the potential to be more pronounced. Article 18 of the Preliminary Draft Convention on Jurisdiction and Foreign Judgments in Civil and Commercial Matters adopted in 1999 by a Special Commission of the Hague Conference on Private International Law provides that:

> 2. [J]urisdiction shall not be exercised by the courts of a Contracting State on the basis solely of one or more of the following[:]
>
> e) the carrying on of commercial or other activities by the defendant in that State, except where the dispute is directly related to those activities.

But the majority's approach allows an exercise of jurisdiction over a defendant based solely on its commercial activity, namely its establishment of an "agency" relationship, with a company subject to specific jurisdiction in this state, whether or not that commercial activity relates to the dispute in question. Thus, separate and apart from contradicting well-established domestic law, the majority's apparent approach to jurisdiction is also the type of "[o]verly aggressive jurisdictional assertion[ ] that [is] incompatible with prevailing notions in other nations." Friedrich K. Juenger, *The American Law of General Jurisdiction*, 2001 U. Chi. Legal F. 141, 166 (2001).

In sum, I join in the outcome only—neither general nor specific jurisdiction may lie over Viega GmbH and Viega International. To the extent the majority has said more, it has said too much.

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KEITH SASSER, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 60091

May 29, 2014 324 P.3d 1221

Appeal from a judgment of conviction, pursuant to a guilty plea, of one count of robbery. Eighth Judicial District Court, Clark County; David B. Barker, Judge.

The supreme court, GIBBONS, C.J., held that: (1) amendment to presentence investigation report (PSI) in judgment of conviction in order to exclude information that was not supported, rather than returning PSI to Division of Parole and Probation, was appropriate; (2) evidence supported remaining information contained in PSI; and (3) sentence to minimum of 48 months and maximum of 120 months was not abuse of discretion.

**Affirmed.**

*Legal Resource Group, LLC*, and *T. Augustas Claus*, Henderson, for Appellant.

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

1. Sentencing and Punishment.
   A defendant has a right to object to his presentence investigation report (PSI), and the district court will make a determination on the PSI information, so long as the defendant objects to it at the time of sentencing. NRS 176.156(1).
2. Sentencing and Punishment.
   Any objections that the defendant has to the presentence investigation report must be resolved prior to sentencing.
3. Sentencing and Punishment.
   The district court's amendment to presentence investigation report (PSI) in judgment of conviction in order to exclude information that was not supported, rather than returning PSI to Division of Parole and Probation, was appropriate for purposes of sentencing for robbery; the district court heard argument on defendant's objections, it resolved objections prior to sentencing, and it made record of findings on dispute it chose to resolve, and by amending PSI in judgment of conviction, it effectively ensured that findings would accompany PSI throughout parole process. NRS 176.159(1), 176.325, 176.335(2).
4. Criminal Law.
   A district court's findings of fact are entitled to deference on review.
5. Sentencing and Punishment.
   A defendant's presentence investigation report must not include information based on impalpable or highly suspect evidence.
6. Criminal Law.
   The supreme court will not interfere with the district court's sentence based on information contained in the presentence investigation report that was impalpable and highly suspect if the defendant was not prejudiced by the consideration of this evidence.
7. Sentencing and Punishment.
   Evidence supported information contained in presentence investigation report that defendant was unemployed, that police officers observed bruises on victim's head and face and her swollen left foot, that victim had significant vaginal bruising and bleeding, that defendant had struck victim in head and face with his fist, and violent nature of offense, for purposes of sentencing on *Alford* plea to robbery; photographs depicted victim's injuries, victim gave statement to police that defendant had struck her in head and knocked her out, and victim's brother made statement in which he indicated that police officers had observed swelling on her head.
8. Robbery; Sentencing and Punishment.
   Sentence to minimum of 48 months and maximum of 120 months upon *Alford* plea to robbery was not abuse of discretion based on defendant's claim that the district court impermissibly considered information contained in presentence investigation report (PSI) that the district court relied on impalpable or highly suspect evidence that it had previously ordered stricken from PSI; the district court expressly stated that it would not

consider information that it had ordered stricken, and judgment of conviction reflected the district court's intent not to consider such information.

