DAVID ROY STILWELL, APPELLANT, *v.* CITY OF NORTH LAS VEGAS AND CITY OF BOULDER CITY, RESPONDENTS.

No. 59735

DAVID ROY STILWELL, APPELLANT, *v.* CITY OF BOULDER CITY AND CITY OF NORTH LAS VEGAS, RESPONDENTS.

No. 59736

October 31, 2013 311 P.3d 1177

Consolidated appeals from district court orders denying motions for attorney fees and costs. Eighth Judicial District Court, Clark County; J. Charles Thompson, Judge.

After prosecution of defendant for riding a motorcycle without wearing proper headgear was dismissed, defendant sought to recover attorney fees as costs of action. The district court denied request. Defendant appealed. The supreme court, PICKERING, C.J., held that the supreme court lacked appellate jurisdiction to review the district court's denial of defendant's request for attorney fees from municipal prosecution.

Dismissed.

Gallian, Welker & Beckstrom, LC, and *Travis N. Barrick*, Las Vegas, for Appellant.

David R. Olsen, City Attorney, Boulder City; *Marquis Aurbach Coffing* and *Craig R. Anderson* and *Micah S. Echols*, Las Vegas, for Respondent City of Boulder City.

Sandra Douglass Morgan, Acting City Attorney, and *Sharon Y. Dockter*, Deputy City Attorney, North Las Vegas; *Marquis Aurbach Coffing* and *Craig R. Anderson* and *Micah S. Echols*, Las Vegas, for Respondent City of North Las Vegas.

1. COURTS.

   The supreme court lacked appellate jurisdiction to consider appeal from the district court's denial of defendant's request for attorney fees following dismissal of municipal prosecution for riding a motorcycle without wearing proper headgear, where state constitution provided that district courts had final appellate jurisdiction in cases arising in inferior tribunals, and case originated in municipal court and was heard by the district court on appeal. Const. art. 6, § 6.

2. COURTS.

   The rule that the district court has final appellate jurisdiction over cases arising in municipal courts applies even when the district court reverses the municipal court, meaning its decision escapes direct appellate review. Const. art. 6, § 6.

Before the Court EN BANC.

OPINION[1]

By the Court, PICKERING, C.J.:

Appellant David Stilwell was twice ticketed and twice convicted in nonrecord municipal courts of riding a motorcycle without wearing proper headgear in violation of NRS 486.231, a misdemeanor. He appealed his convictions to the district court for trial anew as provided by NRS 5.073(1) and NRS 266.595. Rather than try the charges de novo in district court, the prosecution dismissed them with prejudice. It also refunded the fines and costs Stilwell had paid to exonerate bail and appeal his convictions. Thereafter, the district court issued remittiturs, returning the cases to their municipal courts of origin.

Stilwell moved the district court for his attorney fees and court costs, citing NRS 176.115,[2] which reads in full as follows:

> 1. In all cases of criminal prosecution where the defendant is not found guilty, the court may require the complainant, if it appears that the prosecution was malicious or without probable cause, to pay the costs of the action, or to give security to pay the same within 30 days.
>
> 2. If the complainant does not comply with the order of the court, judgment may be entered against the complainant for the amount thereof.
>
> 3. Such judgments may be enforced and appealed from in the same manner as those rendered in civil actions.

Stilwell argued that Nevada's helmet law is unconstitutionally indeterminate and that his ticketing and prosecution were without probable cause and malicious, entitling him to recover attorney fees as ''costs of the action'' under NRS 176.115. The district court disagreed. In its view, the municipal court convictions provided prima facie evidence of probable cause, *see Chapman v. City of Reno*, 85 Nev. 365, 369, 455 P.2d 618, 620 (1969), and malice was not independently claimed. Because the district court denied Stilwell's motion for fees on this basis, it did not answer the statutory construction questions of whether NRS 176.115[3] authorizes

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[1]We originally dismissed these appeals in an unpublished order. Respondents moved to publish the order as an opinion, and appellant joined the motion. We grant the motion and publish this opinion in place of our earlier order. *See* NRAP 36(f).

[2]He simultaneously brought suit in federal court. The federal cases are not relevant to this appeal.

[3]Acknowledging Stilwell's request for an evidentiary hearing on entitlement to fees, the district court invited him to make an offer of proof. Stilwell's offer of proof focused on the prosecution's dismissals following appeal, not on the specifics of the charged offenses themselves.

attorney fees to be awarded as a subset of ''costs of the action,'' or who the ''complainant'' is. The district court also rejected Stilwell's argument that dismissing the charges after they were appealed itself evidenced malice and lack of probable cause. From these orders, Stilwell appeals.

[Headnotes 1, 2]

Article 6, Section 6 of the Nevada Constitution states that district courts ''have final appellate jurisdiction in cases arising in . . . inferior tribunals as may be established by law.'' This court has repeatedly held that ''[d]istrict courts have final appellate jurisdiction in cases arising in municipal courts,'' such that a municipal court conviction, once appealed to and decided by the district court, ''is not subject to further review by appeal to this court.'' *Tripp v. City of Sparks*, 92 Nev. 362, 363, 550 P.2d 419, 419 (1976); *see Waugh v. Casazza*, 85 Nev. 520, 521, 458 P.2d 359, 359-60 (1969) (noting appeal to Supreme Court from district court's review of justice court decision is improper, though there may be an exception if such an appeal is provided for by statute). This rule applies even when the district court reverses the municipal court, meaning its decision escapes direct appellate review. *Compare City of Las Vegas v. Carver*, 92 Nev. 198, 198, 547 P.2d 688, 688 (1976) (rejecting appeal by city from district court judgment reversing municipal court conviction and holding, ''[w]e have no jurisdiction for appellate review of a district court judgment, which has been entered on an appeal from a municipal court''), *with Tripp*, 92 Nev. at 363, 550 P.2d at 419 (holding this court lacks jurisdiction to hear appeal by defendant whose municipal court conviction was upheld by the district court).

Nevada's Constitution and these cases are directly controlling here. Stilwell's cases originated in the municipal courts and were heard by the district court on appeal. The district court's appellate jurisdiction is final, and this court therefore lacks jurisdiction to hear them.

Stilwell argues that the above cases do not apply because in each, the inferior court and then the district court decided the issue on the merits, whereas here the municipal courts convicted Stilwell and so did not entertain his fee requests. But this is a distinction without a difference. If Stilwell had established that his ticketing and prosecution lacked probable cause and were malicious, NRS 176.115 would have been equally available to him in municipal as district court. While the prosecution's dismissal of the charges in district court may have strengthened Stilwell's claim to fees and costs, it did not change his fundamental position that the charges lacked probable cause and were malicious—claims he asserted both in municipal and in district courts. Exercising its appellate jurisdiction, the district court rejected these claims based on the mu-

nicipal court convictions and Stilwell's offer of proof. Here, as in *Carver*, ''[w]e have no jurisdiction for appellate review of a district court judgment, which has been entered on an appeal from a municipal court,'' and, as for Stilwell's constitutional claims, his ''remedy, if any, would have been to timely petition for certiorari, under NRS 34.020(3).'' 92 Nev. at 198-99, 547 P.2d at 688.

As a fallback, Stilwell argues that NRS 176.115(3) licenses this appeal. But this argument is clearly wrong. Subsection 1 of NRS 176.115 authorizes an order directing ''the complainant'' to pay the ''costs of the action . . . within 30 days'' if the defendant is ''not found guilty'' and it appears ''the prosecution was malicious or without probable cause''; subsection 2 provides that, if ''the complainant'' does not timely comply with the order, ''judgment may be entered against the complainant for the amount thereof''; and subsection 3 provides that ''[*s*]*uch* judgments may be enforced and appealed from in the same manner as those rendered in civil actions.'' (Emphasis added.) ''Such judgment[ ]'' in subsection 3 refers back to its antecedent in subsection 2—the judgment subsection 2 says can be entered against a complainant who flouts an order entered pursuant to subsection 1 to pay the ''costs of the action'' within 30 days. As written, NRS 176.115 does not create an additional right of appeal in favor of a defendant who unsuccessfully seeks costs and has already been afforded a right of appeal. *See Blackburn v. State*, 129 Nev. 92, 95, 294 P.3d 422, 425 (2013) (in interpreting a statute, ''[o]ur analysis begins and ends with the statutory text if it is clear and unambiguous'').

This court does not have jurisdiction to hear the case. Accordingly, these consolidated appeals are dismissed.

GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

LALAINE V. BLANCO, APPELLANT, *v.*
MARIO L. BLANCO, RESPONDENT.

No. 60153

October 31, 2013 311 P.3d 1170

Appeal from a divorce decree entered by default in the district court. Eighth Judicial District Court, Family Court Division, Clark County; Charles J. Hoskin, Judge.

Wife filed a complaint for divorce. The district court entered a default divorce decree against wife as a sanction for her failure to comply with several of husband's discovery requests, and wife appealed. The supreme court, HARDESTY, J., held that: (1) it is not

permissible to resolve child custody and child support claims by default as a sanction for discovery violations; and (2) as for the division of community property and debt, the court must make an equal disposition, as required by statute, and cannot enter default as discovery sanction.

Reversed and remanded.

George R. Carter, Las Vegas, for Appellant.

Carol A. Menninger, Las Vegas, for Respondent.

Amber Robinson, Las Vegas; *Kristine Brewer*, Las Vegas; *Silverman, Decaria & Kattelman, Chtd.*, and *Michael V. Kattelman*, Reno, for Amicus Curiae Family Law Section of the State Bar of Nevada.

1. CHILD CUSTODY; CHILD SUPPORT.
   It is not permissible to resolve child custody and child support claims by default as a sanction for discovery violations because the child's best interest is paramount and compels a decision on the merits.
2. CHILD CUSTODY; CHILD SUPPORT.
   The district court could enter a default, as sanction for wife's discovery violations in child custody and support actions, only after a thorough evaluation and express findings of whether less severe sanctions were appropriate, and because the court did not make any express findings as to appropriateness of less severe sanctions before entering the default, case would be remanded for further proceedings.
3. DIVORCE.
   As for the division of community property and debt, the court must make an equal disposition, as required by statute, and cannot enter default as discovery sanction. NRS 125.150(1)(b).
4. PRETRIAL PROCEDURE.
   Pursuant to rule providing the district court with authority to impose case-concluding sanctions for noncompliance with its orders, if a party fails to obey a court order, the court may strike pleadings, dismiss the action, or enter a default, and in addition to this rule-based authority, the court has the inherent equitable power to enter defaults and dismiss actions for abusive litigation practices. NRCP 37(b)(2)(C).
5. APPEAL AND ERROR; PRETRIAL PROCEDURE.
   While the district court enjoys broad discretion in imposing discovery sanctions, when the sanction imposed is dismissal with prejudice, a heightened standard of review applies.
6. CONSTITUTIONAL LAW.
   Procedural due process considerations require that case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order. U.S. CONST. amend. 14.
7. PRETRIAL PROCEDURE.
   Discovery sanction must be supported by an express, careful, and preferably written explanation of the court's analysis of certain pertinent factors that guide the district court in determining appropriate sanctions, and these nonexhaustive factors may include the extent of the offending party's willfulness, whether the nonoffending party would be prejudiced by the imposition of a lesser sanction, whether dismissal is too severe for

the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct.

