join Ferrell. We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order compelling Ferrell's joinder and to enter an order denying New York-New York's motion to compel Ferrell's joinder as a necessary party.

HARDESTY and CHERRY, JJ., concur.

OTAK NEVADA, LLC, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DOUG SMITH, DISTRICT JUDGE, RESPONDENTS, AND PACIFICAP CONSTRUCTION SERVICES, LLC; PACIFICAP PROPERTIES GROUP, LLC; PACIFICAP HOLDINGS XXIX, LLC; CHAD I. RENNAKER; JASON Q. RENNAKER; CHEYENNE APARTMENTS PPG, LP; AND CHRISTOPHER WATKINS, REAL PARTIES IN INTEREST.

No. 59050

November 7, 2013 312 P.3d 491

Original petition for a writ of mandamus challenging a district court order declining to dismiss a third-party complaint.

After survivors of victim of fatal automobile accident brought negligence action against architecture firm and developer, firm reached settlement with survivors, and developer filed third-party complaint against firm, asserting claims for breach of contract, express indemnity, express contribution, breach of the covenant of good faith and fair dealing, professional negligence, and punitive damages, firm sought writ of mandamus to compel the district court to dismiss third-party claims against it. The supreme court, HARDESTY, J., held that: (1) the district court did not abuse its discretion in finding that firm's settlement with survivors was made in good faith; (2) as a matter of first impression, if a settlement is in good faith, good-faith settlement statute bars all claims against defendant, regardless of the claim's title; (3) purported indemnity clause in contract involving developer and firm was actually contribution clause; and (4) developer's claims against firm sought contribution and, thus, were barred by good-faith settlement statute.

Petition granted.

Morris Polich & Purdy, LLP, and *Nicholas M. Wieczorek*, Las Vegas, for Petitioner Otak Nevada, LLC.

Bauman Loewe Witt & Maxwell, PLLC, and *Whitney C. Wilcher*, Las Vegas, for Real Parties in Interest Chad I. Rennaker and Jason Q. Rennaker.

Christiansen Law Offices and *Peter S. Christiansen, Richard E. Tanasi*, and *Kristina Weller*, Las Vegas; *Law Office of Daniel S. Simon* and *Daniel S. Simon*, Las Vegas; *Lewis & Roca, LLP*, and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas, for Real Party in Interest Christopher Watkins.

Lewis Brisbois Bisgaard & Smith, LLP, and *Josh C. Aicklen, Mark J. Brown*, and *Stephanie J. Smith*, Las Vegas; *Sterling Law, LLC*, and *Beau Sterling*, Las Vegas, for Real Parties in Interest Cheyenne Apartments PPG, LP; Pacificap Holdings XXIX, LLC; Pacificap Properties Group, LLC; Chad I. Rennaker; and Jason Q. Rennaker.

Thagard, Reiss & Brown, LLP, and *Thomas Friedman*, Las Vegas, for Real Party in Interest Pacificap Construction Services, LLC.

1. MANDAMUS.
   Whether an original petition for extraordinary relief will be considered is purely discretionary with the supreme court.
2. MANDAMUS.
   Petitioner seeking writ of mandamus bears the burden of demonstrating that extraordinary relief is warranted.
3. MANDAMUS.
   The right to appeal may afford an adequate legal remedy such that mandamus relief is not appropriate. NRS 34.170.
4. MANDAMUS.
   The supreme court will not entertain a petition for a writ of mandamus, challenging the denial of a motion to dismiss, unless the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.
5. APPEAL AND ERROR.
   The supreme court reviews the district court's determination of good faith for an abuse of discretion.
6. APPEAL AND ERROR.
   An abuse of discretion occurs when the district court's decision is not supported by substantial evidence.
7. APPEAL AND ERROR.
   By statute, a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith. NRS 17.245(1)(b).
8. CONTRIBUTION; INDEMNITY.
   A settlement is in good faith, under statute in which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith, so long as it is not disproportionately lower than the settling defendant's fair share of damages. NRS 17.245(1)(b).

9. CONTRIBUTION; INDEMNITY.
A settlement for less than what the other defendants paid will generally be in good faith, under statute in which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith, when the settling defendant's potential liability is minimal. NRS 17.245(1)(b).

10. CONTRIBUTION; INDEMNITY.
In survivors' action against architecture firm and developer, the district court did not abuse its discretion in finding that architecture firm's settlement for $210,000 with survivors of victim of fatal automobile accident was made in good faith, for purposes of statute under which a defendant could not be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settled with the plaintiff in good faith; architecture firm's potential liability was minimal, since firm was not obligated contractually or by custom to frequent site in order to report unsafe conditions, and contract stated that firm was not responsible for safety precautions and programs. NRS 17.245(1)(b).

11. CONTRIBUTION; INDEMNITY.
A settlement is not considered made in bad faith, under statute in which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith, simply because its purpose is to eliminate third-party liability. NRS 17.245(1)(b).

12. CONTRIBUTION; INDEMNITY.
The district court is vested with considerable discretion in approving settlements under the statute in which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith. NRS 17.245(1)(b).

13. CONTRIBUTION; INDEMNITY.
Once a district court determines that a defendant has settled in good faith, the statute under which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith bars all claims against the settling defendant that in effect seek contribution and equitable indemnity, regardless of the claim's title. NRS 17.245(1)(b).

14. MANDAMUS.
In the context of a petition for writ of mandamus, the supreme court reviews issues of statutory interpretation de novo.

15. STATUTES.
The supreme court must interpret statutes consistent with the intent of the Legislature.

16. CONTRIBUTION; INDEMNITY.
To determine if a claim in effect seeks contribution or equitable indemnity in contravention of statute under which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith, the district courts should consider whether (1) the claim arose from the same basis on which the settling defendant would be liable to the plaintiff, and (2) the claim seeks damages comparable to those recoverable in contribution or indemnity actions. NRS 17.245(1)(b).

17. CONTRIBUTION.
Purported indemnity clause in contract involving developer and architectural firm was actually contribution clause, for purposes of statute under which a defendant could not be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settled with

the plaintiff in good faith, where only part of the provision attributing liability to firm was last sentence of clause, which apportioned liability according to fault rather than shifting liability to the primarily responsible party. NRS 17.245(1)(b).

18. CONTRIBUTION; INDEMNITY.
Contribution is an equitable sharing of liability; whereas indemnity is a complete shifting of liability to the party primarily responsible.

19. INDEMNITY.
Indemnity clauses must be strictly construed.

20. CONTRIBUTION.
An express contribution claim is barred under statute in which a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith, since the statute did not distinguish between equitable and contractual contribution. NRS 17.245(1)(b).

21. CONTRIBUTION.
Developer's claims against architecture firm, for breach of contract and breach of the covenant of good faith and fair dealing, sought contribution and, thus, were barred by statute under which a defendant could not be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settled with the plaintiff in good faith, notwithstanding developer's argument that such claims were based on firm's alleged breach of contract, where developer did not seek any damages that were unrelated to fatal accident from which the litigation arose, and developer did not allege that firm breached duty that resulted in liability to developer on a basis other than that firm was potentially responsible for accident. NRS 17.245(1)(b).

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Under NRS 17.245(1)(b), a defendant who enters into ''a release or a covenant not to sue or not to enforce judgment . . . in good faith'' is ''discharge[d] . . . from all liability for contribution and for equitable indemnity to any other [defendant].'' The questions we are asked to decide in this original writ proceeding are: (1) If a defendant settles in good faith, does NRS 17.245(1)(b) bar ''de facto'' claims for contribution and/or equitable indemnity?; and (2) Are the contractor's third-party claims in this matter considered ''de facto'' contribution and/or equitable indemnity claims that may be barred under NRS 17.245(1)(b)? We conclude that, regardless of the claim's title, NRS 17.245(1)(b) bars all claims that seek contribution and/or equitable indemnity when the settlement is determined to be in good faith. Because we conclude that the contractor's remaining third-party claims in this matter are ''de facto'' contribution claims, and are thus barred by NRS 17.245(1)(b), we grant this petition for writ of mandamus.

FACTS AND PROCEDURAL HISTORY

This petition arises from underlying litigation concerning a fatal automobile accident that occurred at a construction site in Las Vegas, Nevada. Real parties in interest Cheyenne Apartments PPG, LP; Pacificap Holdings XXIX, LCC; Pacificap Properties Group, LLC; Chad I. Rennaker; and Jason Q. Rennaker (collectively, P&R) are the owners and developers of the site; and real party in interest Pacificap Construction Services, LLC (PCS), was the general contractor.[1] Petitioner Otak Nevada, LLC, an architecture firm, entered into an agreement with P&R to design a multifamily housing project. Otak hired subcontractor Orion Engineering and Surveying to design and implement necessary off-site road construction. Pursuant to the agreement, Orion was to design four traffic medians to be installed in the intersection adjoining the construction site and to replace traffic markers to alter the flow of traffic. However, one median was not installed, and the traffic markers were not replaced. These omissions allegedly caused the fatal automobile accident.

Following the accident, the plaintiffs and/or their estates filed complaints against, among others, PCS and P&R. After the plaintiffs amended their complaints to add Otak as a defendant, Otak and the plaintiffs reached a settlement agreement in which the plaintiffs agreed to dismiss all of their claims against Otak in exchange for $45,000, and assignment of Otak's experts. Otak filed in the district court a motion for approval of good-faith settlement based on NRS 17.245. The district court denied the motion because it found that a $45,000 settlement was not a fair settlement amount for the plaintiffs, and thus, was not in good faith. After additional settlement negotiations, Otak and the plaintiffs agreed to a new settlement in the amount of $210,000, plus the assignment of Otak's experts. Otak filed an amended motion for good-faith settlement, which was opposed by PCS and P&R on the basis that the proposed amount of the settlement was far less than Otak's potential liability or its insurance policy limits and would unfairly shift Otak's liability to the remaining defendants. The district court granted the motion.

After determining that Otak's settlement with the plaintiffs was made in good faith, the district court granted P&R leave to file a third-party complaint against Otak.[2] P&R's third-party complaint

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[1]PCS has not appeared in this writ proceeding.

[2]At the time the district court granted P&R's motion to file a third-party complaint against Otak, a writ petition challenging, on other grounds, PCS's third-party complaint and P&R's cross-claims against Otak was already pending before this court. This court subsequently concluded that those pleadings were void ab initio. *See Otak Nev., L.L.C. v. Eighth Judicial Dist. Court* (*Otak I*), 127 Nev. 593, 599, 260 P.3d 408, 412 (2011). As a result of that opinion,

against Otak asserted claims for breach of contract, express indemnity, express contribution, breach of the covenant of good faith and fair dealing, professional negligence, and punitive damages.[3] Otak moved to dismiss the complaint on the ground that the claims were all barred by NRS 17.245. It argued that NRS 17.245 bars all claims that are ''de facto'' contribution and/or equitable indemnity claims. Although the district court declined to dismiss P&R's third-party complaint in its entirety, it did dismiss P&R's claim for professional negligence. This petition for a writ of mandamus followed.

DISCUSSION

[Headnotes 1, 2]

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Whether a petition for extraordinary relief will be considered is purely discretionary with this court. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Petitioner bears ''the burden of demonstrating that extraordinary relief is warranted.'' *Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnotes 3, 4]

Mandamus is not appropriate if the petitioner has ''a plain, speedy and adequate remedy in the ordinary course of law.'' NRS 34.170. Generally, an adequate legal remedy is afforded through the right to appeal. *Pan*, 120 Nev. at 224, 88 P.3d at 841. Thus, we '' 'will not entertain a writ petition challenging the denial of a motion to dismiss [unless] . . . the issue is not fact-bound and involves an unsettled and potentially significant, recurring question of law.' ''[4] *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 185, 273 P.3d 861, 864-65 (2012) (second alteration in original) (quoting *Buckwalter v. Eighth Judicial Dist. Court*, 126 Nev. 200, 201, 234 P.3d 920, 921 (2010)). Here,

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the district court dismissed PCS's third-party complaint and denied P&R leave to amend its answer to assert a cross-claim against Otak. PCS has not filed any other claims against Otak.

[3]P&R's third-party complaint alleges claims against petitioner Otak, as well as five other third-party defendants. Because the only claims challenged in this petition are the third-party claims brought against petitioner Otak, we do not address the third-party claims brought by P&R against the five other third-party defendants.

[4]Although Otak's motion was alternatively one for summary judgment, Otak's petition only challenges the district court's refusal to dismiss all of P&R's third-party claims against Otak, not its denial of Otak's motion for summary judgment. Accordingly, we treat Otak's motion as a motion to dismiss.

whether P&R's remaining third-party claims should be dismissed depends on whether NRS 17.245 bars ''de facto'' claims for contribution and/or equitable indemnity, and whether P&R's claims constitute ''de facto'' claims. Because this issue of law is a matter of first impression and may be dispositive of the case, we exercise our discretion to entertain this writ petition.[5]

The district court did not abuse its discretion by granting Otak's motion for approval of good-faith settlement

[Headnotes 5-7]

Because our determination of whether P&R's third-party claims are barred by NRS 17.245 is contingent upon whether Otak settled in good faith with the plaintiffs in the underlying action, we first examine the district court's determination of good faith. We review the district court's determination of good faith for an abuse of discretion. *Velsicol Chem. Corp. v. Davidson*, 107 Nev. 356, 357, 811 P.2d 561, 561 (1991). An abuse of discretion occurs when the district court's decision is not supported by substantial evidence. *Finkel v. Cashman Prof'l, Inc.*, 128 Nev. 68, 72-73, 270 P.3d 1259, 1262 (2012). '' 'Substantial evidence has been defined as that which a reasonable mind might accept as adequate to support a conclusion.' '' *Id.* at 73, 270 P.3d at 1262 (quoting *McClanahan v. Raley's, Inc.*, 117 Nev. 921, 924, 34 P.3d 573, 576 (2001)).

Under NRS 17.245(1)(b), a defendant cannot be liable to co-defendants in a tort action for contribution or equitable indemnity if the defendant settles with the plaintiff in good faith. We have previously declined to define ''good faith'' under NRS 17.245(1)(b), and have left this determination ''to the discretion of the trial court based upon all relevant facts available.'' *Velsicol Chem.*, 107 Nev. at 360, 811 P.2d at 563. But we have recognized the following factors as being relevant, though not exclusive, criteria for this determination: '' '[t]he amount paid in settlement, the allocation of the settlement proceeds among plaintiffs, the insurance policy limits of settling defendants, the financial condition of settling defendants, and the existence of collusion, fraud or tortious conduct aimed to injure the interests of non-settling defendants.' '' *Doctors Co. v. Vincent*, 120 Nev. 644, 651-52, 98 P.3d 681, 686

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[5]Otak's arguments as to PCS's third-party complaint and P&R's cross-claims are now moot because the district court dismissed PCS's third-party complaint and denied P&R leave to amend its answer to add cross-claims against Otak based on this court's opinion in *Otak I*, 127 Nev. at 599, 260 P.3d at 412. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010) (holding that this court will not consider issues where an actual controversy is not present throughout ''all stages of the proceeding''). But, Otak's writ petition is not moot in its entirety because the issue of whether NRS 17.245 bars ''de facto'' claims for contribution and/or equitable indemnity is still an actual controversy between the parties due to the district court's refusal to dismiss all of the claims in P&R's third-party complaint.

(2004) (alteration in original) (quoting *In re MGM Grand Hotel Fire Litig.*, 570 F. Supp. 913, 927 (D. Nev. 1983)). In addition, the district court may consider the merits of any contribution or equitable indemnity claims against the settling defendant. *Id.* at 652, 98 P.3d at 687.

[Headnotes 8, 9]

Relying on these factors, P&R argues that Otak's settlement was not in good faith because Otak paid less than its potential liability, and much less than the amounts paid by the other defendants. In *Velsicol Chemical*, however, we noted that a settlement is in good faith so long as it is not ''disproportionately lower than [the settling defendant's] fair share of damages.'' 107 Nev. at 361, 811 P.2d at 564. Thus, a settlement for less than what the other defendants paid will generally be in good faith when the settling defendant's potential liability is minimal. *See Bay Dev. Ltd. v. Superior Court*, 791 P.2d 290, 299 (Cal. 1990) (upholding a settlement of $30,000 in a case seeking damages in excess of $1 million because there was evidence that the settling defendant ''bore only minor responsibility'' for the plaintiffs' injuries).

Under such an analysis, a settling defendant would not be required to pay the full amount of its potential liability, as such a requirement ''would unduly discourage settlements.'' *Tech-Bilt, Inc. v. Woodward-Clyde & Assocs.*, 698 P.2d 159, 166 (Cal. 1985). Furthermore, because a defendant with minimal liability to the plaintiff will also have minimal liability for contribution or equitable indemnity to co-defendants, permitting a smaller settlement does not prejudice the nonsettling defendants. *Cahill v. San Diego Gas & Elec. Co.*, 124 Cal. Rptr. 3d 78, 101 (Ct. App. 2011).

[Headnote 10]

Here, the evidence in the record indicates that Otak's potential liability is minimal. Although P&R's expert opined that Otak breached a contractual duty owed to P&R by failing to warn P&R of the hazardous roadway condition, Otak's experts refuted that opinion in their reports by stating that Otak was not contractually required to frequent the site in order to report unsafe conditions, and that it was not customary for architects to do this. In addition, although the contract between Otak and P&R contained a clause requiring Otak to periodically visit the site, it also contained a clause stating that Otak was not responsible for ''safety precautions and programs.'' Finally, experts opined that Otak exercised reasonable care in all of its duties and was not involved in or responsible for the road construction. Accordingly, there is substantial evidence in the record to suggest that Otak's potential liability is minimal, thus supporting the district court's finding of good faith.

[Headnotes 11, 12]

P&R also argues that Otak's settlement was not in good faith because the settlement was a tactical decision designed to cut off P&R's equitable indemnity and contractual rights and was for substantially less than Otak's insurance policy limits. But ''[a] settlement is not considered made in bad faith simply because its purpose is to eliminate third-party liability.'' *Dixon v. Nw. Publ'g Co.*, 520 N.E.2d 932, 937 (Ill. App. Ct. 1988); *see also Doctors Co.*, 120 Nev. at 652, 98 P.3d at 687 (providing that the district court may consider the strengths and weaknesses of any known contribution or equitable indemnity claims); *Vertecs Corp. v. Fiberchem, Inc.*, 669 P.2d 958, 961 (Alaska 1983) (holding that ''it could hardly be correct to say that a settlement prompted by a party's wish to avoid contribution is necessarily in bad faith''). And we have declined to treat insurance policy limits as exclusive criteria in determining whether a settlement is in good faith. *See Doctors Co.*, 120 Nev. at 652, 98 P.3d at 686. Because the district court is vested ''with considerable discretion'' in approving good-faith settlements, *id.* at 652, 98 P.3d at 687, we conclude that the district court did not abuse its discretion in finding Otak's settlement to be in good faith given the substantial evidence in the record of Otak's minimal potential liability.[6]

The district court erred when it declined to dismiss P&R's third-party complaint

[Headnote 13]

Otak argues that the district court erred by declining to dismiss P&R's third-party complaint in its entirety because P&R's remaining third-party claims are all ''de facto'' contribution and equitable indemnity claims that are barred by NRS 17.245(1)(b).[7] We

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[6]P&R asserted, during oral argument, that the plaintiffs had no viable claims against Otak because the statute of limitations ran before the plaintiffs voluntarily dismissed their claims against Otak. We decline to address this issue because this argument was not articulated before the district court or in P&R's answer to Otak's writ petition. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to address arguments where a party fails to cogently argue or cite to relevant authority in support of his arguments). We further decline to consider P&R's argument that the district court abused its discretion by approving the settlement when Otak allegedly concealed discovery because P&R fails to cite to any relevant authority in support of this contention. *See id.*

[7]Otak argues that the district court lacked jurisdiction to grant P&R leave to file a third-party complaint while *Otak I* was pending before this court. We do not address this issue because Otak does not provide any argument or authority in support of this assertion in its petition or reply. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

review the district court's legal conclusions de novo. *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008).