Before the Court EN BANC.

## OPINION

By the Court, GIBBONS, C.J.:

After pleading guilty to robbery, appellant Keith Sasser requested that the district court amend his presentence investigation report (PSI) prior to sentencing to correct an error. The district court amended Sasser's PSI in the judgment of conviction, rather than amending the PSI itself. In this opinion, we address whether the district court can properly amend a PSI in the judgment of conviction.

### *FACTS AND PROCEDURAL HISTORY*

Sasser met Dominique Montenegro at a nightclub in Las Vegas. He offered to help Montenegro find her friends and indicated that he was related to an individual in her group. After they were unable to find her group, she accepted a ride from him to her friend's house. However, Montenegro alleges that Sasser did not stop the car when they arrived at her destination. She attempted to get out of the car while it was still moving but alleges that Sasser grabbed her hair, punched her in the face, and ran over her foot with his car to prevent her from escaping. The exact order of events is unclear from Montenegro's statement, but she alleges the following events occurred: (1) Sasser hit her causing her to lose consciousness; (2) she awoke outside the vehicle, and saw Sasser going through her purse; (3) Sasser sexually assaulted her multiple times; (4) Sasser told her to "[s]hut the [explicit] up," and she thought he was going to kill her; and (5) Sasser then apologized to her. Eventually, she escaped and checked into the University Medical Center (UMC).

Sasser pleaded guilty to robbery, pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970).[1] At sentencing, Sasser requested that the district court amend his PSI to exclude certain information that he alleged was unsupported. After hearing arguments from both parties, the district court found that two pages contained unsupported information and struck part of the conclusion. These stricken portions included: (1) the alleged threats from Sasser to kill Montenegro,

[1]The United States Supreme Court in *Alford* concluded that a defendant can enter a plea agreement even though he or she maintains his or her innocence. 400 U.S. at 38.

and (2) a dismissed sexual assault charge against Sasser in an unrelated, subsequent case. The district court noted these amendments in Sasser's judgment of conviction. Sasser requested that additional information be stricken, however, the district court found sufficient evidence to support the remaining information. The district court then sentenced Sasser pursuant to his *Alford* plea to a minimum of 48 months and a maximum of 120 months. Sasser now appeals.

## *DISCUSSION*

[Headnote 1]

On appeal, Sasser argues that the district court erred in (1) amending his PSI in the judgment of conviction, (2) refusing to strike more information from the PSI, and (3) sentencing him. Initially, we note that a defendant has a right to object to his PSI and the district court will make a determination on the PSI information, so long as the defendant objects to it at the time of sentencing. *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248-50, 255 P.3d 209, 213-14 (2012); *see also* NRS 176.156(1). However, since we have not addressed the specific procedure for amending a PSI, we take this opportunity to determine whether a district court may properly amend a defendant's PSI in the judgment of conviction.

### *The district court did not err in amending Sasser's PSI in his judgment of conviction*

Sasser argues that the district court improperly amended the PSI with the judgment of conviction rather than returning it to the Division of Parole and Probation (P&P).[2] We disagree.

[Headnote 2]

In *Stockmeier*, this court explained that it is important for a defendant to object to his PSI at the time of sentencing because "Nevada law does not provide any administrative or judicial scheme for amending a PSI after the defendant is sentenced." 127 Nev. at 249, 255 P.3d at 213. Further, this court acknowledged that "the process by which the district court must resolve objections to a PSI is not entirely clear." *Id.* However, it is clear that "any objections [that the defendant has] must be resolved prior to sentencing."[3] *Id.* at 250,

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[2]Sasser also argues that it is unclear whether the district court struck the assertions concerning the subsequent arrest for sexual assault. We conclude that the judgment of conviction is sufficiently clear to determine (1) what information the district court intended to strike from the PSI, and (2) what information the district court found to be unsupported by evidence.

[3]Other courts have held that when a court finds inaccurate information in a defendant's PSI, the district court has other procedures for amending the PSI instead of revising the actual PSI. *State v. Waterfield*, 248 P.3d 57, 59 (Utah Ct. App. 2011) (requiring the district court to make findings on the record as to the inaccuracies in a defendant's PSI); *State v. Craft*, 490 S.E.2d 315, 319 (W.