8. Pretrial Procedure.
Dismissal or default, as discovery sanctions, should only be used in the most extreme cases.

9. Pretrial Procedure.
When the district court enters a default as a discovery sanction, the nonoffending party still has an obligation to present sufficient evidence to establish a prima facie case, and the court may conduct a prove-up hearing to determine, among other things, the amount of damages to be awarded for each claim; and although the typical divorce case does not involve a claim for damages, an evidentiary hearing may be necessary to take factual evidence and decide the issues in accordance with the relevant law.

10. Divorce.
Divorce proceedings encompass numerous issues, including child custody, child support, spousal support, property division, and attorney fees, with each being governed by a different legal standard; and consequently, the appropriateness of a case-concluding discovery sanction depends on the particular claim involved.

11. Child Custody; Child Support.
With regard to child custody and child support, case-concluding discovery sanction is not permissible because these child custody and support matters must be decided on their merits, but the district court may still consider alternative sanctions, such as contempt, monetary sanctions, and attorney fees, to punish noncompliance with discovery or disobedience of court orders; given the statutory and constitutional directives that govern child custody and support determinations, resolution of these matters on a default basis without addressing the child's best interest and other relevant considerations is improper. NRS 125.480.

12. Constitutional Law.
Child custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children. U.S. Const. amend. 14.

13. Constitutional Law; Divorce.
Aside from child custody and support, case-concluding discovery sanctions are permissible on other claims in domestic relations cases, but any such sanction must comply with procedural due process requirements, and the court must determine whether a case-concluding sanction is warranted or whether the imposition of a less-severe sanction would suffice. U.S. Const. amend. 14.

14. Pretrial Procedure.
Sanction must relate to the claims at issue in the violated discovery order and must be supported by an explanation of the pertinent factors guiding such determination.

15. Husband and Wife.
The equal disposition of community property may not be dispensed with through default. NRS 125.150(1)(b).

16. Divorce.
Before making the factual determinations to support the disposition of property in divorce case, it may be necessary for the court to hold an evidentiary hearing, and at such a hearing, the district court has broad discretion to limit the offending party's presentation of evidence in line with a discovery violation.

17. DIVORCE.
    As for spousal support and attorney fees in divorce action, no prove-up hearing is required, and the court may render a decision without it.
18. DIVORCE.
    Decision whether to grant spousal support and attorney fees is, by statute, purely discretionary with the district court. NRS 125.150(1)(a), (3).
19. DIVORCE.
    Civil procedure rule limits an award of attorney fees to those incurred because of a discovery violation, and, therefore, any additional attorney fees may be granted in accordance with the law governing awards of reasonable attorney fees in divorce cases. NRS 125.150(3); NRCP 37(b)(2).
20. CHILD CUSTODY; CHILD SUPPORT.
    With regard to child custody and child support, a case-concluding discovery sanction was not permissible, and because custody order did not contain sufficient particularity as to husband's visitation rights, that issue had to be addressed by the district court, and the district court also had to make a determination as to child support in accordance with the law, as that claim should not have been resolved by default through the mere adoption of the temporary support order. NRS 125C.010(1).
21. DIVORCE.
    Case would be remanded because the district court did not conduct any analysis as to whether a default divorce decree was an appropriate sanction for wife's discovery violation, including an analysis of the relevant factors and whether a less severe sanction was warranted; and if, on remand, the district court determined that a case-concluding sanction was warranted, it might be necessary to hold an evidentiary hearing.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

In this divorce case, the wife was representing herself and failed to comply with several of the husband's discovery requests. As a consequence, the district court entered a default divorce decree against her as a sanction. We must decide the propriety of such case-concluding discovery sanctions in divorce proceedings, particularly in those cases involving child custody. We hold that it is not permissible to resolve child custody and child support claims by default as a sanction for discovery violations because the child's best interest is paramount and compels a decision on the merits.

[Headnotes 1-3]

As for the division of community property and debt, we conclude that the court must make an equal disposition as required by statute. Regarding all other claims, the court may enter a default, but only after a thorough evaluation and express findings of whether less severe sanctions are appropriate. Here, because the district court did not make any express findings as to appropriate-

ness of less severe sanctions before entering the default, we reverse the default divorce decree and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Mario and Lalaine Blanco were married in 1989, and they have four children. Lalaine filed a complaint for divorce, and Mario filed an answer and counterclaim. By their pleadings, the parties requested resolution of child custody and support, spousal support, property division, and attorney fees. Lalaine sought primary physical custody and $600 in monthly child support, while Mario requested joint physical custody and $2,552 in monthly child support. Lalaine's complaint requested that neither party pay spousal support, whereas Mario sought $1,000 in monthly spousal support for ten and one-half years. Both parties sought the division of the parties' community property, an award of attorney fees, and the permission to claim the children as exemptions on their respective income tax returns. Mario also asked that Lalaine maintain health insurance for the children and for him until he could obtain his own coverage.

Child custody was, for the most part, resolved through mediation. The parties entered into a stipulation and order for custody on June 3, 2011 (June custody order). Under that order, the parties agreed to joint legal custody of their two children, who were still minors at that time. As to physical custody, Mario was to have visitation at least three days each week, with those three days being spent in a row every other weekend from Friday afternoon until Monday. That order referred the parties back to mediation to resolve the holiday visitation schedule. Without any agreement as to the holiday visitation, it is questionable whether the June custody order resolved all custody issues with finality.

Aside from child custody, the remaining matters were not resolved with any finality before trial. The court ordered Lalaine to pay temporary child support to Mario of $1,127 per month. Lalaine, who worked as a nurse, historically earned significantly more income than Mario, but had reduced her work days from five to two days per week, claiming that she suffered an injury that made it difficult to work. Mario sought to prove that Lalaine was willfully underemployed, which was the subject of Mario's unanswered discovery requests that ultimately led to the sanctions. Spousal support, property division, and attorney fees also remained unresolved before trial.

Discovery violations leading up to the default divorce decree

Shortly before trial was to commence, Lalaine's attorney withdrew from representation on the basis that Lalaine was uncooperative. Lalaine proceeded to represent herself. When Lalaine failed

to respond to Mario's discovery requests, Mario filed a motion to compel her responses to his second set of interrogatories and second request for production of documents, and for attorney fees. Mario sought discovery related to Lalaine's personal injury, her claim for lost wages, and her payments on the marital residence. Lalaine did not appear at the hearing before the discovery commissioner, and the commissioner recommended that Lalaine be ordered to comply with the discovery requests and pay $1,500 in attorney fees. No objection was filed and that recommendation became a court order.

Mario moved to continue the trial, and at a hearing on that motion, the district court addressed the issue of Lalaine's compliance with Mario's discovery requests. Although Lalaine was present at the hearing, she was often unresponsive and uncooperative, and the court's marshal had to verbally intervene on multiple occasions to produce a response to the judge's questions. Lalaine asserted that the discovery requests were given to her former attorney and that she had not seen them until a few days before the hearing. The district court continued the trial, allowed Lalaine two weeks to respond to Mario's discovery requests, and strongly suggested that Lalaine retain new counsel. Lalaine was specifically advised that if Mario did not receive the responses by the two-week deadline, then Mario's attorney was to submit an order to the court striking Lalaine's pleadings and granting the relief requested in Mario's counterclaim by default. The court also awarded attorney fees to Mario but deferred until trial a determination as to the amount.

At the following calendar call, Lalaine was present and explained to the court the extent of her compliance with discovery. The court determined that, while Lalaine had provided some information to Mario by the deadline, the responses were not full and complete. Concluding that discovery sanctions were warranted, the court ordered that Lalaine's pleading be stricken from the record and that a case-resolving default be entered that was consistent with prior orders and Mario's counterclaim.

The district court clerk proceeded to enter a default, and Mario requested a summary disposition. Without conducting any prove-up or evidentiary hearing, the district court entered the default divorce decree. Under that decree, the court awarded the parties joint legal and joint physical custody of the children in accord with the June custody order, but included a holiday visitation schedule virtually identical to the one set forth in Mario's counterclaim. The court ordered the temporary child support to stand and granted Mario's request that Lalaine provide health insurance for him and the children. Mario also received his requested $1,000 in monthly spousal support for ten and one-half years, as well as permission to claim both children as tax exemptions every year.

Turning to the division of the parties' community assets and liabilities, Lalaine was awarded the marital residence, which apparently had no equity, and the associated debt that was not specified or offset. Each party received a car and a one-half interest in Lalaine's retirement and bank accounts, although the values were not identified. Lalaine was ordered to assume the entire credit card debt, and to pay the $21,729.25 of attorney fees requested by Mario. Lalaine now appeals from the default divorce decree.

DISCUSSION

On appeal, we must decide whether a default judgment as a discovery sanction in a divorce proceeding is appropriate. Lalaine contends that the case-concluding sanction was unduly harsh. She asserts that the district court should have considered a less severe sanction, or at least conducted a prove-up hearing to take evidence on matters such as spousal support and the monetary value of the parties' property, and provided findings of fact to support the decision. In response, Mario argues that some of the claims had already been resolved by agreement or otherwise, and to the extent that they had not, Lalaine's remedy was to file a motion to modify.

[Headnotes 4-6]

In Nevada, NRCP 37(b)(2)(C) provides the district court with authority to impose case-concluding sanctions for noncompliance with its orders. Under that rule, if a party fails to obey a court order, the court may strike pleadings, dismiss the action, or enter a default. *Id*. In addition to this rule-based authority, the court has the inherent equitable power to enter defaults and dismiss actions for abusive litigation practices. *Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990). While the district court enjoys broad discretion in imposing discovery sanctions, when the sanction imposed is dismissal with prejudice, a heightened standard of review applies. *Id*. Procedural due process considerations require that such case-concluding discovery sanctions be just and that they relate to the claims at issue in the violated discovery order. *Young*, 106 Nev. at 92, 787 P.2d at 779-80; *see also Foster v. Dingwall*, 126 Nev. 56, 65, 227 P.3d 1042, 1048 (2010).

[Headnotes 7, 8]

Moreover, the sanction must ''be supported by an express, careful and preferably written explanation of the court's analysis'' of certain pertinent factors that guide the district court in determining appropriate sanctions. *Young*, 106 Nev. at 93, 787 P.2d at 780. These nonexhaustive factors may include the extent of the offending party's willfulness, whether the nonoffending party would be

prejudiced by the imposition of a lesser sanction, whether dismissal is too severe for the particular discovery abuse, the feasibility and fairness of less severe sanctions, the policy favoring adjudication of cases on their merits, and the need for deterring similar abusive conduct. *Id.* Dismissal or default should only be used in the most extreme cases. *See Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 645, 837 P.2d 1354, 1359 (1992).