NRS 17.245(1)(b)

[Headnotes 14, 15]

In the context of a writ petition, we review issues of statutory interpretation de novo. *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 198, 179 P.3d 556, 559 (2008). ''It is well established that the court must interpret statutes consistent with the intent of the legislature.'' *Steward v. Steward*, 111 Nev. 295, 302, 890 P.2d 777, 781 (1995). NRS 17.245(1)(b) provides that a good-faith settling defendant cannot be liable ''for contribution and for equitable indemnity to any other'' nonsettling defendant. It does not state whether ''contribution'' or ''equitable indemnity'' only include *claims* titled as such, or whether NRS 17.245(1)(b)'s bar encompasses all theories of recovery that seek contribution or equitable indemnity, regardless of the claim's actual title.

According to the Uniform Contribution Act Among Tortfeasors, the purpose for barring contribution claims against a settling defendant is to permit plaintiffs to sever a joint tortfeasor from the case without needing to first reach a global settlement with all of the defendants. *See* Unif. Contribution Among Tortfeasors Act § 4, 12 U.L.A. 284-85 cmt. b (2008). When originally enacted, NRS 17.245 barred a nonsettling defendant from seeking contribution from a settling defendant, but still permitted claims for equitable indemnity. *See* Hearing on A.B. 421 Before the Assembly Comm. on Judiciary, 69th Leg. (Nev., May 21, 1997). In 1997, the Legislature amended NRS 17.245 to also bar equitable indemnity in order to address the fact that a settling defendant was not completely released from a case so long as potential claims for indemnity still existed. *See* Hearing on A.B. 421 Before the Senate Comm. on Judiciary, 69th Leg. (Nev., June 6, 1997). The legislative amendment included equitable indemnity in order ''to eliminate that defense and promote and encourage settlements among joint defendants.'' *Id.* We conclude that allowing a nonsettling defendant to seek contribution or equitable indemnity damages under the guise of a differently named cause of action would defeat the legislative intent behind NRS 17.245—to promote and encourage settlements among joint defendants.

Our conclusion is consistent with the approach taken by other jurisdictions. *See Cal-Jones Props. v. Evans Pac. Corp.*, 264 Cal. Rptr. 737, 739 (Ct. App. 1989) (holding that claims between tortfeasors are for indemnity regardless of the language used if the claims are identical to those made by the plaintiff or if the damages sought are those that the court would consider in determining the

proportionate liability of the tortfeasors); *Herington v. J.S. Alberici Constr. Co.*, 639 N.E.2d 907, 911 (Ill. App. Ct. 1994) (dismissing a claim for ''partial indemnity'' because the court concluded that it was really a claim for contribution); *Westchester Cnty. v. Welton Becket Assocs.*, 478 N.Y.S.2d 305, 314-15 (App. Div. 1984) (dismissing a claim for indemnity because the claim was actually one for contribution); *Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 858 P.2d 1054, 1067 (Wash. 1993) (dismissing claim that was ''simply an indirect attempt to obtain contribution''); *Grant Thornton, L.L.P. v. Kutak Rock, L.L.P.*, 719 S.E.2d 394, 405 (W. Va. 2011) (dismissing claims that essentially sought contribution). These jurisdictions looked to the claim's substance, rather than its label, to determine whether the claim is barred by their good-faith settlement statute. *See Gackstetter v. Frawley*, 38 Cal. Rptr. 3d 333, 344 (Ct. App. 2006) (holding that ''claims for indemnification can include other claims not labeled as indemnity claims, but that in reality are 'disguised' indemnity claims''); *Herington*, 639 N.E.2d at 911 (holding that ''[t]he legal effect to be given an instrument is not determined by the label it bears or the technical terms it contains'').

Likewise, this court has consistently analyzed a claim according to its substance, rather than its label. *See Rolf Jensen & Assocs. v. Eighth Judicial Dist. Court*, 128 Nev. 441, 453, 282 P.3d 743, 751 (2012) (analyzing claims for breach of contract, breach of warranty, and negligent misrepresentation, and concluding that these claims were preempted by the American Disability Act because they were ''de facto claims for indemnification''); *Alsenz v. Clark Cnty. Sch. Dist.*, 109 Nev. 1062, 1066, 864 P.2d 285, 288 (1993) (holding that a personal injury claim asserted by a decedent's estate was actually for wrongful death ''[r]egardless of the cause of action's legal name''). This approach is persuasive, and we now hold that once a trial court determines that a defendant has settled in good faith, NRS 17.245(1)(b) bars all claims against the settling defendant that in effect seek contribution and equitable indemnity, regardless of the claim's title.

[Headnote 16]

To determine if a claim in effect seeks contribution or equitable indemnity in contravention of NRS 17.245(1)(b), trial courts should consider whether (1) the claim arose from the same basis on which the settling defendant would be liable to the plaintiff, and (2) the claim seeks damages comparable to those recoverable in contribution or indemnity actions. *See Cal-Jones Props.*, 264 Cal. Rptr. at 739; *Grant Thornton*, 719 S.E.2d at 405. We used a similar test to determine whether state-law claims were preempted by the 1990 Americans with Disabilities Act's bar against claims seeking indemnity. *See Rolf Jensen*, 128 Nev. at 453, 282 P.3d at 751. In *Rolf Jensen*, we concluded that Mandalay Corporation's

claims for breach of contract, breach of warranty, and negligent misrepresentation against its construction consultant were de facto indemnity claims because the ''claims and requested damages derive[d] solely from [the claimant's] first-party liability.'' *Id.* We now take this opportunity to extend the application of the *Rolf Jensen* test to a determination of whether a claim in effect seeks contribution or equitable indemnity in contravention of NRS 17.245(1)(b).

P&R's remaining claims seek contribution

With this test in mind, we examine whether NRS 17.245(1)(b) bars P&R's remaining third-party claims for express indemnity, contribution, breach of contract, breach of the covenant of good faith and fair dealing, and punitive damages.

[Headnotes 17-19]

First, Otak argues that P&R has no claim for express indemnity because the indemnity clause is actually a contribution clause, recovery under which is barred by NRS 17.245(1)(b).[8] A review of the clause at issue shows that Otak's argument is correct. Contribution ''is an equitable sharing of liability,'' whereas indemnity ''is a complete shifting of liability to the party primarily responsible.'' *Medallion Dev., Inc. v. Converse Consultants*, 113 Nev. 27, 32, 930 P.2d 115, 119 (1997), *superseded by statute on other grounds as stated in Doctors Co.*, 120 Nev. at 654, 98 P.3d at 688; NRS 17.245. The contractual provision at issue here states that:

> [Orion] shall indemnify, hold harmless, and defend [Otak], [Cheyenne] and its respective representatives, officers, directors, and employees from any loss or claim made by third parties including legal fees and costs of defending actions or suits, resulting directly or indirectly from [Orion's] performance or nonperformance of this Agreement, where the loss or claim is attributable to the negligence or other fault of [Orion], its employees, representatives, or its subcontractors. If the loss or claim is caused by the joint or concurrent negligence or other fault of [Otak] and [Orion], the loss or claim

[8]We reject Otak's argument that P&R is not a third-party beneficiary entitled to enforce the indemnity clause in the contract between Otak and Orion because Cheyenne is clearly an intended third-party beneficiary, and P&R is raising this argument on behalf of Cheyenne. *See Canfora v. Coast Hotels & Casinos, Inc.*, 121 Nev. 771, 779, 121 P.3d 599, 605 (2005) (''Whether an individual is an intended third-party beneficiary, however, depends on the parties' intent, gleaned from reading the contract as a whole in light of the circumstances under which it was entered.'' (internal quotations omitted)). Furthermore, contrary to Otak's assertion, P&R raised Cheyenne's third-party beneficiary status below when it alleged that Otak breached the indemnity provision ''covering Cheyenne'' in its third-party complaint.

> shall be borne by each in proportion to the degree of negligence or other fault attributable to each.

The only part of the provision attributing liability to Otak is the last sentence of the clause, which apportions liability according to fault rather than shifting liability to the primarily responsible party, making the contractual clause one for contribution rather than indemnity.[9] Because NRS 17.245(1)(b) bars *all* contribution claims, P&R's cause of action titled as a claim for express indemnity should have been dismissed.[10]

[Headnote 20]

Second, as to P&R's express contribution claim, although NRS 17.245 distinguishes between equitable indemnity and contractual (or express) indemnity, *see* NRS 17.245(2), it does not distinguish between equitable and contractual contribution. *See* NRS 17.245(1)(b). The Legislature could have chosen to make this distinction when it amended NRS 17.245 in 1997 and distinguish between equitable and contractual indemnity claims. Thus, it appears that the Legislature intended for NRS 17.245(1)(b) to bar *all* contribution claims regardless of whether contribution is equitable (implied) or contractual (express). Other jurisdictions have similarly reasoned that allowing a contractual-contribution claim when a common-law or statutory-contribution claim is barred by a good-faith settlement statute, contravenes public policy considerations encouraging settlement. *See Herington*, 639 N.E.2d at 911; *Pierre Condo. Ass'n v. Lincoln Park West Assocs.*, 881 N.E.2d 588, 596 (Ill. App. Ct. 2007). Therefore, we conclude that P&R's express contribution claim is also barred by NRS 17.245(1)(b).

[Headnote 21]

Finally, P&R argues that its claims for breach of contract and breach of the covenant of good faith and fair dealings are not

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[9]Even if the contractual provision at issue could be read as an indemnity clause, it would not require Otak to indemnify P&R. Indemnity clauses must be strictly construed. *Reyburn Lawn & Landscape Designers, Inc. v. Plaster Dev. Co.*, 127 Nev. 331, 340, 255 P.3d 268, 274 (2011). Because the clause does not specifically state that Otak is required to indemnify Cheyenne, the clause only requires indemnification from Orion. *See id.* at 340-41, 255 P.3d at 275 (interpreting an indemnity clause to only cover the negligence of the indemnitor because the clause did not explicitly state that the indemnitor had a duty to indemnify absent negligence on its part); *George L. Brown Ins. Agency, Inc. v. Star Ins. Co.*, 126 Nev. 316, 325, 237 P.3d 92, 97 (2010) (stating that ''indemnification 'provisions are strictly construed and will not be held to provide indemnification unless it is so stated in clear and unequivocal terms' '' (quoting *GKN Co. v. Starnes Trucking, Inc.*, 798 N.E.2d 548, 552 (Ind. Ct. App. 2003))).

[10]Because we conclude that the contractual provision at issue in P&R's express indemnity claim is a contribution clause, we do not reach the issue of whether NRS 17.245(1)(b) bars claims for contractual indemnity.

barred by NRS 17.245(1)(b) because these claims are based on Otak's alleged breach of the contract between Otak and P&R. The allegedly breached provision, however, required Otak to periodically inspect the construction site and report deficiencies to P&R. But this breach is one of the reasons that the plaintiffs allege the accident occurred in the first place, and is thus not independent of P&R's liability to the plaintiffs. Furthermore, P&R seeks to recover the damages it has suffered from defending itself in the lawsuit and settling with the plaintiffs ''for injuries and damages allegedly caused by roadway conditions arising directly from OTAK's various breaches of contract.'' Notably, P&R does not seek any damages that are unrelated to the plaintiffs' accident, nor does P&R allege that Otak breached a duty that resulted in liability to P&R on a basis other than that Otak was potentially responsible for the plaintiffs' accident. We therefore conclude that P&R's claims for breach of contract and breach of the covenant of good faith and fair dealing are barred by NRS 17.245(1)(b) because these claims seek contribution.

As no causes of action remain on which to base an award of damages, we conclude that P&R's punitive damages claim must also be dismissed.[11]

For the reasons discussed above, we grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to dismiss P&R's remaining third-party claims against petitioner Otak Nevada, LLC.

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

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[11]Otak argues that the district court's ruling violated Otak's equal protection rights under the United States and Nevada Constitutions because the district court's decision was opposite to a decision entered by a different district court judge in a similar case. Although parties are guaranteed equal and uniform application of the law, U.S. Const. amend. XIV, § 1; Nev. Const. art. 4, § 21, the United States Supreme Court has rejected the contention that inconsistent judicial rulings from lower courts are grounds for equal protection challenges. *See Milwaukee Elec. Ry. & Light Co. v. Wisconsin*, 252 U.S. 100, 106 (1920) (holding that ''the Fourteenth Amendment does not, in guaranteeing equal protection of the laws, assure uniformity of judicial decisions''). Therefore, we reject Otak's argument. *See Barrett v. Baird*, 111 Nev. 1496, 1509, 908 P.2d 689, 698 (1995) (holding that this court applies the same standards to equal protection challenges as the federal courts), *overruled on other grounds by Lioce v. Cohen*, 124 Nev. 1, 17, 174 P.3d 970, 980 (2008).

SANDPOINTE APARTMENTS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND STACY YAHRAUS-LEWIS, AN INDIVIDUAL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND CML-NV SANDPOINTE, LLC, A FLORIDA LIMITED LIABILITY COMPANY, REAL PARTY IN INTEREST.

No. 59507

November 14, 2013 313 P.3d 849

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion for partial summary judgment and granting a countermotion for partial summary judgment in a deficiency and breach of guarantee action.

Assignee of loan and deed of trust elected to pursue its rights under the deed of trust's power of sale provision and purchased the property at trustee's sale. Assignee subsequently brought deficiency action against mortgagor and guarantor. The district court granted summary judgment in favor of assignee. Mortgagor and guarantor petitioned for writ of mandamus or prohibition. The supreme court, SAITTA, J., held that: (1) writ of mandamus was proper avenue through which to seek review, and (2) statute limiting amounts of deficiency judgments applied prospectively only.

Petition denied.

[Rehearing denied January 24, 2014]

CHERRY, J., with whom PARRAGUIRRE, J., joined, dissented.

Marquis Aurbach Coffing and *Frank M. Flansburg, III*, and *Candice E. Renka*, Las Vegas, for Petitioners.

Lewis & Roca LLP and *Daniel F. Polsenberg*, Las Vegas; *Cotton, Driggs, Walch, Holley, Woloson & Thompson* and *Richard F. Holley, Victoria L. Nelson*, and *William N. Miller*, Las Vegas, for Real Party in Interest.

Holland & Hart LLP and *Jeremy J. Nork* and *Frank Z. LaForge*, Reno, for Amicus Curiae Branch Banking and Trust Company.

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Chief Litigation Counsel, Carson City, for Amicus Curiae Legislature of the State of Nevada.

The O'Mara Law Firm, P.C., and *David C. O'Mara*, Reno, for Amicus Curiae Nevada Bankers Association.

Sylvester & Polednak, Ltd., and *Jeffrey R. Sylvester* and *Allyson R. Noto*, Las Vegas, for Amicus Curiae RADC/CADC Venture 2010-2, LLC.

Alfred M. Pollard, Washington, D.C., for Amicus Curiae Federal Housing Finance Agency.

Joseph Brooks, Arlington, Virginia, for Amicus Curiae Federal Deposit Insurance Corporation.

1. MANDAMUS.
   Writ of mandamus was proper avenue through which to challenge the district court's ruling that statute limiting the amounts of deficiency judgments in instances where a right to obtain a judgment against the debtor, guarantor, or surety had been transferred from one person to another applied prospectively only, rather than retroactively, where there were important issues of law with statewide impact requiring clarification, and an appeal from the final judgment would not have constituted an adequate and speedy legal remedy, given the urgent need for resolution of these issues. NRS 34.160, 40.459(1)(c).
2. MANDAMUS.
   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. NRS 34.160.
3. PROHIBITION.
   A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction.
4. MANDAMUS; PROHIBITION.
   Because both writs of prohibition and writs of mandamus are extraordinary remedies, the supreme court has complete discretion whether to consider them. NRS 34.160.
5. MANDAMUS.
   The supreme court generally will not exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification. NRS 34.160.
6. MORTGAGES; STATUTES.
   Statute limiting the amount of deficiency judgments in instances where a right to obtain a judgment against the debtor, guarantor, or surety had been transferred from one person to another applied prospectively only, rather than retroactively, and therefore limitations in statute applied to deficiency judgments stemming from sales, pursuant to either judicial foreclosures or trustee's sales, occurring on or after the effective date of the statute; statute attached new disability and would have impaired vested rights if applied to deficiencies arising after sales that took place before the statute became effective, as previous version of statute did not limit the amount of judgment that a successor in interest could recover in

deficiency judgment and the right to a deficiency judgment was a right that vested at time of sale of the secured property, and nothing in statute evidenced an intent for statute to have retroactive application. NRS 40.459(1)(c).

7. APPEAL AND ERROR.
Whether applying a statute in a particular instance constitutes retroactive operation is a question of law that the supreme court reviews de novo.

8. APPEAL AND ERROR.
Statutory interpretation is a question of law that the supreme court reviews de novo.

9. STATUTES.
Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively.

10. STATUTES.
Elementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.

11. STATUTES.
With regards to the presumption against retroactive application of substantive statutes, in a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.

12. STATUTES.
Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.

13. STATUTES.
Courts take a commonsense, functional approach in analyzing whether applying a new statute would constitute retroactive operation.

14. STATUTES.
Central to the inquiry into whether a substantive statute applies retroactively are fundamental notions of fair notice, reasonable reliance, and settled expectations.

15. STATUTES.
A conclusion regarding retroactivity comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.

16. STATUTES.
A statute does not operate retrospectively merely because it draws upon past facts or upsets expectations based in prior law; rather, a statute has retroactive effect when it a takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.

17. STATUTES.
Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and courts are not permitted to search for its meaning beyond the statute itself.

18. MORTGAGES.
A holder of the promissory note and deed of trust may transfer right to obtain a deficiency judgment as a bundle of rights secured in a promissory note and deed of trust.

19. STATUTES.

It is only appropriate to consult the Legislative Counsel's Digest to ascertain the intent of the Legislature if the language of a statute is ambiguous.

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

In this opinion, we address NRS 40.459(1)(c), a statute limiting the amount of judgments in instances where a right to obtain a judgment against the debtor, guarantor, or surety has been transferred from one person to another. NRS 40.459(1)(c) was added to Nevada's law by Assembly Bill 273, which provided that NRS 40.459(1)(c) would ''become effective upon passage and approval.'' 2011 Nev. Stat., ch. 311, §§ 5, 7, at 1743, 1748. We conclude that NRS 40.459(1)(c) would have an improper retroactive effect if applied to the facts underlying this writ petition. Because the language of the enrollment section does not overcome the presumption against retroactivity, NRS 40.459(1)(c) only applies prospectively. We therefore conclude that the limitations in NRS 40.459(1)(c) apply to sales, pursuant to either judicial foreclosures or trustee's sales, occurring on or after the effective date of the statute.[1] We further conclude that in cases where application of NRS 40.459(1)(c) would not have a retroactive effect, it applies to any transfer of the right to obtain a deficiency judgment, regardless of when the right was transferred. Accordingly, we deny extraordinary writ relief.