255 P.3d at 214. But other than requiring the defendant an opportunity to object, "the Nevada statutes are silent as to the process to be followed by either . . . [P&P] or the district court for allowing the defendant to make such objections, or for resolving the objections, and communicating the resolution to interested parties." *Id.* at 250, 255 P.3d at 213-14. Based on this uncertainty, we take this opportunity to clarify that one way in which a district court may amend a defendant's PSI is by doing so in the judgment of conviction.[4]

Here, the district court explained its reasoning for amending Sasser's PSI in the judgment of conviction: "[W]hat's fundamentally important is that there be accurate information in front of any . . . subsequent reviewing authority. And the two documents that follow each individual . . . through the corrective system, are the judgment of conviction and the PSI."

[Headnote 3]

We conclude that the district court did not err in amending the PSI in the judgment of conviction. *Stockmeier* did not specify how a district court should amend a PSI, so long as it was objected to and resolved prior to sentencing. The district court properly (1) heard argument on the defendant's objections, (2) resolved the objections prior to sentencing, and (3) made a record of its findings on the disputes it chose to resolve. By including its findings in the judgment of conviction, the district court effectively ensured that its findings will accompany the PSI throughout the parole process.[5] *See generally* NRS 176.159(1) (requiring courts to cause a copy of PSI to be delivered to Department of Corrections "not later than when the judgment of imprisonment is delivered pursuant to NRS 176.335"); NRS 176.325 (requiring the judgment of conviction "be furnished to the officers whose duty it is to execute the judgment"); NRS 176.335(2) (requiring sheriff to deliver certified copies of judgment of conviction to person from Department of Corrections who has been authorized to receive the prisoner). Therefore, we

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Va. 1997) (requiring the district court to make a written record of inaccuracies and append it to the PSI); Fed. R. Crim. P. 32(i)(3)(C) (requiring federal district courts to append a copy of the court's amendment determinations to the PSI).

[4]The State asks this court to overturn *Stockmeier* because of the burden it places on sentencing judges to amend a defendant's PSI when the defendant has opportunities prior to sentencing to amend it. We conclude that this is not a compelling reason to overturn precedent. *Armenta-Carpio v. State*, 129 Nev. 531, 535, 306 P.3d 395, 398 (2013). While we acknowledge that amending a defendant's PSI places a burden on district courts, we conclude that district courts are in the best position to determine whether a defendant's PSI contains impalpable or highly suspect evidence.

[5]As a practical matter, the district court's approach in this case has the same effect as the procedure used in federal court when ruling on a disputed portion of a presentence report. *See* Fed. R. Crim. P. 32(i)(3)(C) (requiring court to append a copy of its determinations regarding disputed portions of the presentence report to any copy of the report made available to the Bureau of Prisons).

conclude that the district court did not err by amending Sasser's PSI in the judgment of conviction. We further note that this opinion should not be construed to require the district courts to amend a defendant's PSI through the judgment of conviction, but simply that it is not error to do so.

*The district court struck impalpable or highly suspect information from Sasser's PSI and only relied on the remaining supported information when sentencing Sasser*

Sasser argues that the district court should have stricken more information in the PSI. Sasser further argues that even though the district court's judgment of conviction ordered certain sections to be stricken, it did not actually strike the information in the PSI prior to sentencing. As a result, Sasser argues that the district court improperly relied on P&P's recommendation based on the inaccurate information in the PSI when it sentenced Sasser.[6] We disagree.

> *The district court properly declined to strike information from Sasser's PSI that was not based on "impalpable and highly suspect evidence"*

[Headnotes 4-6]

"A district court's findings of fact are entitled to deference" on review. *Browning v. State*, 124 Nev. 517, 531, 188 P.3d 60, 70 (2008). A defendant's "PSI must not include information based on 'impalpable or highly suspect evidence.' " *Stockmeier*, 127 Nev. at 248, 255 P.3d at 213 (quoting *Goodson v. State*, 98 Nev. 493, 496, 654 P.2d 1006, 1007 (1982)); *see also Goodson*, 98 Nev. at 496, 654 P.2d at 1007 (holding that information in a PSI indicating that the defendant was a drug trafficker was impalpable and highly suspect because it was merely a "bald assertion" and "unsupported by any evidence whatsoever"). However, this court will not interfere with the district court's sentence if the defendant was not prejudiced by the consideration of this impalpable or highly suspect evidence. *Chavez v. State*, 125 Nev. 328, 348, 213 P.3d 476, 490 (2009).