[Headnote 9]

When the district court enters a default as a discovery sanction, the nonoffending party still has an obligation to present sufficient evidence to establish a prima facie case, and the court may conduct a prove-up hearing to determine, among other things, the amount of damages to be awarded for each claim. *Foster*, 126 Nev. at 66-67, 227 P.3d at 1049-50; *see also Hamlett v. Reynolds*, 114 Nev. 863, 867, 963 P.2d 457, 459 (1998). Although the typical divorce case does not involve a claim for damages, an evidentiary hearing may be necessary to take factual evidence and decide the issues in accordance with the relevant law.

[Headnote 10]

Divorce proceedings encompass numerous issues including child custody, child support, spousal support, property division, and attorney fees, with each being governed by a different legal standard. Consequently, the appropriateness of a case-concluding sanction depends on the particular claim involved.

Child custody and child support

[Headnotes 11, 12]

With regard to child custody and child support, we determine that a case-concluding discovery sanction is simply not permissible. These child custody matters must be decided on their merits. It is well established that when deciding child custody, the sole consideration of the court is the child's best interest. NRS 125.480; *Sims v. Sims*, 109 Nev. 1146, 1148, 865 P.2d 328, 330 (1993). Child support awards are guided by certain formulas as applied to the parties' income. *See* NRS 125B.070 (setting forth a child support formula as applied in primary physical custody cases); *Wright v. Osburn*, 114 Nev. 1367, 1368-69, 970 P.2d 1071, 1072 (1998) (calculating child support in joint physical custody cases based on the parties' gross incomes).

In other contexts, we have held that a court may not use a change of custody as a sword to punish parental misconduct, such as refusal to obey lawful court orders, because the child's best interest is paramount in such custody decisions. *See Sims*, 109 Nev. at 1149, 865 P.2d at 330; *see also Dagher v. Dagher*, 103 Nev. 26,

28, 731 P.2d 1329, 1330 (1987). Moreover, child custody decisions implicate due process rights because parents have a fundamental liberty interest in the care, custody, and control of their children. *See Troxel v. Granville*, 530 U.S. 57, 66 (2000); s*ee also Price v. Dunn*, 106 Nev. 100, 105, 787 P.2d 785, 788 (1990) (stating that the policy in favor of deciding cases on their merits is heightened in domestic relations matters), *disagreed with on other grounds by NC-DSH, Inc. v. Garner*, 125 Nev. 647, 651 n.3, 218 P.3d 853, 857 n.3 (2009). Other courts have similarly held that before rendering a default judgment on child custody and support issues as a discovery sanction, the lower court must conduct an evidentiary hearing or consider other evidence in the record as to the child's best interest. *See Fenton v. Webb*, 705 N.W.2d 323, 327 (Iowa Ct. App. 2005); *Wright v. Wright*, 941 P.2d 646, 652 (Utah Ct. App. 1997).

Of course, the district court may still consider alternative sanctions, such as contempt, monetary sanctions, and attorney fees, to punish noncompliance with discovery or disobedience of court orders. *See Sims*, 109 Nev. at 1149, 865 P.2d at 330; *Dagher*, 103 Nev. at 28 n.3, 731 P.2d at 1330 n.3; *Rolley v. Sanford*, 727 A.2d 444, 448 (Md. Ct. Spec. App. 1999) (suggesting civil contempt as an alternative sanction to dismissal for a discovery violation in a child support matter). But given the statutory and constitutional directives that govern child custody and support determinations, resolution of these matters on a default basis without addressing the child's best interest and other relevant considerations is improper.

Property division, spousal support, and attorney fees

[Headnotes 13, 14]

Aside from child custody and support, we determine that case-concluding discovery sanctions are permissible on other claims, but that any such sanction must comply with the procedural due process requirements of *Young* and *Foster*. The court must determine whether a case-concluding sanction is warranted or whether the imposition of a less-severe sanction would suffice. *Young*, 106 Nev. at 92-93, 787 P.2d at 779-80; *Foster*, 126 Nev. at 67, 227 P.3d at 1048-49. The sanction must relate to the claims at issue in the violated discovery order and must be supported by an explanation of the pertinent factors guiding such determination. *Young*, 106 Nev. at 92-93, 787 P.2d at 779-80; *Foster*, 126 Nev. at 67, 227 P.3d at 1048-49.

[Headnote 15]

With property division in particular, however, we conclude that community property and debt must be divided in accordance with the law. NRS 125.150(1)(b) requires the court to make an equal

disposition of property upon divorce, unless the court finds a compelling reason for an unequal disposition and sets forth that reason in writing. The equal disposition of community property may not be dispensed with through default. Even jurisdictions that have permitted the entry of a default divorce decree as a discovery sanction require the district court to make independent findings on the division of property in accordance with the applicable law. In *Dethloff v. Dethloff*, 574 N.W.2d 867, 872 (N.D. 1998), the North Dakota Supreme Court held that a default judgment against the husband was an appropriate sanction in a divorce proceeding, however, the lower court could not simply accept the wife's proposed property division, but was required to make independent findings as to the value of the marital estate and give some explanation as to why the division was equitable under the law. Likewise, in *Draggoo v. Draggoo*, 566 N.W.2d 642, 648-49 (Mich. Ct. App. 1997), the Michigan Court of Appeals held that the husband could be denied participation in the adjudication of the property division as a sanction for his discovery abuses when the trial court nonetheless entered findings on the value of the marital property and made an equitable division in accordance with the law. We find these authorities persuasive.

[Headnote 16]

Before making the factual determinations to support the disposition of property, it may be necessary for the court to hold an evidentiary hearing. At such a hearing, the district court has broad discretion to limit the offending party's presentation of evidence in line with the discovery violation. *See Foster*, 126 Nev. at 67-68, 227 P.3d at 1050; *see also Draggoo*, 566 N.W.2d at 648-49. Allowing evidence that the offending party refused to produce during discovery, for instance, has been recognized to be inequitable. *See Hamlett*, 114 Nev. at 867, 963 P.2d at 459.

[Headnotes 17-19]

Finally, as for spousal support and attorney fees, we conclude that no prove-up hearing is required and the court may render a decision without it.[1] The decision whether to grant spousal support and attorney fees is, by statute, purely discretionary with the district court. *See* NRS 125.150(1)(a), (3). NRCP 37(b)(2) limits an award of attorney fees to those incurred because of a discovery violation. *Nev. Power Co. v. Fluor Ill.*, 108 Nev. 638, 646-47, 837

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[1]Our holding in *Rodriguez v. Rodriguez*, 116 Nev. 993, 998, 13 P.3d 415, 418 (2000), that marital misconduct may not be considered in awarding spousal support, does not compel a different result. *Rodriguez* involved misconduct within the parties' marital relationship and did not implicate the sanction power of the court.

P.2d 1354, 1360 (1992). Therefore, any additional attorney fees may be granted in accordance with the law governing awards of reasonable attorney fees in divorce cases. *See* NRS 125.150(3) (providing for an award of reasonable attorney fees in a divorce action); *Brunzell v. Golden Gate Nat'l Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969) (setting forth factors that govern the reasonable value of an attorney's services).

Application of these principles to the facts of this case

[Headnote 20]

In the case before us, child custody was mostly resolved by agreement of the parties through the June custody order. We recognize the strong public policy favoring the resolution of child custody matters by agreement. *See Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011). Nevertheless, because Lalaine argues that the June custody order did not contain sufficient particularity as to Mario's visitation rights, that issue must be addressed by the district court. *See* NRS 125C.010(1). The district court must also make a determination as to child support in accordance with the law, as that claim should not have been resolved by default through the mere adoption of the temporary support order.

[Headnote 21]

As for the remaining claims, the district court did not conduct any analysis under *Young* and *Foster* as to whether a default divorce decree was an appropriate sanction for Lalaine's discovery violation, including an analysis of the relevant factors and whether a less severe sanction was warranted. If, on remand, the district court determines that a case-concluding sanction is warranted, it may be necessary to hold an evidentiary hearing. Any resulting default divorce decree must comply with the standards set forth herein. Consequently, we reverse the default divorce decree and remand this matter to the district court for further proceedings consistent with this opinion.

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

WYNN LAS VEGAS, LLC, AKA WYNN CASINO LAS VEGAS, APPELLANT, *v.* DANIEL BALDONADO; JOSEPH CESARZ; AND QUYNGOC TANG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED, RESPONDENTS.

No. 60358

October 31, 2013 311 P.3d 1179

Appeal from a district court order granting a petition for judicial review of the Nevada Labor Commissioner's decision regarding a tip-pooling policy and whether an administrative agency can grant class-action certification. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Casino employees sought review of determination by the Labor Commissioner that casino's tip-pooling policy did not violate Nevada law. The district court set aside the Labor Commissioner's decision. Casino appealed. The supreme court, DOUGLAS, J., held that: (1) statute regarding the division of tips did not preclude casino from instituting tip-pooling policy that split tips among its employees, and (2) regulation regarding administrative complaints to the Labor Commissioner precluded class certification.

Reversed and remanded.

Kamer Zucker Abbott and *Gregory J. Kamer* and *Bryan J. Cohen*, Las Vegas; *Gibson, Dunn & Crutcher LLP* and *Eugene Scalia* and *Porter Wilkinson*, Washington, D.C., for Appellants.

Leon Greenberg Professional Corporation and *Leon M. Greenberg*, Las Vegas, for Respondents.

Catherine Cortez Masto, Attorney General, and *Kimberly A. Arguello*, Senior Deputy Attorney General, Carson City, for Amicus Curiae State of Nevada, Department of Business and Industry, Office of the Labor Commissioner.

Gabroy Law Offices and *Christian J. Gabroy*, Henderson, for Amici Curiae Progressive Leadership Alliance of Nevada, Amalgamated Transit Union Local 1637, Churches of Southern Nevada, Interfaith Worker Justice, Assemblyman Paul Aizley, Assemblywoman Maggie Carlton, Assemblyman Joseph M. Hogan, and Assemblyman James Ohrenschall.

Lemons Grundy & Eisenberg and *Robert L. Eisenberg*, Reno, for Amicus Curiae Don Laughlin's Riverside Resort Hotel and Casino.

Lewis & Roca LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas, for Amici Curiae Nevada Resort Association and Nevada Restaurant Association.

McCracken, Stemerman & Holsberry and *Richard G. McCracken*, Las Vegas, for Amicus Curiae Local Joint Executive Board of Las Vegas.

Urban Law Firm and *Michael A. Urban* and *Shannon M. Gallo*, Las Vegas, for Amicus Curiae Transport Workers Union of America, AFL-CIO, Local 721.

1. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court reviews an administrative agency's decision for an abuse of discretion.
2. ADMINISTRATIVE LAW AND PROCEDURE.
   When the case concerns statutory interpretation, the supreme court reviews the agency's decision de novo.
3. LABOR AND EMPLOYMENT.
   Statute regarding the division of tips did not preclude casino from instituting tip-pooling policy that split tips among its employees. NRS 608.160.
4. ADMINISTRATIVE LAW AND PROCEDURE.
   The supreme court defers to an agency's interpretation of its governing statutes or regulations if the interpretation is within the statute's or regulation's language.
5. LABOR AND EMPLOYMENT.
   Regulation regarding administrative complaints to the Labor Commissioner precluded class certification; regulation explicitly required a complainant to provide his or her full name and address in his or her complaint. NAC 607.200.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we must determine if Nevada law allows employers to require employees to pool their tips with other employees of a different rank. After considering the parties' arguments and the applicable provisions in NRS Chapter 608, we conclude that Nevada law permits the tip-pooling policy at issue here.