FACTS AND PROCEDURAL HISTORY

In 2007, Silver State Bank loaned $5,135,000 to petitioner Sandpointe Apartments, LLC, for the construction of an apartment complex. Sandpointe obtained the loan by executing a promissory note in favor of Silver State Bank, secured by, among other things, a deed of trust to the real property acquired with the loan funds. The deed of trust contained a power of sale provision. Petitioner Stacy Yahraus-Lewis personally guaranteed the loan.

In 2008, the Nevada Financial Institutions Division closed Silver State Bank and appointed the Federal Deposit Insurance Corporation (FDIC) as receiver. In 2009, Sandpointe's loan matured, and Sandpointe defaulted by failing to repay the loan in full. In 2010, pursuant to a large structured sale, the FDIC sold the loan

[1]Trustee's sales are colloquially referred to as nonjudicial foreclosures. However, we will use the more precise term—trustee's sale.

and the guarantee to Multibank. Multibank, in turn, transferred its interest in the loan and the guarantee to its wholly owned subsidiary, real party in interest CML-NV Sandpointe, LLC, a single purpose entity created by Multibank to facilitate and pursue collections on the loan. In early 2011, CML-NV elected to pursue its rights under the deed of trust's power of sale provision, and a trustee's sale was held at which CML-NV purchased the property securing the loan for a credit bid of $1,440,000.

Shortly thereafter, the Nevada Legislature unanimously passed Assembly Bill 273, which, in relevant part, limits the amount of a deficiency judgment that can be recovered by persons who acquired the right to obtain the judgment from someone else who held that right. On June 10, 2011, the Governor signed Assembly Bill 273 into law, and the relevant provision was codified as NRS 40.459(1)(c).

On June 27, 2011, CML-NV filed a complaint in district court against Sandpointe and Yahraus-Lewis for deficiency and breach of guaranty. Yahraus-Lewis later moved for partial summary judgment, requesting that the district court apply the limitation contained in NRS 40.459(1)(c) to CML-NV's action. CML-NV opposed the motion and filed a countermotion for partial summary judgment, arguing that NRS 40.459(1)(c) could not apply retroactively to the action.

The district court held a hearing on the motion and countermotion, at which time the court granted CML-NV's countermotion for summary judgment, concluding that NRS 40.459(1)(c) only applies to loans entered into after June 10, 2011. Arguing that the district court incorrectly determined that applying NRS 40.459(1)(c) in this instance would constitute retroactive operation of the statute and that, even if the court was correct, the statute allows for retroactive application, Sandpointe and Yahraus-Lewis now petition this court for a writ of mandamus or prohibition directing the district court to apply the limitation contained in NRS 40.459(1)(c) to CML-NV's deficiency judgment.

DISCUSSION

[Headnotes 1-5]

''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); NRS 34.160. ''A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction. . . . Because both writs of prohibition and writs of mandamus are extraordinary remedies, we have complete discretion . . . whether to consider them.'' *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906,

907-08 (2008). We have long recognized that writ relief is not appropriate when there is an adequate and speedy remedy at law available. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *see* NRS 34.170; NRS 34.330. Therefore, ''[w]e generally will not exercise our discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.'' *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008).

This petition arises from the Legislature's recent amendments to the statutes governing deficiency judgments. As noted by the district court, the interpretation of the amendments raises important issues that affect many people in this state. Given the current economic climate of this state, these issues will undoubtedly recur, and they have already created considerable confusion in the lower courts. Indeed, although NRS 40.459(1)(c) was enacted less than two years ago, its application has already resulted in conflicting decisions in the district courts. Because there are important issues of law with statewide impact requiring clarification, and because an appeal from the final judgment would not constitute an adequate and speedy legal remedy, given the urgent need for resolution of these issues, we elect to exercise our discretion to entertain the merits of the petition.

Policy underlying Assembly Bill 273 and NRS 40.459(1)(c)

The recent recession severely affected Nevada's real estate market. As a result, a large secondary market emerged wherein various entities, including collection companies, would purchase distressed loans at deep discounts. These entities would then exercise their power of sale or judicially foreclose on the collateral securing the loans and seek deficiency judgments against the debtors and guarantors based upon the full indebtedness. *See* Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm., 76th Leg. (Nev., March 23, 2011).

In response, following the 2011 legislative session, Assembly Bill 273 was signed into law. It is codified, in pertinent part, in NRS 40.459, which is entitled ''Limitations on amount of money judgment.'' Subsection (1)(c)—the subject of the present litigation—provides that ''[i]f the person seeking the judgment acquired the right to obtain the judgment from a person who previously held that right,'' then the person seeking the judgment may only recover

> the amount by which the amount of the consideration paid for that right exceeds the fair market value of the property sold at the time of sale or the amount for which the property was actually sold, whichever is greater, with interest from the date of sale and reasonable costs[.]

During a committee hearing on Assembly Bill 273, Assemblyman Marcus Conklin, primary sponsor of the bill, described the intent of Assembly Bill 273 as follows:

> We are preventing a creditor from profiting from a judgment in excess of the amount the creditor paid for the right to pursue such a judgment.
>
> . . . .
>
> . . . [T]he bill prevents a person who has purchased the rights to a loan from receiving a judgment for more than what he paid plus interest.
>
> . . . .
>
> [I]f a bank chooses to pursue someone for a deficiency judgment in a situation where a house was purchased for $200,000 and the value dropped to $100,000—and the bank decided to pursue the homeowner for the $100,000 and then sold it to a collection agency for $20,000—all the collection agency could collect is the $20,000 plus interest and fees. If the bank was willing to accept $20,000, then why did the bank not negotiate with the homeowner for the $20,000? The homeowner's credit is being destroyed for $20,000, but it appears on his credit report as $100,000. Why not have the discussion take place between the original lender and the homeowner for the true amount the bank is willing to accept in the first place?

Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm., 76th Leg. (Nev., March 23, 2011).

In other words, NRS 40.459(1)(c) was designed to prevent profiteering and to encourage creditors to negotiate with borrowers. To accomplish these goals, the statute greatly limits the amount of a deficiency judgment that a successor in interest can recover, thereby discouraging these entities from purchasing notes or mortgages ''for pennies on the dollar.'' Hearing on A.B. 273 Before the Senate Judiciary Comm., 76th Leg. (Nev., May 3, 2011). More specifically, NRS 40.459(1)(c) limits the amount of a judgment that a successor in interest can recover to the difference between the fair market (or actual sale) value of the property that is foreclosed upon and the amount that the successor paid to acquire an interest from the original creditor.

NRS 40.459(1)(c)'s retroactive effect

[Headnotes 6-8]

Sandpointe and Yahraus-Lewis argue that applying NRS 40.459(1)(c) to deficiency judgments arising from sales, pursuant to either judicial foreclosures or trustee's sales, that occurred before the statute took effect would not constitute retroactive op-

eration of the statute and that, even if it did, the Legislature so intended. Whether applying a statute in a particular instance constitutes retroactive operation is a question of law that we review de novo. *See Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't (PEBP)*, 124 Nev. 138, 146, 179 P.3d 542, 548 (2008). Further, even in the context of a writ petition, ''[s]tatutory interpretation is a question of law that we review de novo.'' *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559.

[Headnotes 9-11]

Substantive statutes are presumed to only operate prospectively, unless it is clear that the drafters intended the statute to be applied retroactively. *Landgraf v. USI Film Prods.*, 511 U.S. 244, 273 (1994); *PEBP*, 124 Nev. at 154, 179 P.3d at 553; *Cnty. of Clark v. Roosevelt Title Ins. Co.*, 80 Nev. 530, 535, 396 P.2d 844, 846 (1964). The presumption against retroactivity is typically explained by reference to fairness. *Landgraf*, 511 U.S. at 270. As the Supreme Court has instructed, ''[e]lementary considerations of fairness dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly; settled expectations should not be lightly disrupted.'' *Id.* at 265. Moreover, ''[i]n a free, dynamic society, creativity in both commercial and artistic endeavors is fostered by a rule of law that gives people confidence about the legal consequences of their actions.'' *Id.* at 265-66.

[Headnotes 12-15]

''[D]eciding when a statute operates 'retroactively' is not always a simple or mechanical task.'' *Id.* at 268. ''Any test of retroactivity will leave room for disagreement in hard cases, and is unlikely to classify the enormous variety of legal changes with perfect philosophical clarity.'' *Id.* at 270. Broadly speaking, courts ''take a 'commonsense, functional' approach'' in analyzing whether applying a new statute would constitute retroactive operation. *PEBP*, 124 Nev. at 155, 179 P.3d at 553 (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001)). Central to this inquiry are ''fundamental notions of 'fair notice, reasonable reliance, and settled expectations.' '' *Id.* at 155, 179 P.3d at 554 (quoting *St. Cyr*, 533 U.S. at 321). Ultimately, a conclusion regarding retroactivity ''comes at the end of a process of judgment concerning the nature and extent of the change in the law and the degree of connection between the operation of the new rule and a relevant past event.'' *Landgraf*, 511 U.S. at 270.

[Headnote 16]

''All laws have connections with the past,'' however. 2 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Con-*

struction § 41:2, at 390 (7th ed. 2009). As such, a statute does not operate ''retrospectively'' merely because it ''draws upon past facts,'' *PEBP*, 124 Nev. at 155, 179 P.3d at 553, ''or upsets expectations based in prior law.'' *Landgraf*, 511 U.S. at 269. Rather, '' '[a] statute has retroactive effect when it ''takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past.'' '' '' *PEBP*, 124 Nev. at 155, 179 P.3d at 553-54 (alteration in original) (quoting *St. Cyr*, 533 U.S. at 321 (quoting *Landgraf*, 511 U.S. at 269)).

NRS 40.459(1)(c) attaches a new disability and would impair vested rights if applied to deficiencies arising after trustee sales that took place before the statute became effective

Sandpointe and Yahraus-Lewis contend that applying NRS 40.459(1)(c) here would not affect any of CML-NV's vested rights because (a) it simply clarifies existing law, as provided in NRS 40.451, rather than creating a new obligation; and (b) CML-NV's right to a deficiency does not vest until the entry of a deficiency judgment, which has not yet occurred.

NRS 40.451

NRS 40.451, which was enacted in 1969 and amended in 1989, reads:

> As used in NRS 40.451 to 40.463, inclusive, ''indebtedness'' means the principal balance of the obligation secured by a mortgage or other lien on real property, together with all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, all advances made with respect to the property by the beneficiary, and all other amounts secured by the mortgage or other lien on the real property in favor of the person seeking the deficiency judgment. *Such amount constituting a lien is limited to the amount of the consideration paid by the lienholder.*

(emphasis added); 1969 Nev. Stat., ch. 327, § 3, at 572-73; 1989 Nev. Stat., ch. 750, § 8, at 1769. The amount of ''indebtedness'' is then used in determining the amount of a deficiency judgment against the borrower under NRS 40.459(1)(a) and (b), which allow for judgments no greater than the amount by which the indebtedness exceeds the fair market value or the actual sale amount, whichever results in the lesser judgment.[2]

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[2]Although NRS 40.459(1)(a) and (b) were renumbered in 2011, no substantive changes were made to those provisions. 2011 Nev. Stat., ch. 311, § 5, at 1743.

[Headnote 17]

In arguing that NRS 40.451 already limits deficiency judgments to the amount of consideration paid and thus that NRS 40.459(1)(c) does not effect a substantive change to the law, Sandpointe and Yahraus-Lewis misread NRS 40.451. '' 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and [we] are not permitted to search for its meaning beyond the statute itself.' '' *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011) (quoting *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998)). When read as a whole, as it must be, *Int'l Game Tech.*, 124 Nev. at 200-01, 179 P.3d at 560, NRS 40.451 defines a successor lienholder's ''indebtedness'' as the amount the successor paid for the mortgage or lien, *as well as* ''all interest accrued and unpaid prior to the time of foreclosure sale, all costs and fees of such a sale, [and] all advances made with respect to the property by the beneficiary.'' NRS 40.451. The statute's last sentence—limiting a lien amount to the amount of consideration paid—plainly does not purport to limit the total amount of the judgment that may be awarded in a deficiency judgment action. Instead, it limits only the lien amount, and as set forth in that statute, the lien amount is only one factor among several in determining the total amount of indebtedness, which is then used to determine the deficiency judgment amount. NRS 40.459(1)(a) and (b). Therefore, NRS 40.459(1)(c), which limits the total judgment amount, is different from NRS 40.451, which places a limit only on the first variable in the equation used to fix the amount of indebtedness.

[Headnote 18]

On the other hand, NRS 40.459(1)(c)'s plain meaning creates a new limitation on the amount a person may recover in a deficiency action whenever there has been a transfer of the right to obtain a deficiency judgment. *See Walters*, 127 Nev. at 727, 263 P.3d at 234. For purposes of applying NRS 40.459(1)(c), a holder of the promissory note and deed of trust may transfer that right to obtain a deficiency judgment as a bundle of rights secured in a promissory note and deed of trust. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 522, 286 P.3d 249, 260 (2012) (determining that when a person holds the note and a beneficial interest in the deed of trust securing the note, the person may proceed with a judicial foreclosure or trustee's sale). However, NRS 40.459(1)(c) now provides that if such a transfer occurs, the successor holder will be limited in the amount that he will be able to recover in a deficiency action.

Further, even if NRS 40.459(1)(c) had not changed the law as to deficiency judgments against borrowers, it clearly changed the law as to judgments against guarantors following a sale, pursuant to a judicial foreclosure or a trustee's sale. *See* NRS 40.465 (stating that its definition for indebtedness applies to NRS 40.495). NRS 40.465 provides a separate and distinct definition of indebtedness that applies in an action against a guarantor. For purposes of the guarantor statutes, NRS 40.465 provides similarly to NRS 40.451 that indebtedness ''means the principal balance of the obligation, together with all accrued and unpaid interest, and those costs, fees, advances and other amounts secured by the mortgage or lien upon real property.'' This definition of indebtedness lacks the final sentence of NRS 40.451, however, and thus pre-2011, guarantors of a note were not protected by any consideration-amount limit in the factors used to determine indebtedness. The 2011 changes to NRS 40.459(1), however, apply to guarantors, and thus guarantors are now afforded the same protections as borrowers when the right to obtain a judgment has been sold to a successor. NRS 40.459(1)(c). Therefore, NRS 40.459(1)(c) creates a new limitation on the amount recoverable against guarantors, when the successor elects to judicially foreclose or conduct a trustee's sale.

Thus, contrary to Sandpointe and Yahraus-Lewis's claims, neither NRS 40.451 nor any other pre-2011 statute or rule limits the amount of the judgment that a successor in interest may recover in a deficiency judgment action to the amount the successor paid to acquire the interest in the obligation. To suggest otherwise is to confuse the intent of NRS 40.459(1)(c). Following the enactment of NRS 40.459(1)(c), a successor holder is now limited in its recovery, in a deficiency action or suit against the guarantor, to the sum by which the amount paid for the ''right to obtain the judgment'' exceeds the greater of the fair market value or the actual sale price. Under NRS 40.459(1)(c), no award may be made for other amounts that the successor in interest may have incurred following the acquisition of the right to obtain the judgment, such as accrued interest, costs and fees, and any advances, as provided in NRS 40.451 and NRS 40.465. Thus, NRS 40.459(1)(c) attaches a new disability to a successor lienholder's ability to obtain a deficiency judgment.

We therefore conclude that NRS 40.459(1)(c) is not simply a clarification of existing law, but is rather a new limitation on the amount that may be recovered in a deficiency judgment.

The right to a deficiency judgment is a vested right

Sandpointe and Yahraus-Lewis next argue that even if NRS 40.459(1)(c) changed existing law, applying its limitation here

would not impact any of CML-NV's existing rights because CML-NV's right to a deficiency judgment only vests upon entry of the judgment, which has not yet occurred. They point out that in order to obtain a final deficiency judgment, CML-NV must first abide by several statutory requirements and overcome any defenses that may be raised. Thus, they insist, CML-NV merely has a ''contingent remedy for a potential deficiency.'' Relying primarily on a passage from Corpus Juris Secundum (C.J.S.), Sandpointe and Yahraus-Lewis assert that applying NRS 40.459(1)(c)'s limitation here would not be retroactive because ''it has generally been the law for more than half a century that 'no right to a deficiency judgment vests until Plaintiff satisfies equity that it would be equitable, in light of the sale price, to authorize a deficiency judgment.' '' (quoting 59 C.J.S. *Mortgages* § 778, at 1474 (1949)). Notably, however, that very ''assertion stated in the C.J.S. encyclopedia . . . is supported by no law.'' *Hartman v. McInnis*, 996 So. 2d 704, 722 (Miss. 2007) (Dickinson, J., concurring and dissenting) (explaining that the two cases cited in Corpus Juris Secundum arose in states that relied on equitable principles rather than on specific deficiency statutes).

In Nevada, the sale of the secured property is the event that vests the right to deficiency. Following the trustee's sale, the amount of a deficiency is crystalized because that is the subject date for determining both the fair market value and trustee's sale price of the property securing the loan. *See* NRS 40.459(1); *In re Filippini*, 66 Nev. 17, 22, 202 P.2d 535, 537 (1949) (defining a ''vested right[ ],'' in relevant part, as ''some interest in the property that has become fixed and established''). In other words, the fair market value of the property is determined on the day of the trustee's sale, and that value can be used in a future deficiency action. Further, NRS 40.462(1), which governs the distribution of foreclosure sale proceeds, provides that the right to receive proceeds from the sale vests at the time of the foreclosure sale; it is logical that the right to a judgment for the amount *not* received in a foreclosure sale would arise on the same date as the right to receive amounts received from the sale. The trustee's sale marks the first point in time that an action for deficiency can be maintained and commences the applicable six-month limitations period. *See* NRS 40.455(1) (providing that an application for deficiency judgment must be filed ''within 6 months after the date of the foreclosure sale or the trustee's sale''). Accordingly, we conclude that the right to deficiency vests upon the sale pursuant to a judicial foreclosure or trustee's sale, and thus, applying NRS 40.459(1)(c) to deficiencies arising from sales that took place before that provision was enacted would affect vested rights.

Application of NRS 40.459(1)(c) in this case would have a retroactive effect

In reaching our conclusion, we rely on *Holloway v. Barrett*, 87 Nev. 385, 487 P.2d 501 (1971). *Holloway* arose from the Legislature's enactment of a statute that limited the amount of a deficiency judgment to the difference between the total amount owed on the loan and the fair market value of the property securing the loan. *Id.* at 387 n.1, 487 P.2d at 502 n.1. The borrowers in *Holloway* argued that this limitation should be applied to a loan that was executed prior to the effective date of the statute but that had resulted in a foreclosure sale after the statute's effective date. *Id.* at 386-88, 487 P.2d at 502-03. The district court agreed, determining that applying the limitation under those circumstances did not constitute retroactive operation. *Id.* at 387-88, 487 P.2d at 503.

The creditor challenged this determination by petitioning this court for a writ of mandamus. *Id.* at 389, 487 P.2d at 503. In denying the petition, the *Holloway* court characterized ''the argument about retrospective and prospective application of [the statute]'' as ''purely academic.'' *Id.* at 390, 487 P.2d at 504. The court reasoned as follows:

> There is no attempt upon the part of the trial court to give [the statute] retrospective effect. *It is being applied to a deficiency occurring as a result of a trustee's sale held after the effective date of the statute.* The only retrospective aspect arises from the fact that the promissory note and the deed of trust were executed prior to the effective date of the statute and may for that reason affect rights already in existence.

Id. at 390-91, 487 P.2d at 504 (emphasis added).