[Headnote 7]

Sasser argues that the district court should have stricken more information in the PSI because the information was "inaccurate,

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[6]Sasser also argues that he has a right to parole because "the Nevada Legislature has . . . created a constitutionally cognizable liberty interest [in parole] to invoke due process rights." We conclude that this argument is without merit based on the plain language of NRS 213.10705, which expressly states that there is no right to parole. To the extent that Sasser claims that the alleged inaccuracies in his PSI will affect his ability to receive parole in the future, we conclude that this argument is moot based on our conclusion that the district court did not err in finding that the remaining information in Sasser's PSI was not based on impalpable or highly suspect evidence.

unsupported by evidence, contradicted by the physical evidence and/or contradicted by Montenegro's own statements."

Here, in addition to the PSI information regarding alleged threats to kill Montenegro and Sasser's subsequent sexual assault charge, which the district court struck, Sasser also objected to the following information in his PSI: (1) that Sasser had been unemployed since January 2010; (2) that officers observed that the victim had obvious bruises around her head and face and a swollen left foot; (3) the Sexual Assault Nurse Examiner (SANE) report that found significant vaginal bruising and bleeding; (4) that Sasser pulled the car over in the desert, struck the victim several times in the head and face with his fist, and the victim reported she was knocked unconscious; and (5) the PSI noted the violent nature of the offense, as well as the injuries inflicted on the victim through physical and sexual assaults, requiring medical treatment.

In response, the State presented (1) a picture of Montenegro's injuries; (2) Montenegro's statement to police indicating that Sasser had hit her in the head; (3) Montenegro's statement that her foot was swelling, she had abrasions on her knees and foot, and blood on her foot; and (4) a statement from Montenegro's brother indicating that an officer observed swelling on her head. Further, regarding Sasser's unemployment, the State noted that Sasser had "been incarcerated for [some time]."[7]

The district court found that sufficient evidence supported the above allegations and explained that it was most concerned with the violent nature of the offense based on the photographs provided by both sides.

We conclude that the district court properly declined to strike the above information from the PSI because the information was not based on impalpable or highly suspect evidence. While Sasser did cast some doubt on the PSI information, the State also provided evidence to support the information. The district court then had the discretion to decide whether any of the information was based on impalpable or highly suspect evidence. Considering the additional evidence presented to the district court and Sasser's failure to provide this court with the photographs that the district court relied on in making its determination,[8] we cannot say that the district court abused its discretion by concluding that the information in the PSI was not based on impalpable or highly suspect evidence.

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[7]When objecting to his PSI, Sasser informed the district court that he had been employed full-time until February 2010 and was precluded from employment since then due to incarceration.

[8]*See Riggins v. State*, 107 Nev. 178, 182, 808 P.2d 535, 538 (1991) (concluding that if materials are not included in the record on appeal, the missing materials ''are presumed to support the district court's decision''), *rev'd on other grounds by Riggins v. Nevada*, 504 U.S. 127 (1992).

*The district court did not rely on impalpable or highly suspect evidence when sentencing Sasser*

[Headnote 8]

Sasser claims that even though the district court ordered certain information stricken from the PSI, it did not actually strike the information prior to sentencing and, as a result, the district court improperly relied on P&P's recommendation, which was based on the inaccurate information in the PSI, when it sentenced Sasser. The record belies this claim.

The district court expressly stated that it would not consider certain information included in the PSI: (1) the alleged threats to kill Montenegro, and (2) a dismissed charge of sexual assault in an unrelated subsequent case against Sasser. Further, when discussing the dismissed charge, the district court noted:

> I'm not going to consider it. It's not—I don't think it's going to be part of this analysis. Frankly, there's plenty of violence on the predicate offense to which Mr. Sasser's indicated he's guilty pursuant to the *Alford* decision. So I'm going to . . . be very clear here. I'm not going to consider that.