FACTS AND PROCEDURAL HISTORY

Appellant, the Wynn Las Vegas, restructured its table-games department and implemented its current tip-pooling policy for its table-games employees. The Wynn eliminated several positions in the table-games department, including the vice president of table-games operations, shift manager, assistant shift manager, pit manager, and floor supervisor. After the restructure, the table-games department consisted of casino managers, assistant casino managers, casino service team leads (CSTL), boxpersons, and dealers. Under the current tip-pooling policy, all tips are gathered and divided among the dealers, boxpersons, and CSTLs.

Respondents Daniel Baldonado, Joesph Cesarz, and Quyngoc Tang (the Dealers) filed a class-action complaint with the Labor Commissioner claiming that the Wynn's restructured tip-pooling policy violated NRS 608.160, NRS 608.100, and NRS 613.120, which govern compensation and employment practices, because it required the dealers to share their tips with employees of different ranks. The Labor Commissioner denied the Dealers class-action status and dismissed all unnamed complainants from the action, citing noncompliance with NAC 607.200's requirements for filing an administrative complaint. But, the Labor Commissioner accepted all named complainants. After conducting an investigation, the Labor Commissioner determined that the Wynn's new tip-pooling policy did not violate Nevada law.

The Dealers petitioned the district court to review the Labor Commissioner's decision, pursuant to NRS 233B.130. The district court granted the petition and set aside the Labor Commissioner's decision, finding that the new tip-pooling policy violated NRS 608.160 because the policy directly benefited the Wynn. Further, the district court determined that the Labor Commissioner erred in dismissing the unnamed complainants because the Commissioner had the power to hear a class-action suit. The district court declined to review the Labor Commissioner's decisions regarding NRS 608.100 and NRS 613.120 because the court determined that its decision regarding NRS 608.160 was completely dispositive of the parties' dispute. The Wynn appealed.

We hold that the district court erred in overturning the Labor Commissioner's decision because the Wynn did not keep any of the tips from the pool; rather, the Wynn distributed the money among its employees.

DISCUSSION

[Headnotes 1, 2]

This court reviews an administrative agency's decision for an abuse of discretion. *Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998). However, when the case concerns statutory interpretation, this court reviews the agency's decision de novo. *Id.* at 207, 955 P.2d at 190.

The Wynn's tip-pooling policy was lawful under NRS 608.160

The Wynn argues that the district court erred by imposing a ''direct-benefit'' test onto its NRS 608.160 analysis, asserting that the statute contains no such language and that prior opinions, while mentioning the benefits that an employer may gain from a tip-pooling policy, never indicated that the policy must be invalidated on the basis of those benefits. In opposition, the Dealers assert that this court has applied the ''direct-benefit'' test in previous

opinions; therefore, the district court did not err in applying the test to this matter.

NRS 608.160 states:

> 1. It is unlawful for any person to:
>
> (a) Take all or part of any tips or gratuities bestowed upon the employees of that person.
>
> (b) Apply as a credit toward the payment of the statutory minimum hourly wage established by any law of this State any tips or gratuities bestowed upon the employees of that person.
>
> 2. Nothing contained in this section shall be construed to prevent such employees from entering into an agreement to divide such tips or gratuities among themselves.

In *Moen v. Las Vegas International Hotel, Inc.*, 402 F. Supp. 157 (D. Nev. 1975), a federal district court interpreted NRS 608.160's purpose, and this court adopted the federal court's interpretation in *Alford v. Harolds Club*, 99 Nev. 670, 674, 669 P.2d 721, 723 (1983). In *Moen*, the court determined that NRS 608.160 was enacted to prevent an employer from taking its employees' tips for the employer's benefit. 402 F. Supp. at 160. Nevertheless, the court determined that an employer can collect employee tips and distribute them among other employees. *Id.* Applying this rationale, the *Moen* court found that a tip-pooling policy requiring a table dealer to share his tips with other dealers, boxpersons, casino cashiers, and floormen was valid. *See id.* at 158, 160.

The Dealers and the district court appear to believe that, in *Alford*, this court created a ''direct-benefit'' test which invalidates any tip-pooling policy that directly benefits the employer. We take this opportunity to clear up any confusion surrounding this issue. *Alford* did not create a ''direct-benefit'' test, nor do we believe that *Moen* created such a test, either. *Moen* mentioned an employer's benefit in a passing remark; however, the benefit the court appeared to reference was the keeping of the employee tips. The *Moen* court determined that NRS 608.160 ''specifies that only the employees can benefit [from a tip-pooling agreement].'' *Id.* at 160. After reviewing *Moen*, we framed the issue in *Alford* as whether an employer can impose a tip-pooling policy on its employees, even though the employer did not keep the tips or ''reap any direct benefit from the pooling.'' This description was not inadvertent—it is possible that an employer, while not keeping the tips, could take them for use in a manner impermissible under the statute. However, nothing in either opinion suggests that a ''direct-benefit'' test should be imposed to determine whether a tip-pooling policy violates NRS 608.160. Further, if the *Moen* court intended to create the purported ''direct-benefit'' test, we expressly reject it. Such a test is unworkable because every tip-pooling policy directly benefits the employer in some manner.

[Headnote 3]

The district court erred in determining that the Wynn's tip-pooling policy violated NRS 608.160 because the Wynn distributed all the tips to its employees. NRS 608.160 prohibits an employer from taking and keeping his or her employees' tips, but the statute does not prohibit a tip policy that splits the tips among the employees. Similar to the casino in *Moen*, the Wynn distributes the tips among its employees, keeping none for itself. This policy is in accordance with NRS 608.160 and *Moen*; thus, the district court should not have disturbed the Labor Commissioner's decision.

The Dealers' claims under NRS 608.100 and NRS 613.120 require judicial review

Under NRS 233B.130, ''(1) [a]ny party who is: (a) [i]dentified as a party of record by an agency in an administrative proceeding; and (b) [a]ggrieved by a final decision in a contested case, is *entitled* to judicial review of the decision. . . .'' (Emphasis added.)

In light of its decision that the tip-pooling policy violated NRS 608.160, the district court declined to review the Labor Commissioner's decisions regarding the Wynn's tip-pooling policy under NRS 608.100 and NRS 613.120. The Labor Commissioner's decision aggrieved the Dealers; thus, the dealers were entitled to judicial review of all of the Commissioner's decisions.[1] In accordance with NRS 233B.130, we remand this matter for the district court to review the Labor Commissioner's decisions regarding NRS 608.100 and NRS 613.120.

The district court should have deferred to the Labor Commissioner's decision declining to grant the Dealers class-action status

[Headnote 4]

This court defers to an ''agency's interpretation of its governing statutes or regulations if the interpretation is within the [statute's or regulation's language].'' *Dutchess Bus. Servs. v. State, Bd. of Pharm.*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008). Under NAC 607.200, a complaint filed with the Labor Commissioner must include ''[t]he full name and address of [all] complainant[s].''

[Headnote 5]

The Labor Commissioner's conclusion that NAC 607.200 does not permit class actions was within the regulation's language; thus,

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[1]The aggrieved party must satisfy certain procedural requirements to receive judicial review. *See* NRS 233B.130. The record suggests that the Dealers satisfied these requirements, and the parties do not argue otherwise.

the district court should have deferred to the Labor Commissioner's interpretation. The Labor Commissioner dismissed all unnamed complainants because they did not comply with NAC 607.200's name and address requirements. This interpretation is within the regulation's language because the regulation explicitly requires a complainant to provide his or her full name and address in his or her complaint. Further, Nevada laws do not require the Labor Commissioner to grant class certification under any circumstances. Accordingly, the district court erred in failing to defer to the Labor Commissioner's decision to decline class certification in this matter.

CONCLUSION

We reverse the district court's order concluding that the Wynn's tip-pooling policy was invalid under NRS 608.160 and that the Labor Commissioner should have granted the Dealers class certification. Further, we remand the matter for the district court to review the Labor Commissioner's decisions regarding the validity of the Wynn's tip-pooling policy under NRS 608.100 and NRS 613.120.

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

THE STATE OF NEVADA, APPELLANT, *v.*
JETHRO RAY LLOYD, RESPONDENT.

No. 56706

October 31, 2013 312 P.3d 467

Appeal from a district court order granting a motion to suppress evidence. Fourth Judicial District Court, Elko County; J. Michael Memeo, Judge.

State appealed from decision of the district court invalidating the search and suppressing the drug evidence. The supreme court, PICKERING, C.J., held that: (1) exigency is not a separate requirement of the automobile exception to the constitutional warrant requirement, and (2) automobile exception to the warrant requirement imposed by the Fourth Amendment and the Nevada Constitution's cognate provision justified the warrantless search of defendant's car, disapproving *State v. Harnisch*, 113 Nev. 214, 931 P.2d 1359 (1997); *Barrios-Lomeli v. State*, 113 Nev. 952, 944 P.2d

791 (1997); and *State v. Harnisch*, 114 Nev. 225, 954 P.2d 1180 (1998).

Reversed and remanded.

CHERRY, J., with whom SAITTA, J., agreed, dissented.

Catherine Cortez Masto, Attorney General, Carson City; *Mark D. Torvinen*, District Attorney, and *Robert J. Lowe*, Deputy District Attorney, Elko County, for Appellant.

Frederick B. Lee, Jr., Public Defender, and *Roger H. Stewart*, Deputy Public Defender, Elko County, for Respondent.

1. SEARCHES AND SEIZURES.
   Exigency is not a separate requirement of the automobile exception to the constitutional warrant requirement, disapproving *State v. Harnisch*, 113 Nev. 214, 931 P.2d 1359 (1997); *Barrios-Lomeli v. State*, 113 Nev. 952, 944 P.2d 791 (1997); and *State v. Harnisch*, 114 Nev. 225, 954 P.2d 1180 (1998). U.S. CONST. amend. 4.
2. CRIMINAL LAW.
   Motion to suppress presents mixed questions of law and fact.
3. CRIMINAL LAW.
   On appeal from an order granting a motion to suppress, the supreme court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that the court reviews de novo.
4. CRIMINAL LAW.
   The district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review. U.S. CONST. amend. 4.
5. SEARCHES AND SEIZURES.
   Warrantless searches are per se unreasonable subject only to a few specifically established and well-delineated exceptions, and one such exception is the automobile exception. Const. art. 1, § 18; U.S. CONST. amend. 4.
6. SEARCHES AND SEIZURES.
   It is the exigency inherent in an automobile's ready mobility that, with probable cause, justifies a warrantless automobile search. U.S. CONST. amend. 4.
7. SEARCHES AND SEIZURES.
   So long as the vehicle for which probable cause to search exists is readily mobile, the requisite exigency is conclusively presumed for purposes of automobile exception to warrant requirement. U.S. CONST. amend. 4.
8. ARREST.
   What drew police attention to the defendant and his car in the first place may legitimately bear on the scope of the search incident to arrest when the automobile exception to warrant requirement does not apply. U.S. CONST. amend. 4.
9. SEARCHES AND SEIZURES.
   Constitutional protection in the federal automobile-exception to warrant requirement lies in the requirement of probable cause to believe the vehicle contains contraband or evidence of a crime and the car's inherent mobility. U.S. CONST. amend. 4.

