned Councilwoman Strickland's misconduct in the complaint because he believed Mr. Strickland was attempting to quiet Mr. Stubbs on behalf of Councilwoman Strickland by filing the original complaint. We conclude that Mr. Stubbs did not bring his complaint for an improper purpose because Mr. Stubbs argued for a change or clarification in existing law and nothing in the record demonstrates Mr. Stubbs made accusations he knew were

untrue. Therefore, the district court did not abuse its discretion by denying Mr. Strickland's motion for attorney fees pursuant to NRS 7.085(1) and NRS 18.010(2)(b).[2]

Accordingly, we affirm the district court's orders.[3]

PICKERING, C.J., and HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

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[2]Moreover, sanctions were not appropriately requested in this case under NRCP 11. NRCP 11(c)(1)(A) requires a party to file a motion for sanctions separately from other motions or requests. Mr. Strickland filed a motion for attorney fees that mentioned NRCP 11 but did not file a separate motion for sanctions based on NRCP 11. Even if Mr. Strickland had filed the NRCP 11 request in the appropriate form, the district court did not abuse its discretion in denying the request because Mr. Stubbs made a good faith argument for clarification or change to existing law and made a reasonable and competent inquiry before filing the claim, as discussed above.

[3]We have considered the parties' remaining arguments and conclude they are without merit.