The judgment of conviction reflects these findings.

We conclude that the district court did not abuse its discretion when sentencing Sasser because it expressly stated that it would not consider the information that it struck from the PSI. Its sentencing decision was based on the violence involved in the charge. The record does not reflect an abuse of discretion in the district court's decision to sentence Sasser to prison for a term of 4 to 10 years, a sentence that is well within the parameters provided by the relevant statute. *See* NRS 200.380(2) (providing that a person who is convicted of a robbery, "shall be punished by imprisonment . . . for a minimum term of not less than 2 years and a maximum term of not more than 15 years.").[9]

## *CONCLUSION*

Although a defendant's PSI is only one of many different considerations that the district court will evaluate when determining a defendant's sentence, *Stockmeier* gives a defendant the right to object to factual errors in the PSI, so long as he or she objects before sentencing, and allows the district court to strike information that

[9]Further, it is important to note that the PSI is only one of many different considerations that the district court uses when determining the appropriate sentence for a defendant. For example, the district court should also consider the arguments from each party during sentencing.

is based on "impalpable or highly suspect evidence." 127 Nev. at 248, 255 P.3d at 213 (internal quotation marks omitted). The district court then has the discretion to amend the PSI itself, return it to P&P for amending, or amend it in the judgment of conviction. Accordingly, we affirm Sasser's judgment of conviction.[10]

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

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CENTURY SURETY COMPANY, APPELLANT, *v.*
CASINO WEST, INC., RESPONDENT.

No. 60622

May 29, 2014 329 P.3d 614

Certified questions, in accordance with NRAP 5, regarding the interpretation of exclusionary provisions in an insurance policy. United States Court of Appeals for the Ninth Circuit; Carlos F. Lucero, Consuelo M. Callahan, and N. Randy Smith, Judges.

The supreme court, DOUGLAS, J., held that: (1) absolute pollution exclusion in CGL policy did not exclude claims stemming from carbon monoxide poisoning, and (2) indoor air quality exclusion did not apply to exclude claims stemming from carbon monoxide poisoning.

**Questions answered.**

*McDonald Carano Wilson LLP* and *James W. Bradshaw* and *Debbie A. Leonard*, Reno; *Woolls & Peer* and *H. Douglas Galt*, Los Angeles, California, for Appellant.

*Burton Bartlett & Glogovac* and *Scott A. Glogovac*, Reno, for Respondent.

*Armstrong Teasdale LLP* and *Kevin R. Stolworthy* and *Conor P. Flynn*, Las Vegas, for Amicus Curiae Complex Insurance Claims Litigation Association.

1. CONTRACTS.
The purpose of contract interpretation is to determine the parties' intent when they entered into the contract.

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

2. Insurance.
   A court interprets an insurance policy from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary, and popular sense.
3. Insurance.
   When interpreting an insurance policy, a court considers the policy as a whole to give reasonable and harmonious meaning to the entire policy.
4. Insurance.
   An insurance policy's interpretation should not lead to an absurd or unreasonable result.
5. Insurance.
   If an insurance policy is unambiguous, a court interprets it according to the plain meaning of its terms.
6. Insurance.
   An insurance policy is considered ambiguous if it creates multiple reasonable expectations of coverage as drafted.
7. Insurance.
   A seemingly clear insurance policy can be rendered ambiguous when applying the policy to the facts leads to multiple reasonable interpretations.
8. Insurance.
   Courts interpret ambiguities in an insurance contract against the drafter, which is typically the insurer.
9. Insurance.
   If an insurance policy has any ambiguous terms, a court will interpret the policy to effectuate the insured's reasonable expectations.
10. Insurance.
    Clauses providing coverage are broadly interpreted so as to afford the greatest possible coverage to the insured.
11. Insurance.
    Clauses excluding coverage are interpreted narrowly against the insurer.
12. Insurance.
    Any exclusion in an insurance policy must be narrowly tailored so that it clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered.
13. Insurance.
    To preclude coverage under an insurance policy's exclusion provision, an insurer must: (1) draft the exclusion in obvious and unambiguous language, (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court.
14. Insurance.
    Absolute pollution exclusion in commercial general liability insurance policy applied only to traditional environmental pollution, rather than to nontraditional indoor pollutants, and therefore exclusion did not exclude coverage of claims arising from carbon monoxide exposure.
15. Insurance.
    Indoor air quality exclusion in commercial general liability insurance policy did not exclude coverage of claims arising from carbon monoxide exposure; exclusion was applicable in situations in which something was permanently present in the air, rather than a temporary condition.