The court drew a distinction based upon this fact, expressly noting that it was not considering ''foreclosure and trustee's sales completed prior to the effective date of the statute[ ],'' thereby foreshadowing the scenario presented here. *Id.* at 392 n.4, 487 P.2d at 506 n.4; *see Paradise Homes Corp. v. Eighth Judicial Dist. Court*, 87 Nev. 617, 619 n.1, 491 P.2d 1277, 1279 n.1 (1971).

Subsequently, in *Farmers Home Mutual Insurance Co. v. Fiscus*, this court characterized *Holloway* as concluding that ''the trial court's order did not constitute retroactive application of a statute, but rather, that the deficiency judgment in question arose after the effective date of the statute.'' 102 Nev. 371, 376, 725 P.2d 234, 237 (1986). Therefore, this court explained, ''[t]he statute in question in *Holloway* did not . . . impair preexisting obligations . . . *since the* [*trustee's sale*] *on the property occurred after the effective date of the statute*.'' *Id.* (emphasis added). Thus, *Holloway* and *Farmers*, read together, demonstrate that statutes affecting de-

ficiency judgments operate prospectively when the sale, pursuant to a judicial foreclosure or trustee's sale, occurs after the enactment of the statute. In contrast, when, as here, the trustee's sale occurs before the effective date of an antideficiency statute, application of the statute will generally be deemed retroactive. *In re Mathiason*, 129 B.R. 173, 175-76 (Bankr. D. Minn. 1991) (reasoning that because the mortgage was foreclosed before the effective date of the statute, the statute could only apply if it operated retroactively); *Allstate Ins. Co. v. Furgerson*, 104 Nev. 772, 776, 766 P.2d 904, 907 (1988) (applying a new statute of repose to an action for construction defects substantially completed before the effective date of the statute would constitute retroactive operation because the ''cause of action accrued before the effective date of the revised [statute]''); *see also Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't (PEBP)*, 124 Nev. 138, 155, 179 P.3d 542, 553 (2008) (stating that courts ''take a 'commonsense, functional' approach'' in analyzing whether applying a new statute would constitute retroactive operation (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001))).

NRS 40.459(1)(c) may only apply prospectively

Having concluded that applying NRS 40.459(1)(c) here would constitute retroactive operation of the statute, we now turn to whether it may, nonetheless, be applied retroactively. Although Sandpointe and Yahraus-Lewis do not concede that NRS 40.459(1)(c) is subject to the presumption against retroactivity, they argue that applying the statute here is consistent with the Legislature's intent.

The United States Supreme Court has explained that ''the presumption against retroactive legislation is deeply rooted in our jurisprudence, and embodies a legal doctrine centuries older than our Republic.'' *Landgraf*, 511 U.S. at 265. And, from this court's inception, it has viewed retroactive statutes with disdain, noting that such laws are ''odious and tyrannical'' and ''have been almost uniformly discountenanced by the courts of Great Britain and the United States.'' *Milliken v. Sloat*, 1 Nev. 573, 577 (1865). Not surprisingly, once it is triggered, the presumption against retroactivity is given considerable force. *See U.S. Fid. & Guar. Co. v. United States ex rel. Struthers Wells Co.*, 209 U.S. 306, 314 (1908) (''The presumption is very strong that a statute was not meant to act retrospectively, and it ought never to receive such a construction if it is susceptible of any other.''). Thus, as we have observed, a statute will not be applied retroactively

> unless [(1)] the Legislature clearly manifests an intent to apply the statute retroactively, or [(2)] ''it clearly, strongly,

> and imperatively appears from the act itself'' that the Legislature's intent cannot be implemented in any other fashion.

PEBP, 124 Nev. at 154, 179 P.3d at 553 (quoting *In re Estate of Thomas*, 116 Nev. 492, 495-96, 998 P.2d 560, 562 (2000)).

The Legislature did not clearly manifest an intent to apply NRS 40.459(1)(c) retroactively

In support of their argument, Sandpointe and Yahraus-Lewis principally rely on a passage from the Legislative Counsel Digest, providing that the relevant provisions of Assembly Bill 273 will ''become effective upon passage and approval and thus apply to a deficiency judgment awarded on or after that effective date.'' 2011 Nev. Stat., ch. 311, Legislative Counsel's Digest, at 1741. CML-NV responds that the Legislative Counsel's Digest cannot be considered in assessing whether the Legislature intended to apply NRS 40.459(1)(c) retroactively. It argues that the Legislative Counsel is an unelected body and that the above-quoted passage conflicts with the text and legislative history of NRS 40.459(1)(c).

[Headnote 19]

'' 'Where the language of a statute is plain and unambiguous and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.' '' *Walters v. Eighth Judicial Dist. Court*, 127 Nev. 723, 727, 263 P.3d 231, 234 (2011) (quoting *Madera*, 114 Nev. at 257, 956 P.2d at 120). Therefore, it is only appropriate to consult the Legislative Counsel's Digest to ascertain the intent of the Legislature ''[i]f the language of a statute is ambiguous.'' *Cal. Teachers' Ass'n v. Governing Bd. of Cent. Union High Sch. Dist.*, 190 Cal. Rptr. 453, 457 (Ct. App. 1983). Stated differently, ''[i]f a law is clear the Legislative Counsel's Digest must be disregarded.'' *Id.* at 458.

Here, the Legislature simply provided that NRS 40.459(1)(c) ''become[s] effective upon passage and approval.'' 2011 Nev. Stat., ch. 311, § 7, at 1748. As the district court determined, this statement does not even begin to approach the type of express legislative command necessary to rebut the presumption against retroactivity. *See Landgraf*, 511 U.S. at 257 (''A statement that a statute will become effective on a certain date does not even arguably suggest that it has any application to conduct that occurred at an earlier date.''); *PEBP*, 124 Nev. at 155, 179 P.3d at 553 (''[W]hen the Legislature intends retroactive application, it is capable of stating so clearly.''). And, although this statement is cursory, it is not ambiguous. There is clearly no evidence in the enactment language that shows the Legislature's intent to apply NRS 40.459(1)(c) retroactively. Resort to the Legislative Counsel's Digest or other

legislative materials is therefore unnecessary. Even if we were to determine that the effective date language of NRS 40.459(1)(c) is ambiguous, such a determination would necessarily compel a conclusion that the Legislature did not *clearly manifest* an intent to apply the statute retroactively.

Nothing in NRS 40.459(1)(c) clearly, strongly, and imperatively shows that the Legislature's intent can only be implemented by applying the statute retroactively

NRS 40.459(1)(c) would certainly have a broader impact if it were applied retroactively. That does not mean, however, that the Legislature's intent can only be implemented by applying it retroactively. *See Landgraf*, 511 U.S. at 285-86 (''It will frequently be true . . . that retroactive application of a new statute would vindicate its purpose more fully. That consideration, however, is not sufficient to rebut the presumption against retroactivity.''). NRS 40.459(1)(c) imposes a dramatic limitation on the amount of a deficiency judgment that a successor in interest can recover, and even if the statute is applied prospectively, it could still reach a large portion of the secondary mortgage market for distressed loans. Therefore, it does not clearly, strongly, and imperatively appear from the language of NRS 40.459(1)(c) that the Legislature's intent can only be implemented by applying the statute retroactively and, as a consequence, the presumption against retroactivity has not been rebutted.

Any lingering doubt regarding whether the Legislature intended NRS 40.459(1)(c) to apply retroactively is quickly put to rest by reference to its legislative history. Although the language of the enactment provision is clear and unambiguous, and reference to legislative history is therefore generally not needed, *Landgraf*, 511 U.S. at 257; *PEBP*, 124 Nev. at 155, 179 P.3d at 553, in this case it simply clarifies that there was no intent that NRS 40.459(1)(c) was meant to apply retroactively. Throughout the various committee hearings, Assemblyman Conklin, the author of Assembly Bill 273, stated that the provisions could not be applied retroactively. *See* Hearing on A.B. 273 Before the Senate Judiciary Comm., 76th Leg., at 2-3 (Nev., May 3, 2011); Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm., 76th Leg., at 12-13 (Nev., March 28, 2011); Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm., 2011 Leg., 76th Leg., at 7 (Nev., March 23, 2011).[3] Given the above points, NRS

[3]Sandpointe and Yahraus-Lewis contend that the statements made by Assemblyman Conklin no longer apply because the language of the provision was changed. We find no merit in this assertion. Although some changes were made to the provision regarding the effective date of the statute, the Legislative intent against retroactive application is still relevant for our consideration.

40.459(1)(c) cannot be applied retroactively.[4] In determining that NRS 40.459(1)(c) cannot apply retroactively, we necessarily also conclude that NRS 40.459(1)(c) is not applicable to the factual circumstances in this petition.[5]

CONCLUSION

We conclude that NRS 40.459(1)(c) is a new statute that impacts vested rights. If a statute affects vested rights, it may not apply retroactively unless such intent is clearly manifested by the Legislature. We conclude that pursuant to the language in Assembly Bill 273, regarding the effective date of NRS 40.459(1)(c), the statute may not apply retroactively. Additionally, there is no clear or strong evidence that supports application of this statute retroactively. Therefore, because the trustee's sale in this petition occurred before the statute became effective, the limitations in NRS 40.459(1)(c) cannot apply here. Accordingly, we conclude that the district court did not act arbitrarily or capriciously in either denying Sandpointe's and Yahraus-Lewis's motion for partial summary judgment or in granting CML-NV's motion for partial summary judgment. We, therefore, deny the petition for extraordinary relief.

PICKERING, C.J., and GIBBONS, HARDESTY, and DOUGLAS, JJ., concur.

CHERRY, J., with whom PARRAGUIRRE, J., joins, dissenting:

I respectfully dissent from my colleagues in the majority. I would grant the original petition for a writ of mandamus or prohibition because, to date, the real party in interest has not obtained a deficiency judgment. I believe that when a deficiency judgment is lawfully obtained from a court of competent jurisdiction, it is at that time that NRS 40.459(1)(c) would apply. This is, of course, contrary to the majority holding that the limitations in NRS 40.459(1)(c) apply to foreclosure or trustee's sales occurring on or after the effective date of the statute.

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[4]We also note that the presence of several potential constitutional and procedural issues, including the Contracts Clause and federal preemption by the Financial Institutions Reform, Recovery, and Enforcement Act, weighs against retroactively applying NRS 40.459(1)(c) here. *See Landgraf*, 511 U.S. at 267 n.21 (''In some cases, . . . the interest in avoiding the adjudication of constitutional questions will counsel against a retroactive application.''). Because NRS 40.459(1)(c) is inapplicable in this case, we need not reach these issues.

[5]CML-NV contends that NRS 40.459(1)(c), which contemplates ''acquir[ing] the right to obtain the judgment from a person,'' cannot apply under these circumstances because the FDIC is not a person as defined by NRS 0.039. However, we need not determine this issue because we conclude that NRS 40.459(1)(c) does not apply here, where the trustee's sale occurred before NRS 40.459(1)(c) became effective.

Although I am deeply troubled by the majority's rejection of Sandpointe's and Yahraus-Lewis's argument that NRS 40.459(1)(c) merely clarified existing limitations on a creditor's recovery set forth in NRS 40.451, even if I were to accept this determination, in my view, NRS 40.459(1)(c)'s protections would nonetheless act to limit the amount of CML-NV's recovery. Before a final deficiency judgment can be obtained, a creditor must comply with the various requirements of Nevada's deficiency legislation and overcome any defenses asserted by the borrower and/or the guarantor. As Sandpointe and Yahraus-Lewis correctly assert, until such a judgment has been obtained, a creditor merely has a ''contingent remedy for a potential deficiency,'' not a vested right to a deficiency judgment. As a result, the application of NRS 40.459(1)(c) in cases, like the one presented here, in which a deficiency judgment had not yet been obtained by the statute's effective date cannot be viewed as having a retroactive effect on a creditor's right to recover. *See Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't (PEBP)*, 124 Nev. 138, 155, 179 P.3d 542, 553-54 (2008) (concluding that '' '[a] statute has retroactive effect when it takes away or impairs vested rights acquired under existing laws, or creates a new obligation, imposes a new duty, or attaches a new disability, in respect to transactions or considerations already past' '' (alteration in original) (quoting *Immigration & Naturalization Serv. v. St. Cyr*, 533 U.S. 289, 321 (2001))).

That the Legislature intended NRS 40.459(1)(c) to operate in this fashion is made clear by the Legislative Counsel Digest's pronouncement that the relevant provisions of Assembly Bill 273 would not only ''become effective upon passage and approval'' but would also ''apply to a deficiency judgment awarded on or after that effective date.'' 2011 Nev. Stat., ch. 311, Legislative Counsel's Digest, at 1741. This statement is instructive in that it confirms that it is the act of obtaining a deficiency judgment, not the holding of a foreclosure or trustee's sales, that triggers the application of NRS 40.459(1)(c). The majority declines to consider this language because they conclude that resorting to legislative intent is unnecessary. The Legislature, however, concerned that this court might improvidently interpret this statute in light of the arguments advanced by real party in interest, unequivocally emphasized and declared in its amicus curiae brief its clear intent that NRS 40.459(1)(c) ''apply to *every deficiency judgment awarded on or after its effective date*.'' (Emphasis added.) But in resolving the important issues presented here, the majority fails to acknowledge the Legislature's participation in this matter, much less address the statement of intent contained in its brief as to the statute's correct operation.

While the Great Recession from which our state has only just begun to emerge began in 2008, it was not until June 10, 2011,

that the Governor signed Assembly Bill 273 into law, codifying the limitation on deficiency judgment recoveries at issue here as NRS 40.459(1)(c). This statute was specifically designed to put a stop to profiteering activities brought on by the emergence during the Great Recession of a secondary market for distressed loans in which third parties swooped in to purchase these loans at deeply discounted prices, exercised their power of sale or judicial foreclosure on the property securing the loans, and then sought deficiency judgments against the debtors and guarantors with the blind hope that there still may be a solvent target. *See* Hearing on A.B. 273 Before the Assembly Commerce and Labor Comm., 76th Leg. (Nev., March 23, 2011). In order to encourage creditors to negotiate with the borrowers of these loans, rather than sell them to third parties for ''pennies on the dollar,'' Hearing on A.B. 273 Before the Senate Judiciary Comm., 76th Leg. (Nev., May 3, 2011), NRS 40.459(1)(c) greatly limits the amount of a deficiency judgment that a successor party can recover.

This court has long recognized that ''Nevada's deficiency legislation is designed to achieve fairness to all parties to a transaction secured in whole or in part by realty.'' *First Interstate Bank of Nev. v. Shields*, 102 Nev. 616, 618, 730 P.2d 429, 431 (1986). In *Shields*, we explained that for obligors, fairness was accorded by ensuring that ''creditors in Nevada may not reap a windfall at an obligor's expense by acquiring the secured realty at a bid price unrelated to the fair market value of the property and thereafter proceeding against available obligors for the difference between such a deflated price and the balance of the debt.'' *Id.* To that end, *Shields* recognized that ''[i]t is irrefutably clear that the salutary purposes of the legislative scheme for recovering legitimate deficiencies would be attenuated, if not entirely circumvented . . . by denying guarantors, or any other form of obligors, the protection provided by the deficiency statutes.'' *Id.* at 618-19, 730 P.2d at 431. This is so, the *Shields* court concluded, because in Nevada lenders are not permitted to ''manipulate sources of recovery in order to realize debt satisfaction in amounts substantially greater than the balance of the debt due.'' *Id.* at 619, 730 P.2d at 431.

While the creditor activities at issue here are obviously different than those addressed in *Shields*, the policy rationale underlying Nevada's deficiency legislation, including the newly enacted NRS 40.459(1)(c), remains the same—achieving ''fairness to *all parties* to a transaction secured . . . by realty.'' *Id.* at 618, 730 P.2d at 431 (emphasis added). But in denying the petition for extraordinary relief brought by Sandpointe and Yahraus-Lewis, the majority turns this policy on its head. By limiting NRS 40.459(1)(c)'s protections so that they apply only when a foreclosure or trustee's sale had not taken place prior to the statute's effective date, rather than allowing their application in cases where a deficiency judgment had not

been obtained by that date, the majority denies these protections not only to Sandpointe and Yahraus-Lewis, but to innumerable similarly situated borrowers and guarantors, the individuals and entities that this statute was specifically designed to assist.

In essence, the majority's decision serves to produce a windfall for collection agencies and other third-party purchasers of distressed loans through the very activities—the sale and purchase of such loans for pennies on the dollar, followed by the sale of the property securing the loans and efforts to recover the full indebtedness through a deficiency judgment—that the Legislature sought to address with the passage of Assembly Bill 273. And in so doing, the majority abrogates the clear intent of Nevada's Legislature in passing Assembly Bill 273 (NRS 40.459(1)(c)), which was to encourage lenders to negotiate with the borrowers and, by extension, the guarantors of these loans, rather than sell them to collection agencies and other third-party purchasers for far less than their original value.

The facts of this case are illustrative of why it is so important that the act of obtaining a deficiency judgment be the trigging event for the application of NRS 40.459(1)(c). Here, the original lender, Silver State Bank, was closed in 2008, with the FDIC appointed as receiver. As a result, when Sandpointe's loan matured and subsequently went into default in 2009, the FDIC was effectively the lender for this loan, meaning that, rather than having a local lender to negotiate with, Sandpointe and Yahraus-Lewis had only the negligible prospect of reaching out to this monolithic government entity. The FDIC, however, quickly shuttled the Sandpointe loan off to Multibank in 2010, and Multibank then transferred it to its wholly owned subsidiary, CML-NV, which foreclosed on the loan and sold the collateral securing it at a trustee sale in early 2011. Under the position adopted by the majority, the occurrence of the trustee sale at this point meant that Sandpointe and Yahraus-Lewis would not receive the protections afforded by NRS 40.459(1)(c), even though the prospect of negotiations on their loan had been all but eliminated by the failure of their original lender and the resulting scenario in which three separate entities, including the FDIC, had control of the loan over the course of a few years.

And one last thought. Even if NRS 40.459(1)(c) was applied, as I believe it should be, to limit a successor's recovery to the difference between the fair market value of the property and the amount the successor paid to acquire its interest, Sandpointe and Yahraus-Lewis, along with similarly situated borrowers and guarantors, would still be liable for a great amount of money to the successor to the loan.

For the above reasons, I dissent.

PUBLIC EMPLOYEES' RETIREMENT SYSTEM OF NEVADA, A PUBLIC AGENCY, APPELLANT, *v.* RENO NEWSPAPERS, INC., RESPONDENT.

No. 60129

November 14, 2013 313 P.3d 221

Appeal from a district court order granting a petition for a writ of mandamus to compel public access to government records. First Judicial District Court, Carson City; James Todd Russell, Judge.

Records requester filed petition for writ of mandamus, seeking to compel Public Employees' Retirement System (PERS) to provide records relating to retired state employees who were collecting pensions. The district court, granted the petition. PERS appealed. The supreme court, PARRAGUIRRE, J., held that: (1) only retirees' files themselves, and not all information contained in the files, were confidential under Public Records Act, and (2) public interest in access outweighed state interest in nondisclosure.

Affirmed in part and vacated in part.

Catherine Cortez Masto, Attorney General, and *Kimberly Okezie*, Deputy Attorney General, Carson City; *Woodburn & Wedge* and *W. Chris Wicker* and *Joshua M. Woodbury*, Reno, for Appellant.

Burton Bartlett & Glogovac, Ltd., and *Scott A. Glogovac* and *David S. McElroy*, Reno, for Respondent.