10. SEARCHES AND SEIZURES.
    Nevada Constitution compels no different automobile exception to its warrant requirement than the Fourth Amendment does. Const. art. 1, § 18; U.S. CONST. amend. 4.
11. COURTS.
    Stare decisis plays a critical role in the supreme court's jurisprudence; but when governing decisions prove to be unworkable or are badly reasoned, they should be overruled.
12. SEARCHES AND SEIZURES.
    In the automobile-exception context, a police officer who has probable cause to believe the car contains contraband or evidence of a crime must either seize the vehicle while a warrant is sought or search the vehicle without a warrant, and given probable cause, either course is constitutionally reasonable. Const. art. 1, § 18; U.S. CONST. amend. 4.
13. SEARCHES AND SEIZURES.
    Federal automobile exception to warrant requirement is rooted in good policy that balances private interests with the collective good, even as it provides law enforcement with clear and unequivocal guidelines for doing their jobs. U.S. CONST. amend. 4.
14. CONTROLLED SUBSTANCES.
    Drug detection dog's alert gave the officers probable cause to believe controlled substances were in defendant's car, and because car was readily mobile and parked in a public place, the automobile exception to the warrant requirement imposed by the Fourth Amendment and the Nevada Constitution's cognate provision justified the warrantless search. Const. art. 1, § 18; U.S. CONST. amend. 4.

Before the Court EN BANC.[1]

OPINION

By the Court, PICKERING, C.J.:

A highway patrol officer saw respondent Jethro Lloyd run a red light and followed him into a shopping center parking lot to issue him a ticket. While the ticket was being processed, a drug detection dog was summoned. The dog alerted for the presence of drugs in Lloyd's car. This led to a warrantless search that uncovered illegal drugs. Lloyd was arrested and charged with trafficking, possession for sale, and possession of schedule I and II controlled substances.

Lloyd moved to suppress, arguing that the Fourth Amendment to the United States Constitution and Article 1, Section 18 of the Nevada Constitution prohibited the warrantless search. The district court granted Lloyd's motion. It determined that the drug dog's alert provided probable cause to search Lloyd's car for contraband. But it concluded that, for a warrantless automobile search to pass

[1]Pursuant to IOP Rule 13(b), this matter was transferred after oral argument before a three-judge panel to the en banc court.

muster under Nevada law, both probable cause and exigency, beyond that inherent in a car's ready mobility, must be shown. Since the State showed nothing in the way of exigent circumstances beyond the car's mobility, the district court invalidated the search and suppressed the drug evidence.

[Headnote 1]

Consistent with federal constitutional law, we hold that exigency is not a separate requirement of the automobile exception to the constitutional warrant requirement. Thus, because the drug detection dog's alert gave the officers probable cause to search Lloyd's car, which was parked in a public place and readily mobile, we reverse.

I.

The essential facts were established through officer testimony and videotape from the patrol car's camera. Trooper Richard T. Pickers of the Nevada Highway Patrol stopped respondent Jethro Lloyd in a shopping center parking lot in Elko, Nevada. It was a Sunday morning, and the courts were closed. The trooper saw Lloyd make a right turn at a red light without coming to a complete stop. By the time Trooper Pickers activated his lights and caught up to him, Lloyd had parked and gotten out of his car to go into Starbucks.

Lloyd denied running a red light. Still, he cooperated with the trooper's request that he produce his driver's license, insurance, and registration. When Trooper Pickers called dispatch to report the traffic stop and confirm Lloyd's paperwork, he asked dispatch to send a drug detection dog and handler team. The K9 unit arrived a few minutes later, before Trooper Pickers finished processing the traffic violation. Nothing suggests that the dog sniff prolonged the traffic stop.[2]

The dog alerted to the presence of drugs in Lloyd's car. Based on the dog's alert and without getting a warrant, Trooper Pickers proceeded to search the vehicle. On opening Lloyd's car door, Trooper Pickers remarked that he smelled an illegal substance. He

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[2]The district court found that, ''The stop up to and including the arrival of the drug dog and the sniff, did not appreciably lengthen the purpose of the original stop, which was for the possible issuance of a traffic ticket for running a red light,'' and ''the dog sniff occurred prior to the conclusion of the traffic stop.'' This case thus differs from *State v. Beckman*, 129 Nev. 481, 305 P.3d 912 (2013), where Trooper Pickers unlawfully detained a car and driver beyond the time needed to process the traffic stop, to give a dog and handler team time to arrive. *See Illinois v. Caballes*, 543 U.S. 405, 408-09 (2005) (a dog sniff during a lawful traffic stop does not violate the Constitution so long as the sniff does not prolong the length of the stop); *Gama v. State*, 112 Nev. 833, 837-38, 920 P.2d 1010, 1013 (1996) (same).

arrested Lloyd, handcuffed him, and secured him in the back of the patrol vehicle.

The vehicle search yielded psilocybin mushrooms and seven pounds of marijuana. Trooper Pickers transported Lloyd to the police station, and the State charged him with several drug-related offenses. It is unclear what became of Lloyd's vehicle after the search.

II.

[Headnotes 2-4]

A motion to suppress presents mixed questions of law and fact. *State v. Beckman*, 129 Nev. at 485, 305 P.3d at 916. On appeal from an order granting a motion to suppress, ''[t]his court reviews findings of fact for clear error, but the legal consequences of those facts involve questions of law that we review de novo.'' *Id.* at 486, 305 P.3d at 916. A district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review. *See United States v. Navas*, 597 F.3d 492, 496 (2d Cir. 2010).

A.

[Headnote 5]

The Fourth Amendment to the United States Constitution provides that ''[t]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated,'' and that ''no Warrants shall issue, but upon probable cause.'' Article I, Section 18 of the Nevada Constitution similarly provides, ''[t]he right of the people to be secure in their persons, houses, papers and effects against unreasonable seizures and searches shall not be violated; and no warrant shall issue but on probable cause . . . .'' Under these cognate provisions of our federal and state constitutions, warrantless searches ''are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions.'' *Katz v. United States*, 389 U.S. 347, 357 (1967); *Hughes v. State*, 116 Nev. 975, 979, 12 P.3d 948, 951 (2000). One such exception is the ''automobile exception.'' *Id.*

The automobile exception was first recognized in *Carroll v. United States*, 267 U.S. 132 (1925). A Prohibition-era case, *Carroll* approved a warrantless automobile search where the police had probable cause to believe the vehicle contained alcohol being transported in violation of the National Prohibition Act. In an extensive opinion, the Supreme Court ruled:

> On reason and authority *the true rule is that if the search and seizure without a warrant are made upon probable cause*, that is, upon a belief, reasonably arising out of circumstances

> known to the seizing officer, *that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid*.

Id. at 149 (emphasis added). The Supreme Court justified this rule by the inherent mobility of automobiles, which often makes it impractical to obtain a search warrant before the contraband is put out of reach:

> . . . the guaranty of freedom from unreasonable searches and seizures by the Fourth Amendment has been construed, practically since the beginning of the Government, as recognizing a necessary difference between a search of a store, dwelling house or other structure in respect of which a proper official warrant readily may be obtained, and a search of a ship, motor boat, wagon or automobile, for contraband goods, where it is not practicable to secure a warrant because the vehicle can be quickly moved out of the locality or jurisdiction in which the warrant must be sought.

Id. at 153. Later cases added a second justification for the automobile exception: A person has a lower expectation of privacy in a vehicle than in a home or office. *See California v. Carney*, 471 U.S. 386, 391 (1985).

Chambers v. Maroney, 399 U.S. 42 (1970), upheld a warrantless automobile search that occurred after the accused had been taken into custody and his car driven to the police station. *Id*. at 47. Differentiating vehicles from houses because of their mobility, the Supreme Court explained that the circumstances that furnish probable cause to search a vehicle are often unforeseeable and the opportunity to conduct a search fleeting. *Id*. at 48, 50-51. So, for law enforcement to search a vehicle effectively, they must either seize the vehicle while awaiting a warrant or search the vehicle without a warrant. *Id*. at 51. The Court found no constitutional difference ''between on the one hand seizing and holding a car before presenting the probable cause issue to a magistrate [for a warrant] and on the other hand carrying out an immediate search without a warrant.'' *Id*. at 52. ''Given probable cause'' to believe the vehicle contains contraband, ''either course is reasonable.'' *Id*.

[Headnotes 6, 7]

As *Chambers* suggests, *Carroll* did not establish exigency as a separate requirement of the automobile exception. To be sure, *Carroll* cites exigency as a reason for its holding, 267 U.S. at 153, but it is the exigency inherent in an automobile's ready mobility that, with probable cause, justifies a warrantless automobile search. *See Pennsylvania v. Labron*, 518 U.S. 938, 940 (1996) (describing *Carroll* as ''based on the automobile's 'ready mobility,' an exigency sufficient to excuse failure to obtain a search warrant

once probable cause to conduct the search is clear''). So long as the vehicle for which probable cause to search exists is readily mobile, the requisite exigency is conclusively presumed. *See Carney*, 471 U.S. at 391 (''The mobility of automobiles . . . 'creates circumstances of such exigency that, as a practical necessity, rigorous enforcement of the warrant requirement is impossible.' '' (quoting *South Dakota v. Opperman*, 428 U.S. 364, 367 (1976))); *Navas*, 597 F.3d at 498-500; *United States v. Scott*, 705 F.3d 410, 417 (9th Cir. 2012).[3]

In 1999, in *Maryland v. Dyson*, the Supreme Court made this point unmistakably clear:

> [T]he automobile exception does not have a separate exigency requirement: ''If a car is readily mobile and probable cause exists to believe it contains contraband, the Fourth Amendment . . . permits police to search the vehicle without more.''

527 U.S. 465, 467 (1999) (second alteration in original) (quoting *Labron*, 518 U.S. at 940).

B.

Nevada has historically followed ''the United States Supreme Court on most, if not all, of its interpretations and applications of the law governing searches and seizures.'' Thomas B. McAffee, John P. Lukens & Thaddeus J. Yurek III, *The Automobile Exception in Nevada: A Critique of the Harnisch Cases*, 8 Nev. L.J. 622, 630-31 (2008); *see Cortes v. State*, 127 Nev. 505, 515 n.7, 260 P.3d 184, 191 n.7 (2011). Initially, Nevada automobile-exception law conformed to this trend. Thus, in *Wright v. State*, 88 Nev. 460, 472, 499 P.2d 1216, 1224 (1972), we applied *Carroll* and *Chambers* to validate the warrantless search of a car parked in a motel parking lot where the police had probable cause to believe the car contained evidence of a crime. The car's inherent mobility—even though the defendant's ''arrest rendered [the car temporarily] nonmobile,'' *id.* at 471, 499 P.2d at 1224—satisfied *Carroll*'s ''standard of continuing 'exigency,' '' *id.*, such that probable cause to believe the car contained contraband or evidence of a crime justified the warrantless search, without more.