Before the Court En Banc.

## OPINION

By the Court, DOUGLAS, J.:

The United States Court of Appeals for the Ninth Circuit has certified questions of law to this court regarding the interpretation of two exclusionary provisions in a motel's insurance policy issued by appellant Century Surety Company: the absolute pollution exclusion and the indoor air quality exclusion. The certified questions ask:

> (1) Does the pollution exclusion in Century's insurance policy exclude coverage of claims arising from carbon monoxide exposure?
>
> (2) Does the indoor air quality exclusion in Century's insurance policy exclude coverage of claims arising from carbon monoxide exposure?

We determine that, when applied to the facts of this case, both exclusions are ambiguous because they are subject to multiple reasonable interpretations; therefore, under the circumstances presented, we answer these questions in the negative.

### *BACKGROUND*

Four people died from carbon monoxide poisoning while sleeping in a room directly above a pool heater in the Casino West Motel, the respondent here. Casino West sought coverage for the deaths from its insurer, Century Surety Company, but Century denied the claims based on two provisions of Casino West's general liability policy: the absolute pollution exclusion, which excludes coverage for " '[b]odily injury' or 'property damage' arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of 'pollutants,' " and the indoor air quality exclusion, which excludes coverage for " '[b]odily injury,' 'property damage,' or 'personal and advertising injury' arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause." After Century denied coverage, it brought a declaratory relief claim in the federal district court. In response, Casino West filed a counterclaim. Century then moved for summary judgment on both its claim and Casino West's counterclaim.

The federal district court denied Century's motion. The court determined that the policy exclusions were ambiguous and interpreted the ambiguity in Casino West's favor. With permission from the federal district court to appeal the interlocutory decision, Century sought review in the Ninth Circuit Court of Appeals, which certified the aforementioned questions to this court after determining that ex-

isting Nevada law did not clearly resolve the issue. We subsequently accepted the questions and directed briefing.[1]

*DISCUSSION*

[Headnotes 1-4]

The purpose of contract interpretation is to determine the parties' intent when they entered into the contract. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 488, 117 P.3d 219, 224 (2005). We interpret an insurance policy "from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary and popular sense." *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993). And we consider the policy as a whole "to give reasonable and harmonious meaning to the entire policy." *Id.* Further, an insurance policy's interpretation should not lead to an absurd or unreasonable result. *Reno Club, Inc. v. Young Inv. Co.*, 64 Nev. 312, 325, 182 P.2d 1011, 1017 (1947).

[Headnotes 5-9]

If an insurance policy is unambiguous, we interpret it according to the plain meaning of its terms. *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011). An insurance policy is considered ambiguous if "it creates [multiple] reasonable expectations of coverage as drafted." *Id.* A seemingly clear policy can be rendered ambiguous when applying the policy to the facts leads to multiple reasonable interpretations. *See Rubin v. State Farm Mut. Auto. Ins. Co.*, 118 Nev. 299, 303-04, 43 P.3d 1018, 1021 (2002). We interpret ambiguities in an insurance contract against the drafter, which is typically the insurer. *Powell*, 127 Nev. at 162, 252 P.3d at 672. So, if an insurance policy has any ambiguous terms, this court will interpret the policy to effectuate the insured's reasonable expectations. *Id.*; *see also Farmers Ins. Exch. v. Young*, 108 Nev. 328, 330, 832 P.2d 376, 377 (1992).