Brownstein Hyatt Farber Schreck, LLP, and *Adam P. Segal* and *Bryce C. Loveland*, Las Vegas, for Amicus Curiae Clark County Association of School Administrators.

Smith Law Firm and *James C. Smith*, Reno, for Amicus Curiae Retired Public Employees of Nevada.

1. MANDAMUS.
   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.
2. MANDAMUS.
   The supreme court reviews a district court's decision to grant or deny a petition for a writ of mandamus 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 on appeal.
4. RECORDS.
   Purpose of the Public Records Act is to promote government transparency and accountability by facilitating public access to information regarding government activities. NRS 239.001 *et seq.*

5. STATUTES.
   When the language of a statute is plain and unambiguous, a court is generally not permitted to search for its meaning beyond the statute itself.
6. RECORDS.
   In order to advance the Public Records Act's public access goal, the Act's provisions must be liberally construed to maximize the public's right of access, and any limitations or restrictions on that access must be narrowly construed. NRS 239.001 *et seq.*
7. RECORDS.
   Analysis of claims of confidentiality under the Public Records Act begins with a presumption in favor of disclosure. NRS 239.001 *et seq.*
8. RECORDS.
   A state entity claiming that requested records are confidential under the Public Records Act bears the burden of overcoming the presumption of openness by proving by a preponderance of the evidence that the requested records are confidential. NRS 239.001 *et seq.*
9. RECORDS.
   A state entity claiming that requested records are confidential under the Public Records Act may either show that a statutory provision declares the record confidential or, in the absence of such a provision, that its interest in nondisclosure clearly outweighs the public's interest in access. NRS 239.001 *et seq.*
10. RECORDS.
    Under section of Public Records Act providing that official correspondence and records, other than the files of individual members or retired employees, were public records available for public inspection, only the individual files of retired state employees maintained by Public Employees' Retirement System (PERS) were confidential, and other reports that PERS generated based on information contained in the files were not similarly protected; information contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, was not confidential merely because the same information was also contained in individuals' files. NRS 286.110(3).
11. RECORDS.
    Information contained in retired state employees' files, other than the files themselves, were not confidential, and thus were required to be disclosed by Public Employees' Retirement System, since public interest in access outweighed the state interest in nondisclosure; concerns that disclosure of the requested information would subject retired employees to a higher risk of identity theft and elder abuse were merely hypothetical and speculative. NRS 239.0113(2).
12. RECORDS.
    In determining whether records are confidential under the Public Records Act, the government's interests in nondisclosure are interpreted narrowly, whereas the public's interests in openness and accessibility are interpreted liberally. NRS 239.001 *et seq.*

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we discuss the applicability of Nevada's Public Records Act (the Act) to information stored in the individual files

of retired employees that are maintained by appellant Public Employees' Retirement System of Nevada (PERS). Specifically, we address the scope of confidentiality set forth in NRS 286.110(3), which states that ''[t]he official correspondence and records, *other than the files of individual members or retired employees*, . . . are public records and are available for public inspection.'' (Emphasis added.)

Although we conclude that the individual files have been declared confidential by statute and are thereby exempt from requests pursuant to the Act, other reports that PERS generates based on information contained in the files are not similarly protected by NRS 286.110(3). However, information contained in such other reports may still be declared confidential, privileged, or protected by other statutes, rules, or caselaw, and therefore not subject to disclosure under the Act. Accordingly, we affirm in part and vacate in part the district court's order.

FACTS AND PROCEDURAL HISTORY

In 2011, respondent Reno Newspapers, Inc., doing business as the Reno Gazette-Journal (RGJ), submitted a public records request to PERS seeking the following pension information: the names of all individuals who are collecting pensions, the names of their government employers, their salaries, their hire and retirement dates, and the amounts of their pension payments. RGJ's request originated as part of an investigation concerning government expenditures and the public cost of retired government employee pensions. PERS denied RGJ's request, asserting that the information was confidential pursuant to NRS 286.110(3), which states that the files of individual retired employees are not public records, and NRS 286.117, which requires a personal waiver from the member to review and copy such records.

RGJ filed a petition for a writ of mandamus in district court seeking the requested information, which it asserted is not confidential because it is generated from public records and easily accessible through an electronic search of the PERS system. PERS opposed the petition, arguing that it strictly maintains the requested information as confidential and that the privacy interests involved outweigh the public's interest in disclosure.[1] For support, PERS submitted a declaration from its executive officer explaining that all information related to the individual files is maintained as

[1]Clark County Association of School Administrators (CCASA) filed a motion to intervene and a proposed opposition to RGJ's writ petition, and Retired Public Employees of Nevada (RPEN) filed a motion for leave to file an amicus brief in support of PERS, both arguing that production of the requested information would subject retired employees to the risk of identity theft and elder abuse. These organizations have also filed amicus curiae briefs on appeal.

confidential but that PERS provides an annual valuation of its system in aggregate form as a public record.

The district court granted RGJ's petition, concluding that neither NRS 286.110(3) nor NRS 286.117 declared the requested information confidential and that privacy concerns did not clearly outweigh the public's right to disclosure. The district court ordered PERS to produce a report for RGJ containing the requested information, subject to appropriate fees under NRS 239.052 and so long as the home addresses and social security numbers of the retired public employees remained confidential.[2] PERS now brings this appeal.

DISCUSSION

PERS argues on appeal that the district court erred in granting RGJ's petition because the Legislature, by enacting NRS 286.110(3), has explicitly declared that information contained in the individual files of retired employees is confidential. Alternatively, PERS argues that the privacy interests in nondisclosure clearly outweigh the public's interest in accessing that information.

Standard of review

[Headnotes 1-3]

''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. This court reviews a district court's decision to grant or deny a petition for a writ of mandamus under an abuse of discretion standard. *City of Reno v. Reno Gazette-Journal*, 119 Nev. 55, 58, 63 P.3d 1147, 1148 (2003). Questions of statutory construction, however, including the meaning and scope of a statute, are questions of law, which this court reviews de novo. *Id*.

Application of Nevada's Public Records Act

[Headnotes 4-9]

At the outset, the Act establishes that ''all public books and public records of governmental entities must remain open to the public, unless 'otherwise declared by law to be confidential.' '' *Reno Newspapers, Inc. v. Gibbons*, 127 Nev. 873, 877, 266 P.3d 623, 626 (2011) (quoting NRS 239.010(1)). The Act's purpose is to promote government transparency and accountability by facilitating

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[2]The district court also carved out an exception prohibiting the disclosure of the names of retired employees in sensitive law enforcement positions where public access to those names could jeopardize their personal safety.

public access to information regarding government activities. *Id.* ''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)). Moreover, in order to advance the Act's public access goal, the Act's ''provisions must be liberally construed to maximize the public's right of access,'' and ''any limitations or restrictions on [that] access must be narrowly construed.'' *Gibbons*, 127 Nev. at 878, 266 P.3d at 626 (citing NRS 239.001(2)-(3)). Accordingly, this court begins its analysis of claims of confidentiality under the Act with a presumption in favor of disclosure. *Id.* at 880, 266 P.3d at 628. The state entity bears the burden of overcoming this presumption of openness by proving by a preponderance of the evidence that the requested records are confidential. *Id.* The state entity may either show that a statutory provision declares the record confidential, or, in the absence of such a provision, ''that its interest in nondisclosure clearly outweighs the public's interest in access.'' *Id.* Within this context, we now address the district court's order granting RGJ's petition for access to the requested information.

The Legislature has declared the files of individual members confidential

[Headnote 10]

As noted, pursuant to NRS 239.010(1), all public books and public records of government entities must remain open to the public unless ''otherwise declared by law to be confidential.'' Applicable here, the Legislature has declared the following limitation with regard to what PERS information constitutes a public record:

> The official correspondence and records, *other than the files of individual members or retired employees*, and, except as otherwise provided in NRS 241.035, the minutes, audio recordings, transcripts and books of the System are public records and are available for public inspection.

NRS 286.110(3) (emphasis added). This exception to disclosure must be construed narrowly. NRS 239.001(3).

On appeal, PERS argues that all information contained in an individual's file is protected by NRS 286.110(3)'s scope of confidentiality and that disclosure of such information is only proper following waiver by the retired employee pursuant to NRS 286.117. RGJ responds that PERS's construction is overly broad and would include information that merely relates to a retired employee's file, regardless of the information's origin, such as other-

wise nonconfidential information derived from third-party payroll records relating to individuals.

PERS's position exceeds the plain meaning of NRS 286.110(3)'s restrictions, which must be narrowly construed to protect only individuals' files. NRS 239.001(3). In concluding that only individuals' files have been declared confidential as a matter of law, we specify that NRS 286.110(3)'s scope of confidentiality does not extend to all information by virtue of it being contained in individuals' files. Where information is contained in a medium separate from individuals' files, including administrative reports generated from data contained in individuals' files, information in such reports or other media is not confidential merely because the same information is also contained in individuals' files.[3] Rather, it is the individuals' files themselves that are confidential pursuant to NRS 286.110(3).

This narrow construction of NRS 286.110(3) is consistent with *Reno Newspapers, Inc. v. Haley*, where we concluded that although NRS 202.3662 unambiguously protects the applications for concealed firearms permits as confidential, the statute's scope of confidentiality must be narrowly construed and does not extend to protecting the identities of permittees or any post-permit records of investigation, suspension, or revocation.[4] 126 Nev. 211, 217, 234 P.3d 922, 926 (2010). Similarly, NRS 286.110(3) only protects as confidential the individuals' files held by PERS, not all information contained in separate media that also happens to be contained in individuals' files.

This is not to say, however, that information contained in separate media that is otherwise confidential, privileged, or protected by law may be disclosed. While we hold that NRS 286.110(3) protects only the individuals' files maintained by PERS, other statutes, rules, or caselaw may independently declare individuals' information confidential, privileged, or otherwise protected. The court in such an instance must review the requested information in camera to ensure that appropriate confidentiality is maintained. At this point, PERS has not identified any statute, rule, or caselaw that would foreclose production of the information requested by RGJ.

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[3]Because we conclude that only the individuals' files are protected as confidential, we decline to address the parties' arguments with regard to NRS 286.117's waiver provision, as access to separately generated reports is not subject to NRS 286.117.

[4]In reaching our conclusion in *Haley*, we clarified that any confidential information within the unprotected post-permit files should be redacted pursuant to NRS 239.010(3). 126 Nev. at 219, 234 P.3d at 928. The same rationale applies here. However, we reiterate that information maintained in a medium separate from individuals' files is not made confidential merely because the same information can also be found in the individuals' files.

Balancing of interests

[Headnotes 11, 12]

In the alternative, PERS argues that the district court erred in concluding that the government's interests in nondisclosure did not clearly outweigh the public's interests in access to the requested information. *See Donrey of Nev., Inc. v. Bradshaw*, 106 Nev. 630, 634-35, 798 P.2d 144, 147 (1990) (explaining that balancing the interests involved is necessary when evaluating whether certain reports must be disclosed). The government bears the burden of showing ''that its interest in nondisclosure clearly outweighs the public's interest in access.'' *Gibbons*, 127 Nev. at 880, 266 P.3d at 628; *see also* NRS 239.0113(2). Further, the government's interests in nondisclosure are interpreted narrowly, whereas the public's interests in openness and accessibility are interpreted liberally. *Haley*, 126 Nev. at 217, 234 P.3d at 926.

PERS argues that disclosure of the requested information would subject retired employees to a higher risk of identity theft and elder abuse. RGJ asserts that such concerns are hypothetical and speculative and thus do not outweigh the presumption in favor of disclosure. The record indicates that the only evidence presented in the district court to support PERS's argument was a PowerPoint presentation with statistics showing that Nevada is the third leading state in the number of fraud complaints to the Federal Trade Commission and the sixth leading state in the number of identity theft complaints.

In Nevada, ''[a] mere assertion of possible endangerment does not clearly outweigh the public interest in access to . . . records.'' *Haley*, 126 Nev. at 218, 234 P.3d at 927 (internal quotations omitted). Because PERS failed to present evidence to support its position that disclosure of the requested information would actually cause harm to retired employees or even increase the risk of harm, the record indicates that their concerns were merely hypothetical and speculative. Therefore, because the government's interests in nondisclosure in this instance do not clearly outweigh the public's presumed right to access, we conclude that the district court did not err in balancing the interests involved in favor of disclosure. *Id.*; *see also San Diego Cnty. Emps. Ret. Ass'n v. Superior Court*, 127 Cal. Rptr. 3d 479, 492-93 (Ct. App. 2011) (holding the potential for elder abuse and financial crime did not outweigh the public's interest in disclosure of pension information).

Accordingly, the district court correctly interpreted NRS 286.110(3)'s scope of confidentiality and did not abuse its discretion in ordering PERS to provide the requested information to the extent that it is maintained in a medium separate from individuals' files. We therefore affirm in part the district court's order granting the writ of mandamus.

However, to the extent that the district court ordered PERS to create new documents or customized reports by searching for and compiling information from individuals' files or other records, we vacate the district court's order. NRS 239.010(1) (permitting ''inspection'' and copying by the public); NRS 239.055(1) (permitting a government entity to charge an additional fee for extraordinary resources necessary to comply with ''a request for a *copy* of a public record'' (emphasis added)); *see also State ex rel. Kerner v. State Teachers Ret. Bd.*, 695 N.E.2d 256, 258 (Ohio 1998) (concluding Ohio public records laws impose ''no duty to create a new document by searching for and compiling information from [a government agency's] existing records'').

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

BENJAMIN JAMES CLANCY, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 59571

November 27, 2013 313 P.3d 226

Appeal from a judgment of conviction, pursuant to a jury verdict, of leaving the scene of an accident. Eighth Judicial District Court, Clark County; Doug Smith, Judge.

Defendant was convicted in the district court of felony leaving the scene of an accident that resulted in bodily injury. Defendant appealed. The supreme court, PARRAGUIRRE, J., held that: (1) as a matter of apparent first impression, knowledge on part of driver that he was involved in an accident is an element of offense of leaving the scene of an accident that resulted in death or bodily injury; (2) as a matter of apparent first impression, requirement that driver have knowledge that he was involved in an accident may be satisfied by actual or constructive knowledge; (3) as a matter of first impression, statute requiring driver of a vehicle involved in an accident involving death or bodily injury to stop at scene was not unconstitutionally vague; (4) actual physical contact between two vehicles is not required for a person to be ''involved in an accident,'' within meaning of statute requiring driver of any vehicle involved in an accident in which death or personal injury occurred to stop at scene; and (5) evidence was sufficient to support conviction for felony leaving the scene of an accident that resulted in bodily injury.

Affirmed.

The Weiner Law Group, LLC, and *Jason G. Weiner* and *Nathan Sosa*, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   The district court has broad discretion in determining the appropriate jury instructions.
2. Criminal Law.
   The supreme court reviews de novo whether a proffered jury instruction is a correct statement of the law.
3. Automobiles.
   Knowledge on part of driver that he was involved in an accident is an element of offense of leaving the scene of an accident that resulted in death or bodily injury. NRS 484E.010.
4. Criminal Law.
   Because strict liability offenses generally are disfavored, simple omission of scienter terminology in a criminal statute does not end the supreme court's inquiry as to whether the Legislature intended to include a scienter requirement as an element of a criminal offense.
5. Statutes.
   The supreme court's primary goal in construing a statute is to ascertain the Legislature's intent in enacting it.
6. Statutes.
   Where the language of the statute standing alone cannot directly resolve an issue of statutory interpretation, the supreme court considers the context and spirit of the statute in question, together with the subject matter and policy involved.
7. Automobiles.
   Purpose of statute imposing a duty upon driver of any vehicle involved in an accident to stop at scene of accident in which death or bodily injury occurred is to require the driver to stop and provide identifying information and render reasonable assistance to injured persons for the benefit of any person who may have been injured in the accident. NRS 484E.010.
8. Automobiles.
   Statute requiring driver of any vehicle involved in an accident to stop at scene of accident in which death or bodily injury occurred in order to provide identifying information and render reasonable assistance to injured persons imposes an affirmative course of action on the driver; implicit therein must be the element of recognition or awareness on the part of driver of fact of an accident. NRS 484E.010.
9. Automobiles.
   For purposes of offense of failing to stop and remain at the scene of an accident that resulted in death or bodily injury, requirement that driver have knowledge that he was involved in an accident may be satisfied by actual or constructive knowledge of accident. NRS 484E.010.
10. Automobiles; Constitutional Law.
    Statute requiring driver of a vehicle involved in an accident in which death or bodily injury occurred to stop at scene in order to provide identifying information and render reasonable assistance to injured persons

was not unconstitutionally vague for failure to specifically define phrase ''involved in an accident''; terms were easily defined by reference to their common dictionary definitions, such that statute provided fair notice of what conduct was prohibited and did not encourage discriminatory enforcement. NRS 484E.010(1).

11. CONSTITUTIONAL LAW; CRIMINAL LAW.
The supreme court reviews the constitutionality of a statute de novo, presuming that a statute is constitutional.

12. CONSTITUTIONAL LAW.
The party challenging a statute's constitutionality has the burden of making a clear showing of invalidity.

13. CONSTITUTIONAL LAW.
A statute is unconstitutionally vague (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited, or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement.

14. AUTOMOBILES.
Actual physical contact between two vehicles is not required for a person to be ''involved in an accident,'' within meaning of statute requiring driver of any vehicle involved in an accident in which death or personal injury occurred to stop at scene in order to provide identifying information and render reasonable assistance to injured persons. NRS 484E.010(1).

15. CRIMINAL LAW.
In reviewing the sufficiency of evidence to support a conviction, the supreme court determines whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt.

16. CRIMINAL LAW.
In reviewing the sufficiency of the evidence to support a conviction, the supreme court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.

17. AUTOMOBILES.
Evidence was sufficient to support finding that defendant's vehicle was ''involved in an accident'' with victim's motorcycle, as required to support conviction for felony leaving the scene of an accident that resulted in bodily injury; although defendant's expert witness testified that markings on defendant's vehicle after alleged accident were not consistent with a vehicle-motorcycle accident, witness riding in vehicle in front of defendant's vehicle at time of incident testified that she observed defendant's vehicle strike victim's motorcycle, victim testified that defendant's vehicle struck his motorcycle, and incident caused victim and passenger on motorcycle to fall off the motorcycle. NRS 484E.010.

18. AUTOMOBILES.
Evidence was sufficient to support finding that defendant knew or should have known that an accident occurred, as required to support conviction for felony leaving the scene of an accident that resulted in bodily injury; witness riding in vehicle in front of defendant's vehicle at time of accident testified that she observed defendant's vehicle strike victim's motorcycle, and that, immediately following collision, she saw defendant looking over his shoulder and at his rearview mirror before he accelerated and exited the freeway at the next off-ramp, despite having entered the freeway just over a mile earlier. NRS 484E.010.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

In Nevada, a driver who has been involved in an accident must stop and remain at the scene until he has provided certain information and rendered reasonable assistance to any person injured in the accident. NRS 484E.010-.030. If the accident resulted in bodily injury or the death of a person, a driver's failure to stop and remain at the scene is a felony. NRS 484E.010(3). In this appeal, we must determine whether the State is required to prove that the driver had knowledge that he had been involved in an accident. Holding that such knowledge is required and that the knowledge may be actual or constructive, we conclude that sufficient evidence was presented to support the jury's finding that appellant knew or should have known that he was involved in an accident before leaving the scene. Thus, we affirm the judgment of conviction.