Twenty-five years after *Wright*, this court handed down three cases—*State v. Harnisch (Harnisch I)*, 113 Nev. 214, 931 P.2d

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[3]Whether and how the automobile exception applies when the vehicle is parked on private, residential property is an open question, *see Robinson v. Cook*, 706 F.3d 25, 31 n.4 (1st Cir. 2013) (noting issue and collecting cases); *United States v. Goncalves*, 642 F.3d 245, 250 (1st Cir. 2011), implicating trespass as well as privacy search-and-seizure concerns, *cf. Florida v. Jardines*, 569 U.S. ___, 133 S. Ct. 1409 (2013); *Florida v. White*, 526 U.S. 559, 561 (1999); *State v. Hobbs*, 933 N.E.2d 1281, 1285-86 (Ind. 2010).

1359 (1997); *Barrios-Lomeli v. State*, 113 Nev. 952, 944 P.2d 791 (1997); and *State v. Harnisch (Harnisch II)*, 114 Nev. 225, 954 P.2d 1180 (1998)—that called a ''startling halt'' to Nevada's reliance on United States Supreme Court automobile-exception precedent. McAffee et al., *supra*, at 633.

The seminal case, *Harnisch I*, upheld the suppression of evidence found in a search of the trunk of a car parked in an apartment complex parking lot. The police had a warrant authorizing them to search the defendant's apartment, but the warrant did not mention the car. On appeal, the State argued that, since the car had been parked inside the apartment's curtilage, the warrant extended to the car. This court disagreed. Since ''the State only raised the curtilage issue and did not raise [any] warrant exception issue,'' *Harnisch I*, 113 Nev. at 222 n.4, 931 P.2d at 1365 n.4, the State's appeal could and should have ended there. But we continued, sua sponte, to raise and reject the automobile exception as a possible alternative basis for the State's appeal. Citing *Carroll* and *Chambers*, but repudiating *Wright*'s accurate reading of them, we declared: ''For the automobile exception to apply, two conditions must be present: first, there must be probable cause to believe that criminal evidence was located in the vehicle; and second, there must be exigent circumstances sufficient to dispense with the need for a warrant.'' *Id.* at 222-23, 931 P.2d at 1365. Since the police arrested the defendant when he arrived home, ''the car was not readily movable by the defendant,'' defeating exigency. *Id.* at 223, 931 P.2d at 1365.

Harnisch I misstated federal law, which contains no separate exigency requirement. This we acknowledged in *Barrios-Lomeli*, 113 Nev. at 957, 944 P.2d at 794, and *Harnisch II*, 114 Nev. at 227, 954 P.2d at 1182. But ''[r]ather than conceding its mistake and conforming to federal precedent, the court quickly changed direction.'' McAffee et al., *supra*, at 634.

Harnisch II denied rehearing in *Harnisch I*. In doing so, it recast *Harnisch I*'s flawed automobile-exception analysis as rooted in state, not federal, constitutional law: ''[W]hile the federal constitution may not require the presence of exigent circumstances to validate a warrantless search of an automobile, Nevada may adhere to this requirement.'' 114 Nev. at 228, 954 P.2d at 1182. Continuing, *Harnisch II* held: ''We now conclude . . . that the Nevada Constitution requires both probable cause and exigent circumstances in order to justify a warrantless search of a parked, immobile, unoccupied vehicle.'' *Id.* at 228-29, 954 P.2d at 1183.

Comparing *Barrios-Lomeli* with *Fletcher v. State*, 115 Nev. 425, 990 P.2d 192 (1999), demonstrates how little real guidance *Harnisch I* and *II* offer. In *Barrios-Lomeli*, we *invalidated* a warrantless search of a car that police officers, on a drug-buy stakeout, saw the defendant park in a shopping center parking lot. Probable

cause existed to believe the car contained contraband, 113 Nev. at 956, 944 P.2d at 793, and the car was fully operational, the defendant having driven there and gone inside for a McDonald's meal with his girlfriend. 113 Nev. at 954, 944 P.2d at 792. In *Fletcher*, by contrast, we *upheld* the warrantless search of a car that police officers pulled over on a roadside stop. As in *Barrios-Lomeli*, probable cause existed to believe the car contained contraband, and the car was fully operational, the defendant having been driving it before being pulled over. *Fletcher*, 115 Nev. at 430, 990 P.2d at 195. And in both, the police detained the defendant before conducting the warrantless vehicle search, *Barrios-Lomeli*, 113 Nev. at 958, 944 P.2d at 794; *Fletcher*, 115 Nev. at 430, 990 P.2d at 195, and the defendants' privacy interests were equivalent—Barrios-Lomeli's car was parked in a shopping center parking lot and Fletcher's by the side of a public road.

But we found insufficient exigent circumstances in *Barrios-Lomeli* and sufficient exigent circumstances in *Fletcher* to justify the warrantless automobile search. The difference? Fletcher's arrest left his vehicle ''on the roadside subject to a police inventory search and later impoundment, creating what we conclude to be a sufficient exigent circumstance distinct from the parked, [immobile and] unoccupied vehicles'' in *Harnisch* and *Barrios-Lomeli*. *Fletcher*, 115 Nev. at 430, 990 P.2d at 195; *see Hughes v. State*, 116 Nev. 975, 980, 12 P.3d 948, 951 (2000) (''*Fletcher* concerned a roadside search, as opposed to a search of a parked and unoccupied vehicle''). ''It would be unreasonable to require the police to remain at the scene of the [roadside] arrest pending the arrival of a warrant.'' *Fletcher*, 115 Nev. at 430, 990 P.2d at 195. This begs the question, though, why it was reasonable to require the same commitment of time and resources to detain the defendant and his car in a shopping center parking lot pending arrival of a warrant in *Barrios-Lomeli*. *See Camacho v. State*, 119 Nev. 395, 75 P.3d 370 (2003) (no exigency where vehicle was parked in a grocery store parking lot, the vehicle's owner was detained, and police subsequently towed the vehicle).[4] *Hughes* suggests an additional distinction—that the pre-*Fletcher* cases (*Harnisch* and *Barrios-Lomeli*) arose ''in the context of an automobile that was 'parked, immobile and unoccupied *at the time the police first en-*

[4]*Barrios-Lomeli* cites NRS 171.123, which authorizes the police to detain a person ''whom the officer encounters under circumstances which reasonably indicate that the person has committed, is committing or is about to commit a crime,'' but the detention may not last ''longer than is reasonably necessary to effect the purposes of this section, and in no event longer than 60 minutes,'' and suggests that an hour's detention pending application for a warrant is preferable to an immediate search. 113 Nev. at 958, 944 P.2d at 794. *Chambers* rejects this logic, 399 U.S. at 51, and neither *Fletcher* nor *Hughes* alludes to this aspect of *Barrios-Lomeli*.

countered it,' '' whereas in *Fletcher*, the police pulled the car over, *Hughes*, 116 Nev. at 980, 12 P.3d at 951 (quoting *Harnisch II*, 114 Nev. at 228, 954 P.2d at 1182)—but this is not true of *Barrios-Lomeli*, where the officers saw the defendant park and alight from his car, *Barrios-Lomeli*, 113 Nev. at 954, 944 P.2d at 792.

[Headnote 8]

These cases draw perplexing distinctions that do not square with the reasons for them. To begin with, *Harnisch II*'s ''parked, immobile and unoccupied'' standard sounds like more than it is; when do the police search cars that are moving and occupied? A person's residence differs from a parking lot or public road, *see supra* note 3, but the latter two do not differ meaningfully from each other as to privacy or risk of pillage. If anything, a car left unattended in a shopping center parking lot probably carries a more immediate risk of loss of evidence than one left by the side of a road. And as the facts of this case illustrate—Trooper Pickers saw Lloyd run a red light and followed him into a shopping center parking lot—traffic stops occur both in parking lots and at the side of the road. Finally, what drew police attention to the defendant and his car in the first place may legitimately bear on the scope of the search incident to arrest when the automobile exception does not apply. *E.g.*, *Arizona v. Gant*, 556 U.S. 332, 350-51 (2009); *Camacho*, 119 Nev. at 399-400, 75 P.3d at 373-74. But where probable cause exists to believe the car contains contraband or evidence of a crime, a vehicle that is readily mobile presents the same risk of loss of evidence, or exigency, regardless of what caused it to stop. *See* McAffee et al., *supra*, at 646-48 (distinguishing ''automobile exception'' from ''search incident'' to arrest cases and suggesting that the *Harnisch* cases and their progeny conflate the two).

After analyzing our automobile-exception decisions, the district court did not—and likely could not—determine whether Lloyd's situation was more like *Harnisch*, *Barrios-Lomeli*, and other parked car cases, or *Fletcher* and *Hughes*, the roadside stop cases. After all, before the search, Lloyd alighted from his car to walk into Starbucks, but there was also evidence that Trooper Pickers was in pursuit when Lloyd pulled into the parking lot. If Lloyd had seen the trooper's lights before he pulled into the shopping center and stopped by the side of the road, *Fletcher* and *Hughes* would control. Yet, because Lloyd continued into the parking lot and got out of his car, *Barrios-Lomeli* seems more applicable. Even this is not clear, though, since *Barrios-Lomeli* suggests that if the police cannot get a warrant after 60 minutes of trying, sufficient exigency might materialize; here, since it was a Sunday with the courts

closed, it seems likely that waiting an hour would have accomplished little, if anything.

C.

[Headnote 9]

Nevada's automobile-exception caselaw has been criticized as ''produc[ing] confusion, while doing little to enhance the protection of individual privacy interests.'' McAffee et al., *supra*, at 624. The criticism is fair. The constitutional protection in the federal automobile-exception caselaw lies in the requirement of probable cause to believe the vehicle contains contraband or evidence of a crime and the car's inherent mobility, not the peripheral factors identified in the *Harnisch* cases and their progeny. And the confusion in our caselaw not only makes it difficult for district courts to apply the law, it also makes it difficult for police to comply with the law in the field. *Compare* Barry Latzer, *The New Judicial Federalism and Criminal Justice*: *Two Problems and a Response*, 22 Rutgers L.J. 863, 865-66 (1991) (explaining that police confusion undermines laws meant to protect constitutional rights), *with Herring v. United States*, 555 U.S. 135, 144 (2009) (the exclusionary rule applies to ''deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence,'' not every error that occurs).