FACTS

Appellant Benjamin Clancy was charged with a felony for leaving the scene of an accident that resulted in bodily injury. The accident involved a vehicle driven by Clancy and a motorcycle operated by Barry Robinson. Robinson was traveling southbound on Interstate 15 through Las Vegas early in the morning with his girlfriend, Erica Norris, as a passenger. A vehicle merged in front of him and struck the front tire or fender of his motorcycle, causing him to lose control. Robinson and Norris fell off the motorcycle, which hit the center divider and then skidded across the freeway, stopping in the far right emergency lane.

A passenger in a minivan traveling ahead of Robinson's motorcycle witnessed the accident. Diane Camacho saw a silver SUV strike Robinson's motorcycle and then accelerate, overtaking the minivan on the right side. Camacho saw the driver of the SUV, whom she later identified as Clancy, looking in the rearview mirror and over his shoulder at the crash behind him. The silver SUV exited the freeway at the next off-ramp but did not pull over. Camacho dialed 911 and gave the dispatcher the license plate number for the silver SUV.

Nevada Highway Patrol Trooper George Thaw arrived on scene to conduct an investigation. After taking photographs of the motorcycle, he interviewed Robinson and Norris in the hospital while waiting for his dispatcher to run the plate numbers taken by Camacho. Thaw learned that the silver SUV belonged to Clancy, and he drove to Nellis Air Force Base, where Clancy was stationed, to question him. While there, he inspected Clancy's car and saw damage to the vehicle's right rear panel, which Thaw estimated

was the same height as the front fender of Robinson's motorcycle. Thaw arrested Clancy for leaving the scene of an accident that resulted in bodily injury to a person. Clancy denied having any knowledge of the accident.

At trial, Clancy called an accident reconstruction specialist as an expert witness. Based on scrutiny of the two vehicles and the nature of the markings on Clancy's SUV, the defense expert opined that there was no evidence of a collision between Clancy's SUV and Robinson's motorcycle. The State did not call an expert to rebut this testimony, but it did cross-examine the defense expert as to whether there could have been contact between the two vehicles that could have resulted in the motorcycle's crash without causing significant damage to the SUV.

At the close of evidence, Clancy argued in favor of a jury instruction stating: ''You must find Defendant not guilty of Leaving the Scene of an Accident unless you find that the Defendant had *actual knowledge* of the accident at the time it occurred.'' (Emphasis added.) The district attorney, however, sought the following instruction: ''In order to find the Defendant guilty of Leaving the Scene of an Accident, you must find that the Defendant *knew or should have known* that he had been involved in an accident prior to leaving the scene of that accident.'' (Emphasis added.) The court ultimately adopted the district attorney's proposed instruction. The jury returned a guilty verdict.

DISCUSSION

On appeal, Clancy argues that the district court abused its discretion by instructing the jury that it must find that a defendant knew or should have known that he was involved in an accident in order to find the defendant guilty of leaving the scene of an accident because actual knowledge is required. We disagree and hold that NRS 484E.010 requires the State to prove that the driver either knew or should have known that he was involved in an accident. We further conclude that NRS 484E.010's phrase ''involved in an accident'' is not unconstitutionally vague or ambiguous and that the evidence presented at trial was sufficient to support the jury's guilty verdict.

NRS 484E.010 requires knowledge that an accident occurred

[Headnotes 1, 2]

The district court has broad discretion in determining the appropriate jury instructions. *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008). We have declined to disturb a district court's refusal of a jury instruction absent an abuse of discretion or judicial error. *Id*. The question presented is whether the defense instruction on knowledge should have been given because

it was a correct statement of the law. *See Nay v. State*, 123 Nev. 326, 330, 167 P.3d 430, 433 (2007) (''[T]he defendant 'is not entitled to an instruction which incorrectly states the law or that is substantially covered by other instructions.' '' (quoting *Barnier v. State*, 119 Nev. 129, 133, 67 P.3d 320, 322 (2003))). We review de novo whether an instruction is a correct statement of the law. *Id.*

[Headnote 3]

To determine whether the defense instruction was a correct statement of the law, we must look to the statute defining the offense. NRS 484E.010 provides in pertinent part:

> 1. The driver of any vehicle involved in an accident on a highway or on premises to which the public has access resulting in bodily injury to or the death of a person shall immediately stop his or her vehicle at the scene of the accident or as close thereto as possible, and shall forthwith return to and in every event shall remain at the scene of the accident until the driver has fulfilled the requirements of NRS 484E.030.
>
> . . . .
>
> 3. A person failing to comply with the provisions of subsection 1 is guilty of a category B felony . . . .

[Headnotes 4-6]

The statute does not contain any express language regarding the driver's knowledge that he had been involved in an accident. Because strict liability offenses generally are disfavored, the simple omission of appropriate terminology does not end our inquiry. *See Ford v. State*, 127 Nev. 608, 614, 262 P.3d 1123, 1127 (2011) (''many 'cases interpret[ ] criminal statutes to include broadly applicable scienter requirements, even where the statute by its terms does not contain them' '' (alteration in original) (quoting *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 70 (1994))). Our primary goal in construing a statute is to ascertain the Legislature's intent in enacting it. *Moore v. State*, 117 Nev. 659, 661, 27 P.3d 447, 449 (2001). ''[W]here the language of the statute cannot directly resolve the issue standing alone, we consider the context and spirit of the statute in question, together with the subject matter and policy involved.'' *Id.* at 661-62, 27 P.3d at 449 (internal quotations and citations omitted).

[Headnotes 7, 8]

The purpose behind NRS 484E.010 is to require drivers involved in an accident to stop and provide identifying information and render reasonable assistance to injured persons for the benefit of any person who may have been injured in the accident. *See generally State v. Feintuch*, 375 A.2d 1223 (N.J. Super. Ct. App. Div. 1977) (discussing purpose of offense of leaving the scene of an ac-

cident). It imposes an affirmative course of action on the driver. *State v. Wall*, 482 P.2d 41, 45 (Kan. 1971). ''Implicit therein must be the element of recognition or awareness on the part of that driver of the fact of [an accident].'' *Id.* The statute's purpose is not served where the driver is unaware of the event requiring him to stop and provide identifying information and render assistance—the accident. In that situation, the statute does nothing to encourage the driver to stop and provide information and render assistance; the driver did not stop because he was not aware that there was a reason to do so. As the Washington Supreme Court has observed in addressing this issue, ''It is inconceivable that the legislature intended that punishment would be imposed for failure to follow the course of conduct outlined [stop, exchange information, and render aid], if the operator of the vehicle was ignorant of the happening of an accident.'' *State v. Martin*, 440 P.2d 429, 436 (Wash. 1968). Rules of statutory construction require us to avoid such an absurd result. Accordingly, we construe NRS 484E.010(1) to require proof of knowledge of involvement in an accident.[1]

[Headnote 9]

Having concluded that knowledge of involvement in an accident is required for criminal liability under NRS 484E.010, we must determine whether that knowledge must be actual knowledge. We agree with the State that actual knowledge need not be proven to satisfy the knowledge requirement.[2] Imposing an actual knowledge requirement would encourage drivers not to stop so as to avoid gaining actual knowledge of an accident or to avoid further

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[1]We acknowledge that we have declined to impose a similar knowledge requirement with respect to the bodily-injury-or-death element of the statute. *Dettloff v. State*, 120 Nev. 588, 594, 97 P.3d 586, 590 (2004) (holding that ''actual or constructive knowledge of injury or death is not an element of the felony offense of leaving the scene of an accident''). There is good reason for this distinction. As explained in this opinion, omitting a knowledge requirement as to the accident element would defeat the purpose of the statute. In contrast, adding a knowledge requirement as to the bodily-injury-or-death element would defeat the purpose of the statute because doing so would encourage drivers involved in an accident to leave the scene in order to avoid gaining any knowledge of potential injury or death or to avoid an arrest for other crimes, such as driving under the influence. *Id.*

[2]Clancy suggests that we approved of an actual knowledge instruction in *Dettloff*. In that case, we merely observed that the district court had instructed the jury that ''to find Dettloff guilty of leaving the scene of an accident, he must have known he was involved in an accident.'' 120 Nev. at 593, 97 P.3d at 589. Our opinion does not reproduce the exact language of the instruction. Even assuming that the instruction required actual knowledge that Dettloff was involved in an accident, our decision in that case does not address whether that part of the instruction was a correct statement of the law. We were asked to determine whether the instruction was a correct statement of the law to the extent that it did not require knowledge of injury, and we addressed the instruction only as to that issue. *Id.* at 593-95, 97 P.3d at 589-90.

criminal liability, which defeats the purpose of the statute. *Cf. Dettloff v. State*, 120 Nev. 588, 594, 97 P.3d 586, 590 (2004) (declining to require knowledge of injury). In contrast, focusing on whether the driver knew or should have known that he was involved in an accident is more consistent with the duty to stop and render aid imposed by NRS 484E.030. The Kansas Supreme Court, for example, provides a sound rationale for adopting such a standard:

> Direct evidence of absolute, positive, subjective knowledge may not always be obtainable. We think it *sufficient if the circumstances are such as to induce in a reasonable person a belief that collision has occurred*; otherwise a callous person might nullify the humanitarian purpose of the statute by the simple act of immediate flight from an accident scene without ascertaining exactly what had occurred.

State v. Wall, 482 P.2d 41, 45 (Kan. 1971) (emphasis added).

Accordingly, we conclude that the jury instruction given by the district court correctly informed the jury to determine whether Clancy knew or should have known that he was involved in an accident, and therefore the district court did not abuse its discretion by giving that instruction.

NRS 484E.010 is not unconstitutionally vague or ambiguous

[Headnote 10]

Clancy argues that the phrase ''involved in an accident'' in NRS 484E.010(1) is unconstitutionally vague or ambiguous because it is not clear whether the phrase requires actual contact with the vehicle, or also includes a motorcycle swerving to avoid a vehicle without any physical contact.

[Headnotes 11-13]

We review the constitutionality of a statute de novo, presuming that a statute is constitutional. *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010). The party challenging a statute's constitutionality ''has the burden of making a clear showing of invalidity.'' *Id.* (internal citations and quotations omitted). A statute is unconstitutionally vague ''(1) if it 'fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if it 'is so standardless that it authorizes or encourages seriously discriminatory enforcement.' '' *Id.* at 481-82, 245 P.3d at 553 (quoting *Holder v. Humanitarian Law Project*, 561 U.S. 1, 18, (2010)).

Although the constitutionality of the phrase ''involved in an accident'' as used in NRS 484E.010(1) has never been addressed in Nevada, a number of other jurisdictions have determined that very similar language is not vague or ambiguous. In *State v. Carpenter*, 334 N.W.2d 137 (Iowa 1983), the Iowa Supreme Court held that

such language was not vague or ambiguous because such terms were easily defined by reference to their common dictionary definitions. *Id.* at 139-40. The Texas Court of Appeals has held the same. *Sheldon v. State*, 100 S.W.3d 497, 500-01 (Tex. Ct. App. 2003)).

[Headnote 14]

The word ''accident'' is commonly defined as ''[a]n unintended and unforeseen injurious occurrence.'' *Black's Law Dictionary* 16 (9th ed. 2009). Webster's dictionary defines ''involve'' as ''to draw in as a participant'' or ''to require as a necessary accompaniment.'' *Webster's Third New International Dictionary* 1191 (3d ed. 2002). These definitions do not require direct physical impact between two vehicles in order to be ''involved in an accident.'' Other jurisdictions have concluded that similar language does not require actual contact between vehicles. *See, e.g.*, *People v. Kroncke*, 83 Cal. Rptr. 2d 493, 501 (Ct. App. 1999) (interpreting ''accident'' as used in California's hit-and-run statute broadly to include a passenger jumping out of a moving car); *State v. Carpenter*, 334 N.W.2d 137, 140 (Iowa 1983) (''[Iowa's hit-and-run] statute does not require a collision between the driver's vehicle and another vehicle or person'' in order to be deemed to have been ''involved'' in an ''accident''); *State v. Hughes*, 907 P.2d 336, 339 (Wash. Ct. App. 1995) (''[W]e conclude the Legislature did not intend that the duty to stop, identify and render aid in an injury accident be interpreted so narrowly as to attach only to the driver of a vehicle which collided with another.'').

Applying the dictionary definition of the words ''involved'' and ''accident,'' and following the construction of such language as used by other jurisdictions in their hit-and-run statutes, we conclude that NRS 484E.010 gives fair notice of what is prohibited and does not encourage discriminatory enforcement, thus is not unconstitutionally vague. *See Castaneda*, 126 Nev. at 483, 245 P.3d at 553.

Evidence was sufficient to support the verdict

Next, we address Clancy's argument that the evidence at trial was insufficient to establish that a collision actually occurred or that Clancy knew that there had been an accident.

[Headnotes 15, 16]

In reviewing the sufficiency of evidence, this court determines whether a rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt. *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008). ''This court will not reweigh the evidence or evaluate the credibility of witnesses because that is the responsibility of the trier of fact.'' *Id.*

[Headnote 17]

At trial, Camacho, the witness in the vehicle in front of Clancy and Robinson, stated that she saw Clancy's silver SUV strike Robinson's motorcycle. On cross-examination, Clancy attempted to show that from the angle Camacho viewed the vehicles, she could not have seen the rear corner of Clancy's SUV and only inferred that the SUV actually made contact with the motorcycle. Another witness, Cary Pierce, was driving behind Robinson at the time of the accident and saw a light-colored SUV or van make contact with Robinson's motorcycle. Pierce, distracted by the motorcycle crash, was unable to positively identify the vehicle he saw strike the motorcycle.

Clancy's expert testified that the marks on Clancy's car are not consistent with such an accident. However, the State's cross-examination attempted to raise the possibility that the nature of the particular accident could have resulted in minimal markings on Clancy's SUV.

As we have concluded, actual physical contact between two vehicles is not required for a person to be involved in an accident under NRS 484E.010. Accordingly, Camacho's observation that Clancy merged into Robinson's motorcycle immediately followed by the motorcycle crashing, Pierce's observation from behind that a light-colored vehicle actually struck the motorcycle, and Robinson's observation that a vehicle actually struck his motorcycle provide sufficient evidence for a jury to find beyond a reasonable doubt that Clancy's SUV was involved in an accident with Robinson's motorcycle, even if Clancy's expert raised doubts about whether actual contact between the vehicles occurred. *See Mitchell*, 124 Nev. at 816, 192 P.3d at 727.

[Headnote 18]

The State's evidence was also sufficient to support the jury finding that Clancy either knew or should have known that an accident occurred. Specifically, Camacho testified that immediately following Robinson's crash, she saw Clancy looking over his shoulder and at his rearview mirror before he accelerated away and exited the freeway at the next off-ramp, despite having entered the freeway just over a mile earlier and still being well short of Nellis Air Force Base, his destination. Thus, we hold that sufficient evidence supported the jury's guilty verdict.

Accordingly, we affirm the judgment of conviction entered by the district court.

HARDESTY and CHERRY, JJ., concur.

NOE ORTEGA PEREZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 55817

November 27, 2013 313 P.3d 862

Appeal from a judgment of conviction, pursuant to a jury verdict, of six counts of lewdness with a child under 14 years of age and two counts of sexual assault of a minor under 14 years of age. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Defendant was convicted in the district court of six counts of lewdness with a child under 14 years of age and two counts of sexual assault of a minor under 14 years of age. He appealed. The supreme court, PARRAGUIRRE, J., held that: (1) clinical psychologist had sufficient qualifications to testify as an expert on grooming activity, (2) testimony on grooming behavior was relevant for purposes of evaluating the evidence of abuse and assessing the victim's credibility, and (3) psychologist's opinion was the product of reliable methodology.

Affirmed.

DOUGLAS, J., with whom PICKERING, C.J., and CHERRY, J., agreed, dissented in part.

David Phillips, Las Vegas, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *James R. Sweetin*, Deputy District Attorney, Clark County, for Respondent.

Robert Arroyo and *Amy Coffee*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Richard A. Gammick and *Terrence P. McCarthy*, Reno, for Amicus Curiae Nevada District Attorneys Association.

1. CRIMINAL LAW.

As a general matter, whether expert testimony on grooming behavior is admissible in a case involving sexual conduct with a child must be determined on a case-by-case basis, considering the requirements that govern the admissibility of expert testimony, including whether the particular expert is qualified to testify on the subject, whether the testimony is relevant and the product of reliable methodology such that it will assist the jury to understand the evidence or to determine a fact in issue, and whether the testimony is limited in scope to matters that are within the expert's specialized knowledge.

2. Criminal Law.

The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will assist the trier of fact to understand the evidence or determine a fact in issue. NRS 50.275.

3. Criminal Law.

Expert testimony is admissible if it meets three requirements, described as the qualification, assistance, and limited scope requirements: (1) the expert must be qualified in an area of scientific, technical, or other specialized knowledge; (2) his or her specialized knowledge must assist the trier of fact to understand the evidence or to determine a fact in issue; and (3) his or her testimony must be limited to matters within the scope of his or her specialized knowledge. NRS 50.275.

4. Criminal Law.

The supreme court reviews a district court's decision to allow expert testimony for an abuse of discretion. NRS 50.275.

5. Criminal Law.

Clinical psychologist had sufficient qualifications to testify for State as an expert on grooming activity at trial of defendant for sex offenses against minor victim; witness had a bachelor's degree in psychology and a doctorate degree in clinical psychology, had worked for ten years with family courts conducting child custody evaluations, dealing with the issues of domestic violence or sex abuse allegations, had conducted over 1,000 psychosexual evaluations on sex offenders, and had spent a large part of his career studying the relationships between victims and offenders. NRS 50.275.

6. Criminal Law.

Factors that are useful in determining whether a witness is qualified in an area of scientific, technical, or other specialized knowledge and therefore may testify as an expert include: (1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training. NRS 50.275.

7. Criminal Law.

The assistance requirement for determining admissibility of expert testimony has two components: whether the testimony is (1) relevant and (2) the product of reliable methodology. NRS 50.275.

8. Criminal Law.

Expert testimony of clinical psychologist on grooming behavior and its effect on child victims of sexual abuse was relevant, as required for testimony to be admissible at trial of defendant for sex offenses against minor victim, for purposes of evaluating the evidence of abuse and assessing the victim's credibility; testimony, that the goal of grooming was to reduce victim's resistance to abuse as well as the likelihood of disclosure, helped explain evidence that prior to charged event defendant had engaged in seemingly innocuous flirtatious behavior and sexual discussions, and testimony helped explain victim's seeming acquiescence to abuse and her inconsistent reports of abuse. NRS 48.015, 50.275.

9. Criminal Law.

Danger of unfair prejudice did not outweigh probative value of expert testimony of State witness on grooming behavior and its effect on child victims of sexual abuse was relevant, as required for testimony to be admissible at trial of defendant for sex offenses against minor victim; witness generally addressed how grooming occurs and its purpose, offered insight in the form of hypotheticals that were based on defendant's conduct

and indicated that such conduct was probably grooming behavior, and did not offer an opinion as to the victim's credibility or express a belief that she had been abused. NRS 48.035, 50.275.

10. CRIMINAL LAW.

Opinion of clinical psychologist, that defendant had probably engaged in grooming behaviors with child victim, was the product of reliable methodology, as required for testimony to be admissible at trial of defendant for sex offenses against minor victim; although opinion may not have been subject to peer review, psychologist practiced in a recognized field of expertise and testified about a phenomenon that courts had recognized as generally accepted in the scientific community. NRS 50.275.

11. CRIMINAL LAW.

Factors to be considered in determining whether an expert's opinion is the product of reliable methodology, as required for expert testimony to be admissible, include whether the opinion is: (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community, which is not always a determinative factor; and (5) based more on particularized facts rather than assumption, conjecture, or generalization. NRS 50.275.

12. CRIMINAL LAW.

Factors to be considered in determining whether an expert's opinion is the product of reliable methodology, as required for expert testimony to be admissible, may be afforded varying weights and may not apply equally in every case. NRS 50.275.

13. CRIMINAL LAW.

Testimony of clinical psychologist regarding adolescent neurological development was outside the scope of expert testimony on sex offenders' grooming behavior and its effect on child victims and thus was inadmissible at trial of defendant for sex offenses against minor victim; psychologist had not demonstrated any specialized knowledge in neuroscience or adolescent neurological development, such that this part of his testimony exceeded the scope of his specialized knowledge. NRS 50.275.

14. CRIMINAL LAW.

The district court did not commit plain error at trial of defendant on charges of sex offenses against child victim by admitting portion of testimony of clinical psychologist regarding adolescent neurological development, which testimony was outside the scope of expert testimony on sex offenders' grooming behavior and its effect on child victims; psychologist's digression on subject of neurological development was brief, as compared to the whole of his testimony. NRS 50.275.

15. CRIMINAL LAW.

Expert testimony of clinical psychologist on sex offenders' grooming behavior and its effect on child victims did not amount to improper vouching for testimony of child victim at trial of defendant for sex offenses; psychologist did not vouch for the victim's veracity and did not offer a specific opinion as to whether he believed that the victim in this case was telling the truth, but instead offered a general opinion about the effect of grooming on a child victim of sexual abuse. NRS 50.275.

16. CRIMINAL LAW.

A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness.

17. CRIMINAL LAW.

Although an expert may not comment on whether he or she believes that the minor victim is telling the truth about the allegations of abuse, an

expert may testify on the issue of whether a victim's behavior is consistent with sexual abuse, if that testimony is relevant. NRS 50.345.

18. CRIMINAL LAW.
The fact that expert testimony is incidentally corroborative of testimony of another witness does not render it inadmissible, since most expert testimony, in and of itself, tends to show that another witness either is or is not telling the truth.

19. CRIMINAL LAW.
State filed sufficient notice of expert testimony, as required for admission of expert testimony of clinical psychologist on sex offenders' grooming behavior and its effect on child victims at trial of defendant for sex offenses against child victim; notice indicated that psychologist would testify as to grooming techniques used upon children and included his curriculum vitae, which indicated that psychologist had conducted sexual offender assessments on juveniles. NRS 174.234(2).

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are concerned with the admissibility of expert testimony related to sex offender grooming behavior and the effect that behavior has on a child victim. ''Grooming'' generally describes conduct or actions by an offender that are undertaken to develop a bond between the victim and offender and, ultimately, make the victim more receptive to sexual activity with the offender. In particular, we address whether (1) the district court abused its discretion in concluding that the State's expert was qualified to offer grooming behavior testimony, (2) the expert's testimony improperly vouched for the complaining witness's testimony, and (3) the expert witness notice was insufficient.

[Headnote 1]

As a general matter, we hold that whether expert testimony on grooming behavior is admissible in a case involving sexual conduct with a child must be determined on a case-by-case basis, considering the requirements that govern the admissibility of expert testimony. Those requirements include whether the particular expert is qualified to testify on the subject, whether the testimony is relevant and the product of reliable methodology such that it will assist the jury to understand the evidence or to determine a fact in issue, and whether the testimony is limited in scope to matters that are within the expert's specialized knowledge. Applying those considerations, we conclude that the district court did not abuse its discretion in admitting the expert testimony in this case. We further conclude that the expert's testimony did not improperly vouch for the complaining witness's testimony and that the State's pre-

trial notice was sufficient. We therefore affirm the judgment of conviction.

FACTS AND PROCEDURAL HISTORY

Appellant Noe Perez was convicted of six counts of lewdness with a minor under 14 years of age and two counts of sexual assault of a minor under 14 years of age, involving his niece. At trial, the victim testified that her relationship with Perez began to change after she turned 13. He began calling her more and complimenting her, as well as winking at her when they attended the same parties. After driving her and a couple home one evening, Perez kissed the victim and touched her thigh when they were alone. He later called her and told her about a dream he had about undressing her and said that he was uncomfortable when she was close to other boys.

In September 2008, Perez invited the victim to accompany him and his wife, Maria, to Las Vegas, Nevada, for a concert. Perez's own children did not come on this trip. On the first evening, Perez played with the victim's feet under the table at dinner, hugged her while they walked along the street, and kissed the victim while Maria was in the shower. The next day, Perez again played with the victim's feet while she was swimming in the hotel pool, and the victim indicated that she wanted to spend time alone with Perez.

In the hotel room, Perez began kissing the victim after Maria had entered the bathroom and turned on the shower. Perez undressed the victim, kissed her breasts, rubbed her vaginal area, and penetrated her vagina with his fingers and tongue. Maria emerged from the shower and began screaming at Perez and the victim and slapping the victim. Hotel security arrived shortly thereafter, and the victim told them that Perez had pinned her down and touched her. The victim testified that she told security that Perez forced her down because she feared Maria would leave her in Las Vegas. While Maria's reports to hotel security and responding officers were consistent with the victim's testimony, Maria testified that she only saw Perez kissing the victim, who was fully clothed.

Dr. John Paglini testified that the grooming relationship is a deceptive relationship with the intent of sexual contact. Dr. Paglini testified that an uncle touching his niece's foot under a table, winking at her, calling her and talking about how pretty she was, pulling her close while walking, touching her feet and arm in a swimming pool, touching her thigh, kissing her, showing concern for her spending time with other suitors, telling her about a dream in which he undressed her, and inviting her to attend an out-of-town concert with him could be construed as grooming behavior. In particular, he noted that showing concern for her spending time

with other boys acts to isolate her from other intimate relationships and telling her about the dream is a method of probing her resistance to engaging in sexual behavior. The ultimate goal of such behavior is to establish a trusting relationship that lowers the child's resistance to engaging in sexual activity. Dr. Paglini also testified that whether a victim discloses abuse ''is based upon the relationship to the perpetrator, the impact on the family and also the perceptions of the alleged victim regarding the people they're being interviewed on.'' Dr. Paglini noted that grooming typically results in lower rates of abuse disclosure.

DISCUSSION

The issues raised in this appeal involve expert testimony on ''grooming'' behavior.[1] The term ''grooming'' describes when an offender prepares a child for victimization by '' 'getting close to [the] child, making friends with the child, becoming perhaps a confidant of the child, [and] getting the child used to certain kinds of touching, [and] play activities.' '' *State v. Stafford*, 972 P.2d 47, 49 n.1 (Or. Ct. App. 1998) (quoting trial expert testimony). It can also include gifts, praises, and rewards, *id.*; *State v. Hansen*, 743 P.2d 157, 160 (Or. 1987), *superseded by statute on other grounds as stated in Powers v. Cheeley*, 771 P.2d 622, 628-29 n.13 (Or. 1989), as well as exposure to sexual items and language, *People v. Ackerman*, 669 N.W.2d 818, 825 (Mich. Ct. App. 2003). This conduct is undertaken to develop an emotional bond between the victim and offender, *Hansen*, 743 P.2d at 160; *Morris v. State*, 361 S.W.3d 649, 651 (Tex. Crim. App. 2011), and may even lead the victim to feel responsible for his or her own abuse, *Stafford*, 972 P.2d at 49 n.1. The offender engages in grooming activity to reduce the child's resistance to sexual activity and reduce the possibility that the victim will report the abuse. *Ackerman*, 669 N.W.2d at 824-25.

Expert qualification

Perez contends that the State failed to present sufficient evidence of Dr. Paglini's qualifications to testify as an expert. He therefore argues that the district court abused its discretion in allowing Dr. Paglini to testify as an expert on grooming activity.

[Headnotes 2-4]

''The threshold test for the admissibility of testimony by a qualified expert is whether the expert's specialized knowledge will as-

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[1]We invited the participation of amici curiae Nevada Attorneys for Criminal Justice (NACJ) and Nevada District Attorneys Association (NDAA) concerning the relevance and applicability of expert testimony about sex offender grooming.

sist the trier of fact to understand the evidence or determine a fact in issue.'' *Townsend v. State*, 103 Nev. 113, 117, 734 P.2d 705, 708 (1987); *see* NRS 50.275 (''If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by special knowledge, skill, experience, training or education may testify to matters within the scope of such knowledge.''). Expert testimony is admissible if it meets the following three requirements, which we have described as the ''qualification,'' ''assistance,'' and ''limited scope'' requirements:

> (1) [the expert] must be qualified in an area of ''scientific, technical or other specialized knowledge'' (the qualification requirement); (2) his or her specialized knowledge must ''assist the trier of fact to understand the evidence or to determine a fact in issue'' (the assistance requirement); and (3) his or her testimony must be limited ''to matters within the scope of [his or her specialized] knowledge'' (the limited scope requirement).

Hallmark v. Eldridge, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (second alteration in original) (quoting NRS 50.275); *see also Higgs v. State*, 126 Nev. 1, 18, 222 P.3d 648, 658 (2010). We review a district court's decision to allow expert testimony for an abuse of discretion. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650. As explained below, we conclude that Dr. Paglini's testimony satisfied the three requirements identified in *Hallmark*.

Qualification requirement

[Headnote 5]

Perez argues that there was nothing to indicate that Dr. Paglini had sufficient training or experience to assert an opinion as to the effect of grooming behaviors on the young victim. Further, Perez complains that this was the first time that Dr. Paglini had testified regarding grooming behaviors and he failed to establish that his findings were subjected to peer review or that he had received specialized training in the area of sex offender grooming behaviors. Amicus NACJ asserts that the record is insufficient to support a conclusion that Dr. Paglini was qualified to testify to grooming techniques as he had not published any scholarly articles or testified regarding grooming techniques in any proceeding prior to Perez's trial.

[Headnote 6]

We have identified several nonexclusive factors that are useful in determining whether a witness ''is qualified in an area of scientific, technical, or other specialized knowledge'' and therefore may testify as an expert. *Hallmark*, 124 Nev. at 499, 189 P.3d at

650. Those factors include ''(1) formal schooling and academic degrees, (2) licensure, (3) employment experience, and (4) practical experience and specialized training.'' *Id*. at 499, 189 P.3d at 650-51 (footnotes omitted).

We conclude that Dr. Paglini's academic career and professional experience were sufficient to qualify him to testify as an expert on grooming behaviors and the effects of such behaviors on victims of sexual abuse. Dr. Paglini was formally educated in psychology. He held a bachelor's degree in psychology and a doctorate degree in clinical psychology. For the ten years prior to trial, Dr. Paglini ''worked with family courts [conducting] child custody evaluations, dealing with the issues of domestic violence or sex abuse allegations.'' During the eight years prior to trial, he conducted over 1,000 psychosexual evaluations on sex offenders. In conducting those evaluations, Dr. Paglini considered ''variables like sex offending history, substance abuse problems, previous criminal problems . . . [and] the relationship of the offender and the victim.'' Thus, he spent the better part of his career studying the relationships between victims and offenders. In looking at these relationships, Dr. Paglini studied whether grooming by the offender occurred. Based on his formal schooling and academic degrees and his employment and practical experience, Dr. Paglini possessed the knowledge or experience necessary to render an opinion on grooming behaviors and the effects of such behaviors on victims of sexual abuse. *See Morris*, 361 S.W.3d at 666-67 (''A person can, through his experience with child-sex-abuse cases gain superior knowledge regarding the grooming phenomenon.''); *see also People v. Atherton*, 940 N.E.2d 775, 783, 790 (Ill. App. Ct. 3d 2010) (child welfare supervisor who had worked as a sexual abuse therapist for over six years qualified to testify about child-sexual-abuse-accommodation syndrome); *Ackerman*, 669 N.W.2d at 824, 825 (psychotherapist with master's degree in social work and who works with sex offenders and victims qualified); *State v. Quigg*, 866 P.2d 655, 661 (Wash. Ct. App. 1994) (expert with 13 years' experience in victims services unit, degree in child abuse and neglect, and numerous hours in intensive training and specialized workshops on child abuse, who had also conducted interviews with 3,000 victims qualified to testify about grooming). Other jurisdictions have concluded that witnesses with less academic preparation, *see Haycraft v. State*, 760 N.E.2d 203, 210-11 (Ind. Ct. App. 2001) (detective with experience investigating sexual abuse cases and who attended training on sexual abuse was qualified as a ''skilled witness'' to discuss grooming); *People v. Petri*, 760 N.W.2d 882, 888 (Mich. Ct. App. 2008) (detective with 15 years of law enforcement experience and who received training in forensic interviews of children would have qualified to offer testimony about grooming), or less experience than Dr. Paglini, *see Atherton*,

940 N.E.2d at 790, were sufficiently qualified to offer expert testimony on grooming or the effect of abuse on child victims.

We next examine whether Dr. Paglini's grooming testimony satisfied the ''assistance'' requirement of NRS 50.275.

Assistance requirement

[Headnote 7]

The ''assistance'' requirement asks whether the expert's ''specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue.'' NRS 50.275. The ''assistance'' requirement has two components: whether the testimony is (1) relevant and (2) the product of reliable methodology. *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (''An expert's testimony will assist the trier of fact only when it is relevant and the product of reliable methodology.'' (footnote omitted)). Although Perez only challenged Dr. Paglini's qualifications, at our invitation, amici briefed the relevance of expert testimony about sex offender grooming.

Relevance

[Headnote 8]

Evidence is relevant when it tends ''to make the existence of any fact that is of consequence to the determination of the action more or less probable.'' NRS 48.015. Generally, all relevant evidence is admissible. NRS 48.025. However, relevant evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice or misleading the jury, or if it amounts to needless presentation of cumulative evidence. NRS 48.035.

Amicus NACJ contends that Dr. Paglini's testimony was not particularly probative because the issue for the jury to decide was whether Perez committed the charged acts, not his intent during the purported grooming activity. Further, NACJ argues, what probative value the testimony may have had was outweighed by the danger of unfair prejudice as the testimony compared Perez's behavior to the known behavior of sex offenders and created a distinct impression that Perez was a sex offender.[2] Amicus NDAA argues against a broad rule that would prohibit expert testimony about sex offender grooming and instead urges a case-by-case approach.

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[2]The NACJ also contends that the State should not have been able to introduce an expert opinion as to Perez's *mens rea*. We disagree. *See* NRS 50.295 (''Testimony in the form of an opinion or inference otherwise admissible is not objectionable because it embraces an ultimate issue to be decided by the trier of fact.''); *Townsend*, 103 Nev. at 118, 734 P.2d at 708 (noting that an expert may give an opinion on issues that embrace the ultimate issue to be decided by the trier of fact so long as it is within scope of expertise).

We conclude that expert testimony on grooming behaviors and its effect on child victims of sexual abuse may be relevant depending on the circumstances of the case. Dr. Paglini's testimony, under the circumstances in this case, was relevant. The victim testified that Perez engaged in seemingly innocuous flirtatious behavior and sexual discussions that finally escalated into more overt sexual contact, which is not unlike a dating relationship. This trajectory of behavior seems to indicate even to the lay juror a definite design on engaging in sexual conduct with the victim and may suggest that expert testimony would be unnecessary to explain his designs. *See United States v. Raymond*, 700 F. Supp. 2d 142, 150-51 (D. Me. 2010) (''Expert' testimony about matters of common sense is not helpful to a jury and carries the risk of unfair prejudice . . . .''). However, it was not immediately apparent how Perez's behavior affected the victim. Notably, the victim appeared to acquiesce to the abuse and later gave inconsistent reports about that abuse. The victim's conduct leading up to the abuse and her inconsistent reports after the abuse could have been influenced by Perez's prior fawning, the fear of Maria's reaction to the conduct, and later counseling. Therefore, Dr. Paglini's testimony that the goal of grooming is to reduce the resistance to the abuse as well as the likelihood of disclosure was beneficial to the jury in evaluating the evidence of abuse and assessing the victim's credibility. *See United States v. Hitt*, 473 F.3d 146, 158-59 (5th Cir. 2006) (finding no abuse of discretion by district court admission of expert grooming testimony to explain ''return-to-the-abuser behavior''); *Jones v. United States*, 990 A.2d 970, 978 (D.C. 2010) (''The testimony helped to explain not only how a child molester could accomplish his crimes without violence, but also why a child victim would acquiesce and be reluctant to turn against her abuser.''); *Howard v. State*, 637 S.E.2d 448, 451 (Ga. Ct. App. 2006) (admitting evidence of grooming, even if it incidentally places defendant's character in issue, to explain victim's unwillingness to disclose abuse); *Ackerman*, 669 N.W.2d at 825-26 (recognizing that most jurors lack knowledge of the conduct of sexual abusers and thus expert testimony regarding grooming behavior was helpful); *State v. Berosik*, 214 P.3d 776, 782-83 (Mont. 2009) (admitting expert testimony about grooming as relevant to assessing victim credibility); *see also Smith v. State*, 100 Nev. 570, 572-73, 688 P.2d 326, 327 (1984) (holding that expert testimony about family dynamics related to sexual abuse is relevant to help the jury understand ''superficially unusual behavior of the victim and her mother'').

[Headnote 9]

As to unfair prejudice, Dr. Paglini's testimony did not stray beyond the bounds set by this court and other jurisdictions for expert

testimony. Dr. Paglini generally addressed how grooming occurs and its purpose. He then offered insight in the form of hypotheticals that were based on Perez's conduct and indicated that such conduct was probably grooming behavior. *See Shannon v. State*, 105 Nev. 782, 787, 783 P.2d 942, 945 (1989) (providing that experts can testify to hypotheticals about victims of sexual abuse and individuals with pedophilic disorder). He did not offer an opinion as to the victim's credibility or express a belief that she had been abused. *See Townsend*, 103 Nev. at 118-19, 734 P.2d at 708-09. Dr. Paglini's testimony therefore meets the first component of the ''assistance'' requirement.

Reliability of methodology

[Headnotes 10-12]

This court has articulated five factors to use in evaluating the second component of the ''assistance'' requirement—whether an expert's opinion is the product of reliable methodology. These factors include

> whether the opinion is (1) within a recognized field of expertise; (2) testable and has been tested; (3) published and subjected to peer review; (4) generally accepted in the scientific community (not always determinative); and (5) based more on particularized facts rather than assumption, conjecture, or generalization.

Hallmark, 124 Nev. at 500-01, 189 P.3d at 651-52 (footnotes omitted). These ''factors may be afforded varying weights and may not apply equally in every case.'' *Higgs v. State*, 126 Nev. 1, 20, 222 P.3d 648, 660 (2010).

Considering the applicable factors, we conclude that Dr. Paglini's opinion was the product of reliable methodology. In particular, Dr. Paglini practices in a recognized field of expertise, *see Ackerman*, 669 N.W.2d at 824, 825 (noting that psychotherapist who works with sex offenders is ''clearly qualified in a recognized discipline''); *Morris*, 361 S.W.3d at 656 (recognizing study of behavior of sex offenders to be a legitimate field of expertise), and he testified about a phenomenon that courts have recognized as generally accepted in the scientific community, *see Morris*, 361 S.W.3d at 668 (concluding that grooming as a phenomenon exists); *see also State v. Stafford*, 972 P.2d 47, 54 (Or. Ct. App. 1998) (noting that observations about grooming behavior not drawn from testing or scientific methodology but derived from personal observations made in light of education, training, and experience constituted admissible evidence based on specialized knowledge); *Bryant v. State*, 340 S.W.3d 1, 9 (Tex. Crim. App. 2010) (same). Although he testified about the general nature of grooming, his tes-

timony indicated that he had based this on specific facts observed in his practice and applied it to the specific circumstances of this case. However, the record does not indicate that Dr. Paglini's opinion had been subject to peer review or was testable or had been tested. While Dr. Paglini's methodology did not meet two of the *Hallmark* factors, those factors are not as weighty given the nature and subject matter of his opinion testimony. *See Higgs*, 126 Nev. at 20, 222 P.3d at 660.