[Headnote 10]

In the 80 years since *Carroll* articulated the automobile exception, the Supreme Court ''has slowly and cautiously developed this narrow exception to the warrant requirement into a balanced doctrine that protects privacy concerns while providing clear guidelines for effective law enforcement.'' McAffee et al., *supra*, at 623. Given that the Fourth Amendment and Article 1, Section 18 of the Nevada Constitution use virtually identical language, independently deriving a different formulation to protect the same liberty that the United States Constitution secures—and paying for that difference with confusing rules and unpredictable, oft-litigated results—cannot be justified. James A. Gardner, *State Constitutional Rights as Resistance to National Power: Toward a Functional Theory of State Constitutions*, 91 Geo. L.J. 1003, 1059 (2003); *see also* Latzer, *supra*, at 864 (''There is nothing improper in concluding that the Supreme Court's construction of similar text is sound.''). We now conclude, as a number of sister states have, that our state constitution compels no different automobile exception to its warrant requirement than the Fourth Amendment does. *See, e.g.*, *State v. Reyna*, 71 P.3d 366, 369 (Ariz. Ct. App. 2003) (''[T]he decisions concerning the scope of allowable vehicle

searches under the federal constitution are 'well on point' in deciding cases under the Arizona Constitution.''); *Berry v. State*, 843 A.2d 93, 113 (Md. Ct. Spec. App. 2004) (''We therefore apply the law as it exists in Maryland, which calls for us to follow in this case the Supreme Court's law on the subject.''); *Commonwealth v. Motta*, 676 N.E.2d 795, 800 (Mass. 1997) (''[W]e have also followed the Supreme Court in the area of the automobile exception.''); *State v. Zwicke*, 767 N.W.2d 869, 873 (N.D. 2009) (overruling prior case establishing exigency as a separate requirement of the automobile exception); *State v. Saine*, 297 S.W.3d 199, 207 (Tenn. 2009) (''the automobile exception does not require a separate finding of exigency under the Tennessee Constitution''); *McKenney v. State*, 165 P.3d 96, 99 (Wyo. 2007) (the automobile exception does not require a separate finding of exigency under Wyoming law); *see also* 3 Wayne R. LaFave, *Search and Seizure: A Treatise on the Fourth Amendment* § 7.2(b), at 557 n.79 (4th ed. 2004) (listing jurisdictions that have dispensed with a separate exigency requirement for automobile searches based on probable cause).

[Headnote 11]

We therefore disapprove of *Harnisch II* and its progeny to the extent that they establish exigency as a separate requirement of the automobile exception under the Nevada Constitution. We do not take this step lightly. ''[S]tare decisis plays a critical role in our jurisprudence,'' *Egan v. Chambers*, 129 Nev. 239, 243, 299 P.3d 364, 367 (2013), but ''when governing decisions prove to be 'unworkable or are badly reasoned,' they should be overruled.'' *Id.* (quoting *Payne v. Tennessee*, 501 U.S. 808, 827 (1991)).

[Headnotes 12, 13]

The dissent argues that allowing a police officer who has probable cause to search a readily mobile vehicle to do so without a warrant carries too great a cost. We cannot agree. Our Constitutions protect against unreasonable searches *and* seizures. U.S. Const. amend. IV; *see* Nev. Const. art. I, § 18. In the automobile-exception context, a police officer who has probable cause to believe the car contains contraband or evidence of a crime must either seize the vehicle while a warrant is sought or search the vehicle without a warrant. Given probable cause, either course is constitutionally reasonable. *See Maroney*, 399 U.S. at 52. ''Although it is elementary that states may provide greater protections than required by the federal Constitution, it is at least as fundamental that such decisions should be carefully reasoned and grounded in a strong public policy.'' McAffee et al., *supra*, at 648. *Harnisch I* and its confusing progeny do not meet these criteria.

''The federal automobile exception is rooted in good policy that balances private interests with the collective good, even as it provides law enforcement with clear and unequivocal guidelines for doing their jobs.'' *Id.*

III.

[Headnote 14]

The district court correctly found that the drug detection dog's alert gave the officers probable cause to believe controlled substances were in Lloyd's car. *Florida v. Harris*, 568 U.S. ___, ___, 133 S. Ct. 1050, 1057 (2013) (''[A] court can presume (subject to any conflicting evidence offered) that the dog's alert provides probable cause to search.''); *Latham v. State*, 97 Nev. 279, 280, 629 P.2d 780, 780-81 (1981) (upholding issuance of a search warrant based upon a trained drug detection dog's alert). The car was readily mobile and parked in a public place. Thus, the automobile exception to the warrant requirement imposed by the Fourth Amendment and the Nevada Constitution's cognate provision justified the search. We therefore reverse the district court's order granting Lloyd's motion to suppress and remand for further proceedings consistent with this opinion.

GIBBONS, HARDESTY, PARRAGUIRRE, and DOUGLAS, JJ., concur.

CHERRY, J., with whom SAITTA, J., agrees, dissenting:

I respectfully disagree with my colleagues in the majority. The majority holds that in order to have a warrantless search of an automobile, the police need only probable cause and need not show exigent circumstances. Their decision to reverse the trial court is not supported by our own stare decisis, *State v. Harnisch*, 114 Nev. 225, 228-29, 954 P.2d 1180, 1183 (1998), and is not consistent with but is in fact violative of Article 1, Section 18 of our Nevada Constitution, which prohibits unreasonable searches. In this day of modern technology and the allowance of telephonic search warrants, NRS 179.045(2), there is no plausible reason why an officer, after bringing a drug dog to establish probable cause, should fail to attempt to obtain a telephonic search warrant. More importantly, if the officer had attempted to obtain a telephonic search warrant, he would have been put under oath as to Lloyd's alleged traffic violation. The majority infers that the officer did not attempt to get a warrant because it was a Sunday morning, the courts were closed, and a telephonic warrant was not available. As a former district court judge who served in that capacity for eight years, I cannot accept that argument. There were many occasions when officers came to my home on a Saturday or Sunday to obtain

a search warrant, and even more on point are the numerous telephonic warrants that I granted in the middle of the night and at other ''inconvenient'' times. It is not out of the ordinary for police officers throughout our state to have the home phone numbers and cellular numbers of members of the judiciary.

I do not see the ''confusion'' that the majority alleges in Nevada's automobile exception caselaw, which requires probable cause and exigent circumstances for a warrantless search. I see no reason not to give the people of our state more protection from warrantless searches of automobiles than is afforded by the United States Constitution and existing federal caselaw.

In the instant case, the officer sees the respondent run a red light. The officer follows the respondent into a shopping center parking lot to issue him a ticket. The respondent is out of his car, and while the ticket is being processed, a drug dog is summoned in accordance with *State v. Beckman*, 129 Nev 481, 305 P.3d 912 (2013), and establishes probable cause. There is no sound reason at this stage that the officer could not telephone a judicial officer, be put under oath, and obtain a search warrant. This makes sense to me and should be the correct constitutional procedure in our state.

For the above reasons, I would affirm the trial court's grant of the motion to suppress evidence.

CIVIL RIGHTS FOR SENIORS, A NEVADA NONPROFIT CORPORATION, APPELLANT, *v.* ADMINISTRATIVE OFFICE OF THE COURTS, RESPONDENT.

No. 60945

October 31, 2013 313 P.3d 216

Appeal from a district court order denying a petition for a writ of mandamus seeking to compel the Administrative Office of the Courts to disclose records under Nevada's Public Records Act, NRS Chapter 239. First Judicial District Court, Carson City; James Todd Russell, Judge.

Requestor filed petition for writ of mandamus seeking to compel the Administrative Office of the Courts to disclose records related to Foreclosure Mediation Program (FMP) under the Public Records Act. The district court denied petition. Requestor appealed. On issues of apparent first impression, the supreme court held that: (1) requested documents were confidential as a matter of law, (2) documents were not court records subject to public in-

spection, and (3) documents were not subject to public inspection pursuant to principles of the common-law right to inspect public records.

Affirmed.

[Rehearing denied February 24, 2014]

Philip A. Olsen, Tahoe City, California, for Appellant.

Allison, MacKenzie, Pavlakis, Wright & Fagan, Ltd., and *Alicia G. Johnson*, Carson City, for Respondent.

1. MANDAMUS.
   A writ of mandamus is available to compel 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. NRS 34.160.
2. MANDAMUS.
   A district court's decision to grant or deny a writ petition is reviewed by the supreme court under an abuse of discretion standard.
3. APPEAL AND ERROR.
   Questions of statutory construction, including the meaning and scope of a statute, are questions of law, which the supreme court reviews de novo.
4. STATUTES.
   Generally, when the language of a statute is plain and unambiguous, the courts are not permitted to search for its meaning beyond the statute itself.
5. RECORDS.
   Documents related to Foreclosure Mediation Program (FMP) of the Administrative Office of the Courts were confidential as a matter of law, and therefore were not subject to disclosure under the Public Records Act, where court rules governing proceedings under the FMP stated that ''all documents and discussions presented during the mediation'' were ''deemed confidential and inadmissible in any subsequent actions or proceedings, except in an action for judicial review,'' and requested documents included all mediator statements, all certificated, all assignments provided to mediators, all petitions for sanctions, and all trustee affidavits. NRS 239.010(1).
6. RECORDS.
   In assessing claims of confidentiality under the Public Records Act, courts presume that all government-generated documents are open to disclosure unless they are explicitly declared confidential by law or the state entity proves that the private or law enforcement interests in confidentiality clearly outweigh the general policy in favor of open government. NRS 239.010(1).
7. COURTS.
   Court rules, when not inconsistent with the state or federal constitution or certain laws of the state, have the effect of statutes.
8. RECORDS.
   Documents related to Foreclosure Mediation Program (FMP) of the Administrative Office of the Courts were not subject to disclosure as court records, where the requested documents were not maintained in connec-

tion with a judicial proceeding; rather, the FMP process was completed before, and often in lieu of, the initiation of a proceeding in any court.

9. COURTS.

As a separate branch of government under the state constitution, the judiciary has the inherent authority to manage its own affairs, make rules, and carry out other incidental powers when reasonable and necessary for the administration of justice.

10. RECORDS.

Documents related to Foreclosure Mediation Program of the Administrative Office of the Courts (AOC) were not subject to public inspection pursuant to principles of the common-law right to inspect public records, where the AOC's interest in maintaining the confidentiality of participant information was justified, given the personal and sensitive nature of the information involved.

Before PICKERING, C.J., GIBBONS, HARDESTY, PARRAGUIRRE, DOUGLAS and CHERRY, JJ.[1]

OPINION

Per Curiam:

This appeal presents novel issues regarding the scope of public access to certain records maintained by the Administrative Office of the Courts (AOC) and whether the AOC is a ''[g]overnmental entity'' within the meaning of NRS 239.005(5).[2]

Appellant Civil Rights for Seniors (CRS) filed a request with the AOC pursuant to Nevada's Public Records Act (the Act), seeking access to a variety of documents related to Nevada's Foreclosure Mediation Program (FMP). The AOC offered to provide some of the documents in redacted or statistical form but refused to disclose other information as either confidential or privileged. CRS filed a petition for a writ of mandamus in district court to compel the AOC to produce all of the requested documents in their original form. The district court denied CRS's petition, reasoning that the AOC, as a judicial entity, is not subject to the Act and that the requested documents are otherwise confidential as a matter of law.

On review, we conclude that the district court properly rejected access to the requested information based on the confidentiality provisions set forth in the rules of this court. Accordingly, we affirm the district court's order.

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[1]THE HONORABLE NANCY M. SAITTA, Justice, voluntarily recused herself from participation in the decision of this matter.

[2]At the time of the relevant events in this case, NRS 239.005(5) was numbered NRS 239.005(4). The subsection was renumbered effective October 1, 2013. *See* A.B. 31, 77th Leg. (Nev. 2013). For consistency, all citations refer to the subsection number of the 2013 version of the statute.

FACTS AND PROCEDURAL HISTORY

Beginning in 2009, the Foreclosure Mediation Program has provided Nevada homeowners the opportunity to attend loan-modification mediation with the beneficiary of the deed of trust or a qualified representative before a nonjudicial foreclosure sale can occur. *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 888, 266 P.3d 602, 603 (2011). When a homeowner elects mediation, the homeowner and the beneficiary of the deed of trust must participate in mediation in good faith and produce certain documents and information. *See Pasillas v. HSBC Bank USA*, 127 Nev. 462, 469, 255 P.3d 1281, 1286-87 (2011). After mediation has concluded, the mediator issues a statement that may recommend sanctions and must include any agreement reached by the parties. FMR 17. If either party fails to comply with the statutory requirements, the other party can request judicial review to determine whether sanctions are warranted for bad faith. *See Holt*, 127 Nev. at 893, 266 P.3d at 606. Ultimately, the beneficiary must obtain an FMP mediation certificate to exercise a valid nonjudicial foreclosure sale under NRS 107.080. NRS 107.086(2)(c)[3] (a ''trustee shall not exercise a power of sale . . . unless the trustee . . . [c]auses to be recorded [an FMP certificate stating either] that no mediation is required [or that] mediation has been completed in the matter'').

Under authority delegated by the Legislature, NRS 107.086(8), this court appointed the AOC as Mediation Administrator, which is charged with the general duties for administering foreclosure mediations. FMR 2(1). As Administrator, the AOC may appoint a manager and support staff and may enter into contracts with third parties for mediation-related services. FMR 2(2). The AOC maintains a list of court-approved available mediators and selects mediators for assignment. FMR 3(2), (3).

In 2011 and 2012, CRS twice sought access to information contained in FMP records maintained by the AOC in its capacity as Mediation Administrator. CRS sought copies of all mediator statements and FMP certificates issued since July 2009, as well as copies of all mediator assignments, all correspondence between AOC employees, any recommendations of sanctions, the minutes of various meetings conducted by the AOC or the supreme court, law firm billings, legal agreements, and all written comments received by the AOC from FMP participants. The AOC denied many of CRS's requests, contending that the requested documents were either confidential pursuant to Nevada's Foreclosure Mediation Rules or subject to the attorney-client or government deliberative process

[3]NRS 107.086 was amended effective July 1, 2013. *See* S.B. 278, 77th Leg. (Nev. 2013). The amendments do not affect the quoted paragraph.

privileges. In doing so, the AOC offered to provide many records in statistical or redacted form so that CRS could receive the benefit of the information without compromising the confidentiality of the FMP records. Dissatisfied with this response, CRS filed a petition for a writ of mandamus with the district court to compel the AOC to grant access to the requested documents in their original form.

During the district court's mandamus hearing, CRS explained that it was requesting the information in order to evaluate the effectiveness of the FMP and to increase administrative transparency. CRS also clarified that although the AOC had offered to provide the records in statistical or redacted form, this was insufficient because CRS would be unable to track a particular case or contact homeowners for additional information. The AOC responded that it was not a government entity as defined in NRS Chapter 239, and therefore CRS could not rely on the Act to compel disclosure. The AOC further argued that disclosure of homeowners' identifying information would inappropriately reveal highly personal and sensitive financial information. Additionally, according to the AOC, FMP participants had previously been assured that certain aspects of the FMP process would be confidential. The AOC also objected to disclosure of the mediator statements and trustee affidavits regarding negotiation terms, as it might discourage future FMP participation.

The district court denied CRS's petition, concluding that the judicial branch of government is not included in NRS 239.005(5)'s definition of ''[g]overnmental entity,'' and thus the Act did not apply. The district court further determined that the FMRs prohibit disclosure of the requested documents, which include the identifying information of FMP participants, until a petition for judicial review is filed. CRS now brings this appeal.

DISCUSSION

[Headnotes 1-4]

''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.'' *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see* NRS 34.160. '' 'A district court's decision to grant or deny a writ petition is reviewed by this court under an abuse of discretion standard.' However, questions of statutory construction, including the meaning and scope of a statute, are questions of law, which this court reviews de novo.'' *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003) (quoting *DR*

Partners v. Bd. of Cnty. Comm'rs, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000)). ''Generally, when 'the language of a statute is plain and unambiguous . . . the courts are not permitted to search for its meaning beyond the statute itself.' '' *Chanos v. Nev. Tax Comm'n*, 124 Nev. 232, 240, 181 P.3d 675, 680 (2008) (quoting *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)).

The requested records are confidential under the Act

[Headnote 5]

Under the Act, ''unless otherwise declared by law to be confidential, all public books and public records of a governmental entity must be open at all times during office hours to inspection by any person.'' NRS 239.010(1).[4] On appeal, CRS argues that the Act compels disclosure because ''governmental entity'' necessarily applies to the judiciary and the requested information has not otherwise been declared confidential. However, we need not decide whether the Act applies to the judiciary in general, or the AOC in particular, because we conclude that even if the Act does apply to the judiciary, the records in question are confidential as a matter of law.

[Headnotes 6, 7]

In assessing claims of confidentiality under the Act, we presume that all government-generated documents are open to disclosure unless they are explicitly declared confidential by law or the state entity proves that the private or law enforcement interests in confidentiality clearly outweigh the general policy in favor of open government. *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 880, 266 P.3d 623, 628 (2011). ''Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes.'' *Margold v. Eighth Judicial Dist. Court*, 109 Nev. 804, 806, 858 P.2d 33, 35 (1993) (citing *Lauer v. Eighth Judicial Dist. Court*, 62 Nev. 78, 85, 140 P.2d 953, 956 (1943)).

Under NRS 107.086(8)(d), the Supreme Court is to carry out the FMP statutory provisions by ''[e]stablishing procedures to protect the mediation process from abuse.'' Accordingly, we enacted the FMRs under power delegated by the Legislature and under our inherent power to provide for the efficient administration of justice. FMR 1(1).

The FMRs provide for confidentiality of many FMP documents. Most important here, the rules state that ''[a]ll documents and dis-

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[4]The quoted language reflects NRS 239.010(1) as amended effective October 1, 2013. *See* A.B. 31, 77th Leg. (Nev. 2013). The pertinent part of the previous version of NRS 239.010(1) contained substantially similar language.

cussions presented during the mediation shall be deemed confidential and inadmissible in any subsequent actions or proceedings, *except* in an action for judicial review.'' FMR 19. In addition, FMR 7(3) provides that ''[a]ny program-issued certificate is considered confidential until recorded.''[5]

Thus, the FMRs plainly state that any documents or discussions presented at mediation, as well as any unrecorded certificates, are unequivocally confidential unless and until a participant files a petition for judicial review or the certificate is recorded.[6] FMR 7, 19. Because all discussions during the mediation are confidential, post-mediation documents memorializing or relating to those discussions are also confidential as a matter of law. *See* FMR 19.

Here, CRS is requesting various documents dating back to July 2009, including all mediator statements, all certificates, all assignments provided to the mediators, all petitions for sanctions, and all trustee affidavits. The AOC refused to release these documents in their original form, explaining that they contain the names and other identifying information of FMP participants. We conclude that regardless of whether the requested documents contain identifying information, they are documents presented at mediation, documents that embody the discussions and negotiations that took place therein, and certificates without regard to their recording status. We further conclude that these documents are confidential according to FMR 7 and FMR 19, and thus are confidential as a matter of law.

The requested documents are not court records

[Headnotes 8, 9]

In the alternative, CRS argues that the records are subject to disclosure as court records. As a separate branch of government under the Nevada Constitution, the judiciary has the inherent authority to manage its own affairs, make rules, and carry out other incidental powers when ''*reasonable and necessary*'' for the administration of justice. *Halverson v. Hardcastle*, 123 Nev. 245,

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[5]The court also notes that the version of FMR 11 in effect both when CRS made its requests and when the district court denied CRS's petition explicitly provided confidentiality for certain materials. FMR 11(8)-(9). Amendments removing these subsections became effective January 1, 2013. *In re Adoption of Rules for Foreclosure Mediation*, ADKT No. 435 (Order Amending Foreclosure Mediation Rules, December 6, 2012).

[6]Similarly, because the requested information relates to the FMP, a confidential and voluntary mediation program, and does not relate to a public judicial proceeding, we reject CRS's argument that the First Amendment guarantees the public's right to access. *Del Papa v. Steffen*, 112 Nev. 369, 374, 915 P.2d 245, 248 (1996) (recognizing First Amendment rights of access to criminal and civil judicial proceedings, as these places are ''traditionally open to the public'').

260-61, 163 P.3d 428, 439-40 (2007) (internal quotations omitted). In exercising this power, we have adopted rules declaring that ''[a]ll court records in civil actions are available to the public, except as otherwise provided in these rules or by statute.'' SRCR 1(3). ''Court records'' are then defined to include ''information . . . that is maintained by a court in connection with a judicial proceeding.'' SRCR 2(2)(a). This ''does not include data maintained by or for a judge pertaining to a particular case or party, such as . . . working papers; or information gathered, maintained, or stored by a government agency or other entity to which the court has access but which is not entered in connection with a judicial proceeding.'' SRCR 2(2)(b).

We conclude that the requested documents are not maintained in connection with a judicial proceeding. Indeed, the FMP process is completed before, and often in lieu of, the initiation of a proceeding in any court. Thus, the requested records are not court records subject to disclosure pursuant to SRCR 1(3).

The common law does not mandate disclosure

[Headnote 10]

Because the requested documents are not court records and are not otherwise open to the public, we also reject CRS's argument that disclosure is required pursuant to principles of the common law right to inspect public records. *See Nixon v. Warner Commc'ns, Inc.*, 435 U.S. 588, 597-98 (1978) (holding that the public's ''general right to inspect and copy public records'' is not absolute and courts have inherent authority to deny public access to its records when justified). Even if this court were to conclude that the requested documents were public court records, however, the AOC's interest in maintaining the confidentiality of participant information is justified, given the personal and sensitive nature of the information involved. This is particularly true in this case, where CRS admitted it sought the information in order to contact homeowners directly. To hold otherwise would expose highly sensitive personal and financial information to the public and thus have a chilling effect on open and candid FMP participation, undermining the Legislature's interest in promoting mediation.

CONCLUSION

Because the FMRs plainly provide that the requested information is confidential, and given the judiciary's inherent authority to manage its own affairs, we hold that the information is explicitly declared confidential by law and the AOC acted within its power by maintaining the requested documents as confidential in order to protect the privacy of FMP participants. As to the remaining documents, the AOC has asserted the attorney-client and government

deliberative process privileges in denying CRS's requests. Because CRS has never argued that these privileges do not apply, we conclude that CRS has waived any argument against the AOC's asserted privileges. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (''A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.'').

Thus, we conclude that the district court properly rejected access to the requested information based on the confidentiality provisions set forth in the rules of this court, and we therefore affirm its decision.