Finally, we must determine if Dr. Paglini's expert opinion was limited to the area of his expertise. *Hallmark*, 124 Nev. at 498, 189 P.3d at 650.

Limited scope requirement

[Headnotes 13, 14]

Perez argues that Dr. Paglini's testimony about neurological development was outside the scope of his proposed testimony and that the State failed to show that he had received neurological training. We agree. Dr. Paglini's testimony, for the most part, proceeded within the scope of his expertise. He testified about the phenomenon of grooming and its effect on the victim. However, during a digression, Dr. Paglini testified regarding adolescent neurological development. As Dr. Paglini had not demonstrated any specialized knowledge in neuroscience or adolescent neurological development, this part of his testimony exceeded the scope of his specialized knowledge. *See Kelly v. State*, 321 S.W.3d 583, 600-01 (Tex. Crim. App. 2010) (concluding that expert who lacked medical training was not qualified to testify about grooming when her testimony was predicated on detailed medical information). However, Perez did not object to this digression on the basis that it exceeded the scope of Dr. Paglini's qualifications. Because Dr. Paglini's digression was brief, as compared to the whole of his testimony, we conclude that it did not amount to plain error. *See Gallego v. State*, 117 Nev. 348, 365, 23 P.3d 227, 239 (2001) (reviewing for plain error where party fails to object at trial), *abrogated on other grounds by Nunnery v. State*, 127 Nev. 749, 776 n.12, 263 P.3d 235, 253 n.12 (2011).

Vouching

[Headnote 15]

Perez also contends that Dr. Paglini's testimony impermissibly bolstered the victim's testimony and therefore the district court abused its discretion in admitting it. We disagree.

[Headnotes 16, 17]

A witness may not vouch for the testimony of another or testify as to the truthfulness of another witness. *Lickey v. State*, 108 Nev. 191, 196, 827 P.2d 824, 827 (1992). Although an expert may not

comment on whether that expert believes that the victim is telling the truth about the allegations of abuse, *Townsend*, 103 Nev. at 118-19, 734 P.2d at 709; *see also Lickey*, 108 Nev. at 196, 827 P.2d at 827 (noting that expert commentary on the veracity of the victim's testimony invades the prerogative of the jury), Nevada law allows an expert to testify on the issue of whether a victim's behavior is consistent with sexual abuse, if that testimony is relevant, *see Townsend*, 103 Nev. at 118, 734 P.2d at 708; NRS 50.345 (''In any prosecution for sexual assault, expert testimony is not inadmissible to show that the victim's behavior or mental or physical condition is consistent with the behavior or condition of a victim of sexual assault.'').

[Headnote 18]

Dr. Paglini did not vouch for the victim's veracity. He offered a general opinion about the effect of grooming on a child victim of sexual abuse. He did not offer a specific opinion as to whether he believed that the victim in this case was telling the truth. ''[T]he fact that such evidence is incidentally corroborative does not render it inadmissible, since most expert testimony, in and of itself, tends to show that another witness either is or is not telling the truth.'' *Davenport v. State*, 806 P.2d 655, 659 (Okla. Crim. App. 1991); *see Townsend*, 103 Nev. at 118-19, 734 P.2d at 709 (acknowledging that ''expert testimony, by its very nature, often tends to confirm or refute the truthfulness of another witness'' but that relevant testimony by a qualified expert within that expert's field of expertise is admissible ''irrespective of the corroborative or refutative effect it may have on the testimony of a complaining witness'' so long as the expert does not ''directly characterize a putative victim's testimony as being truthful or false''); *Bryant*, 340 S.W.3d at 10 (''The information about grooming could have influenced the jury's credibility determinations, but only in an indirect fashion.''). Therefore, the district court did not abuse its discretion in admitting the testimony.

Sufficiency of expert witness notice

[Headnote 19]

Last, Perez contends that the State's notice of expert testimony was inadequate and therefore the district court should have precluded the State from calling Dr. Paglini. We disagree.

The State filed its notice of witnesses over one month before the start of trial. *See* NRS 174.234(2) (requiring State to provide notice of expert witnesses at least 21 days prior to trial). To comply with NRS 174.234(2), the notice had to include: ''(a) A brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony; (b) A copy of the curriculum vitae of the expert witness; and (c) A copy

of all reports made by or at the direction of the expert witness.'' The State's notice in this case indicated that Dr. Paglini would ''testify as to grooming techniques used upon children'' and included his curriculum vitae. Dr. Paglini's curriculum vitae indicated that he had conducted sexual offender assessments on adult offenders and sexual offense and violence risk assessments on juveniles. The State did not submit any reports produced by Dr. Paglini because he did not prepare any reports related to the litigation. Perez's brief argument does not allege that the State acted in bad faith or that his substantial rights were prejudiced because the notice did not include a report or more detail about the substance of Dr. Paglini's testimony. *See Mitchell v. State*, 124 Nev. 807, 819, 192 P.3d 721, 729 (2008). Under the circumstances, we discern no abuse of discretion in allowing Dr. Paglini to testify. *See id.* (''This court reviews a district court's decision whether to allow an unendorsed witness to testify for abuse of discretion.'').

Having rejected Perez's challenges to the admission of Dr. Paglini's testimony, we affirm the judgment of conviction.[3]

GIBBONS, HARDESTY, and SAITTA, JJ., concur.

DOUGLAS, J., with whom PICKERING, C.J., and CHERRY, J., agree, concurring in part and dissenting in part:

I concur with the majority's conclusion that the admissibility of expert testimony about grooming should be decided on a case-by-case basis under NRS 50.275 and *Hallmark v. Eldridge*, 124 Nev. 492, 189 P.3d 646 (2008). However, such testimony should be admitted in rare circumstances, and I disagree that this case warrants its admission. The State did not introduce sufficient specific evidence that Dr. Paglini was qualified to discuss grooming of child victims by sex offenders, and his testimony did not assist the jury in understanding the victim's actions and unfairly prejudiced Perez. I also disagree with the majority's conclusion that the expert-witness notice was sufficient.

Admission of expert testimony

Expert testimony is admissible if it meets three requirements, which we have described as the ''qualification,'' ''assistance,'' and ''limited scope'' requirements:

> (1) [the expert] must be qualified in an area of ''scientific, technical or other specialized knowledge'' (the qualification requirement); (2) his or her specialized knowledge must ''assist the trier of fact to understand the evidence or to determine

[3]We deny Perez's motion to strike NACJ's request for a remand for additional supplementation of the record as moot.

> a fact in issue'' (the assistance requirement); and (3) his or her testimony must be limited ''to matters within the scope of [his or her specialized] knowledge'' (the limited scope requirement).

Hallmark, 124 Nev. at 498, 189 P.3d at 650 (second alteration in original) (quoting NRS 50.275); *see also Higgs v. State*, 126 Nev. 1, 18, 222 P.3d 648, 658 (2010). As I explain below, the State failed to put forth sufficient evidence to demonstrate that Dr. Paglini was qualified to offer expert testimony and the testimony that he provided failed to assist the jury.

Expert qualifications

The majority concludes that Dr. Paglini's academic career and professional experience were sufficient to qualify him to offer the testimony on the grooming phenomenon. It notes that Dr. Paglini is a clinical psychologist who had conducted child custody evaluations, pretrial competency evaluations, death penalty evaluations, and psychosexual evaluations. However, Dr. Paglini did not identify how many of his prior evaluations involved child victims of sexual abuse or grooming, and he had not written any treatises or articles on the phenomenon.

Dr. Paglini's principal qualification, according to his testimony, was his work preparing ''risk assessments'' for use in sentencing convicted sex offenders. ''[I]t's my job as a psychologist . . . to educate the judge on the history of the defendant, what their violent history and sex offender history is'' so the court can ''understand what the risk of reoffending is towards a community'' in sentencing. Continuing, Dr. Paglini testified, ''You're looking at certain variables like sex offending history . . . . Was there grooming involved, and what was the grooming?'' Notably absent from Dr. Paglini's testimony about his qualifications was any reference to work with victims of grooming. Rather, the focus was—and remained—on what sex offenders do that can constitute grooming.

Grooming testimony is permissible in certain child-sex-abuse cases, normally to explain the impact the grooming had on the victim's behavior in terms of delayed reporting and the like. *See* NRS 50.345 (''expert testimony is not inadmissible'' in sexual assault cases when offered to show ''the behavior or condition of a victim of sexual assault''). But here, the record does not show Dr. Paglini's qualification to address the impact on the victim of grooming activity. He thus did not demonstrate with sufficient specificity that his formal schooling, employment experience, or practical experience qualified him to testify about grooming and its impact on the victim in this case. *See Hallmark*, 124 Nev. at 499, 189 P.3d at 650-51; *see also* NRS 50.275; *Jones v. United States*, 990 A.2d 970, 975, 978-80 (D.C. 2010) (former FBI agent who

studied 400 to 500 cases of sexual abuse involving teenage victims as well as published writing in manuals on sexual abuse and the behavior of child molesters qualified); *Morris v. State*, 361 S.W.3d 649, 668 (Tex. Crim. App. 2011) (recognizing that law enforcement officer ''with a significant amount of experience with child sex abuse cases may be qualified'' to discuss grooming).

Although this court has not specified the requirements for admitting expert testimony about grooming, I would have preferred a more thorough record for reviewing the district court's exercise of discretion, including the link between his expertise and the subject matter of the testimony being offered to assist the jury in this case.

Assistance

The record further fails to demonstrate that Dr. Paglini's testimony was sufficiently relevant to have assisted the jury. *See* NRS 50.275 (requiring that expert testimony assist the jury to ''understand the evidence or to determine a fact in issue''); *Hallmark*, 124 Nev. at 500, 189 P.3d at 651 (requiring that expert testimony be ''relevant and the product of reliable methodology'' (footnote omitted)). The majority notes that Perez's behavior and conduct with the victim began as mildly flirtatious and escalated to the point of being overtly sexual. I agree with the majority that Perez's actions needed no expert explanation in and of themselves as his designs for engaging in sexual conduct with the victim were evident from the escalating nature of his actions. However, I part from the majority's conclusion that expert testimony was necessary to explain the effect of Perez's actions on the victim.

The testimony was not of assistance because the victim could, and in fact did, explain how Perez's conduct allayed her resistance to his abuse. The victim, who was 14 years old at the time of trial, testified about events that occurred only the year before, described how the grooming activity made her feel, and acknowledged that she developed feelings for Perez. Further, she did not resist Perez's physical advances because of these feelings. In addition, she explained her hesitance to fully and accurately disclose the nature of Perez's abuse. Remarkably, her resistance to disclosing the abuse turned on fear of her aunt's reaction, not the effects of Perez's grooming. Because the victim explained during her testimony that Perez's conduct ingratiated himself to her and, to some extent, beguiled her, *see Morris*, 361 S.W.3d at 652, 667 (describing grooming behavior as ''really no different from behavior that occurs in high school dating''), the expert testimony was unnecessary, *see United States v. Raymond*, 700 F. Supp. 2d 142, 152 (D. Me. 2010) (noting that expert testimony on motivation of child victim is not required when victim can testify about her motivations); *State v. Braham*, 841 P.2d 785, 790 (Wash. Ct. App. 1992)

(''Surely, expert opinion is not necessary to explain that an adult in a 'close relationship' with a child will have greater *opportunity* to engage in the alleged sexual misconduct.''). While this court tolerates expert testimony that *incidentally* bolsters another witness's testimony, *see Townsend v. State*, 103 Nev. 113, 118-19, 734 P.2d 705, 709 (1987) (recognizing that expert testimony may have a corroborative effect on the complaining witness's testimony), the testimony here *primarily* served to augment the victim's testimony.

As the expert testimony was not probative with regard to the victim's actions, it became unfairly prejudicial in how it characterized Perez's behavior. Unnecessary expert testimony carries the risk of unduly influencing the jury:

> Expert testimony on a subject that is well within the bounds of a jury's ordinary experience generally has little probative value. On the other hand, the risk of unfair prejudice is real. By appearing to put the expert's stamp of approval on the government's theory, such testimony might unduly influence the jury's own assessment of the inference that is being urged.

United States v. Montas, 41 F.3d 775, 784 (1st Cir. 1994); *see also Raymond*, 700 F. Supp. 2d at 150 (noting that expert witness testimony about matters in the jury's common sense ''invites a toxic mixture of purported expertise and common sense''). Although expert insight into the effect of grooming behavior, *i.e.*, the victim's emotional dependence on the abuser, may have appeared relevant to understanding the victim's reluctance to come forward, testimony about the defendant's prior bad acts, which may have fostered that emotional dependence, did not explain the victim's behavior and carried a significant risk of unfair prejudice to the defendant by characterizing his prior actions as similar to those of other sex offenders. *See State v. Hansen*, 743 P.2d 157, 160-61 (Or. 1987), *superseded on other grounds by* Or. Evidence Code R. 103, *as stated in Powers v. Cheely*, 771 P.2d 622, 628 n.13 (Or. 1989). Thus, where expert testimony addresses a defendant's prior bad acts, ''[c]are must be taken in order that prior acts evidence is not bundled into an official-sounding theory and coupled with expert testimony in order to increase its apparent value in demonstrating a 'plan' or malevolent intent by the defendant.'' *State v. Coleman*, 276 P.3d 744, 750 (Idaho Ct. App. 2012).

Apart from his testimony about the impulsivity of adolescents due to lack of cortical function in the frontal lobes of the brain—testimony the majority correctly concludes Dr. Paglini was not qualified to give—Dr. Paglini said very little about grooming's impact on victim behavior that, left unexplained, would confuse the jury. Rather, Dr. Paglini was asked to define grooming and then to answer a series of purported hypotheticals, such as, ''You have a situation of a 13-year-old niece who had known her 33-year-old

uncle her whole life and had seen him on a regular basis, would the following conduct over about a three and four month period potentially constitute grooming activity? First touching the niece's foot under the table at family parties or winking at the niece.'' There follows a series of hypothetical questions, each one identifying something the defendant did in relation to the victim, such as calling her, objecting to her having boyfriends, and concluding it might be grooming. Such testimony

> exceeded permissible bounds when the prosecutor tailored the hypothetical questions to include facts concerning the abuse that occurred in this particular case. [It] went beyond explaining victim behavior that might be beyond the ken of a jury, and had the prejudicial effect of implying that the expert found the testimony of this particular claimant to be credible.

People v. Williams, 987 N.E.2d 260, 263 (N.Y. 2013); *see State v. McCarthy*, 283 P.3d 391, 394-95 (Or. App. 2012).

Here, Dr. Paglini focused on Perez's uncharged bad (and, in some instances, perhaps innocent) acts and characterized them as motivated purely by his intent to sexually abuse his niece. The testimony carried a significant risk that the jury would ''make the quick and unjustified jump from his expert testimony about behavioral patterns to guilt in a particular case that shows similar patterns.'' *Raymond*, 700 F. Supp. 2d at 150; *see also Hansen*, 743 P.2d at 161 (noting that where probative value is lacking, ''the danger of unfair prejudice to defendant from the unwarranted inference that, because defendant engaged in acts that sexual child abusers engage in, she, too, is a sexual child abuser is simply too great''). Thus, even if the testimony had some limited probative value, NRS 48.015, that value was substantially outweighed by the danger of unfair prejudice, NRS 48.035(1).

Considering that the State failed to elicit sufficient information regarding Dr. Paglini's qualifications and the victim was able to articulate how Perez's prior conduct affected her, I would conclude that the district court abused its discretion in admitting this testimony. I reiterate that I am not opposed to the use of expert testimony on grooming in all cases. It certainly becomes more relevant where the grooming activity in question is not clearly apparent or the child witness is of such an age that he or she could not plainly express how that activity affected him or her. Nevertheless, in that situation, the State must make a sufficient showing that the expert has sufficient academic or professional experience specifically related to grooming of child sexual assault victims.

Expert-witness notice

I further disagree with the majority's conclusion that the expert-witness notice was adequate to inform the defendant of the extent

of testimony that the State sought to elicit. NRS 174.234(2) requires pretrial disclosure of experts in cases involving gross misdemeanor or felony charges. The disclosure must, at minimum, give ''[a] brief statement regarding the subject matter on which the expert witness is expected to testify *and the substance of the testimony*.'' NRS 174.234(2)(a) (emphasis added). The State's expert-witness disclosure designated Dr. Paglini and stated he would ''testify as to grooming techniques used upon children,'' nothing more. This notice was far too brief, and while it identified the subject matter of the testimony in the broadest of terms, it did not sufficiently address the substance of that testimony. As noted above, most of Dr. Paglini's direct testimony involved his opinion of hypothetical scenarios posed by the prosecutor that mirrored the specific facts of this case. The notice did not inform Perez that the State sought Dr. Paglini's opinion on these matters. Further, the notice did not inform the defense that Dr. Paglini had reviewed materials specific to this case, including the victim's statements, reports, and transcripts of other hearings. Therefore, Dr. Paglini's testimony about the specific conduct at issue in this case ambushed Perez with expert testimony he was not warned to be prepared to defend against.

Harmless error

I further conclude that the error in admitting Dr. Paglini's testimony was not harmless. *See Fields v. State*, 125 Nev. 776, 784, 220 P.3d 724, 729 (2009) (reviewing erroneous admission of evidence for harmless error). In considering whether the erroneous admission of evidence had a '' 'substantial and injurious effect or influence in determining the jury's verdict,' '' *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946)), this court considers ''whether the issue of innocence or guilt is close, the quantity and character of the error, and the gravity of the crime charged.'' *Big Pond v. State*, 101 Nev. 1, 3, 692 P.2d 1288, 1289 (1985).

This case is impacted by all three factors. First, the question of guilt or innocence is close. The testimony supporting the charges was inconsistent. The victim's testimony was inconsistent with her initial reports to hotel security and the police. Perez's wife, whose initial reports to hotel security and the police supported the allegations of abuse, testified consistently with Perez's admission that he kissed the victim. No physical evidence supported the allegations. Second, the character of the error was particularly damaging in this case. Expert testimony which rationalized the inconsistencies in the victim's testimony had a significant impact on the jury's determination of guilt. The problem was exacerbated by the

emphasis Dr. Paglini and the State placed on Dr. Paglini's work conducting ''risk assessments'' on known sex offenders. Proceeding act by act through hypothetical questions concerning the flirtations that preceded the Las Vegas assault portrayed Perez as a sex offender, on a par with the 1,000 other convicted sex offenders of risk to the community Dr. Paglini had evaluated. But Perez was not on trial for grooming over a three to four month period in California. The charges he faced involved a single incident in a Las Vegas hotel room that occurred in the space of time it took Perez's wife, the victim's aunt, to take a shower in the room's adjacent bathroom. Lastly, Perez was charged with serious sexual offenses against a minor, for which he has been sentenced to multiple life sentences, with the possibility of parole after 35 years. *See* NRS 200.366(3)(c); NRS 201.230(2).

Accordingly, I would reverse the judgment of conviction and remand for a new trial.