[Headnotes 10-13]

Clauses providing coverage are broadly interpreted "so as to afford the greatest possible coverage to the insured, [and] clauses excluding coverage are interpreted narrowly against the insurer." *Nat'l Union Fire Ins. Co. of the State of Pa., Inc. v. Reno's Exec. Air, Inc.*, 100 Nev. 360, 365, 682 P.2d 1380, 1383 (1984). Any exclusion must be narrowly tailored so that it "clearly and distinctly communicates to the insured the nature of the limitation, and specifically delineates what is and is not covered." *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 485, 133 P.3d 251, 255 (2006) (internal quotation marks omitted). To preclude coverage under an insurance

[1]The Complex Insurance Claims Litigation Association filed an amicus curiae brief supporting Century's interpretation of the provisions at issue.

policy's exclusion provision, an insurer must (1) draft the exclusion in "obvious and unambiguous language," (2) demonstrate that the interpretation excluding coverage is the only reasonable interpretation of the exclusionary provision, and (3) establish that the exclusion plainly applies to the particular case before the court. *Powell*, 127 Nev. at 164, 252 P.3d at 674 (2011).

*The absolute pollution exclusion*

[Headnote 14]

The absolute pollution exclusion in Casino West's insurance policy provides that the policy does not apply to

> (1) "Bodily injury" or "property damage" arising out of the actual, alleged or threatened discharge, dispersal, seepage, migration, release or escape of "pollutants":
>
> (a) At or from any premises, site or location which is or was at any time owned or occupied by, or rented or loaned to, any insured. However, this subparagraph does not apply to:
>
> (i) [Building-heater exception:] "[b]odily injury" if sustained within a building caused by smoke, fumes, vapor or soot from equipment used to heat that building.

The policy defines a pollutant as "any solid, liquid, gaseous or thermal irritant or contaminant, including smoke, vapor, soot, fumes, acids, alkalis, chemicals, and waste."

The parties have competing interpretations of the absolute pollution exclusion. Casino West argues that the absolute pollution exclusion only applies to traditional environmental pollution because the exclusion contains environmental terms of art. Casino West notes that other courts have interpreted similar exclusions to apply only to traditional forms of pollution. Casino West also contends that the fact that it and Century disagree on the exclusion's applicability demonstrates the policy's ambiguity. To the contrary, Century asserts that the absolute pollution exclusion applies to this case to exclude coverage because carbon monoxide is a "pollutant" under the policy's terms. Further, Century contends that the building-heater exception demonstrates that the drafters intended the absolute pollution exclusion to apply to both indoor and outdoor pollution. Specifically, Century asserts that, if the absolute pollution exclusion applied only to traditional environmental pollution, the building-heater exception would be unnecessary, as harm from a building's heating system would not fall within the absolute pollution exclusion.

The absolute pollution exclusion is a standard provision in general commercial liability policies. *See Apana v. TIG Ins. Co.*, 574 F.3d 679, 680 (9th Cir. 2009). Its scope is a matter of first impression in Nevada, but it has been heavily litigated in numerous other jurisdictions, resulting in conflicting outcomes. *See id.* at 682

(collecting cases). Some courts have found that the exclusion is unambiguous and applies to all types of pollution. *Id.* But others have concluded that its application is limited to situations involving traditional environmental pollution, either because they find that the exclusion's terms are ambiguous or because the application of the exclusion to nontraditional forms of pollution would contradict the policyholders' reasonable expectations. *Id.*

As drafted here, the absolute pollution exclusion permits multiple reasonable interpretations of coverage. As relevant here, the exclusion's language can be read to support Century's interpretation. Initially, it is reasonable to categorize carbon monoxide as a pollutant because it is a gaseous element that contaminates the air, making it dangerous and sometimes deadly to breathe. *See Midwest Family Mut. Ins. Co. v. Wolters*, 831 N.W.2d 628, 637 (Minn. 2013) (noting that both the federal Clean Air Act and the Minnesota Pollution Control Agency treat carbon monoxide as a pollutant). And the exclusion precludes coverage for any injury resulting from a pollutant. Therefore, it is reasonable to conclude that the policy would not cover any damage that carbon monoxide caused. But Casino West's interpretation that the exclusion's applicability is limited only to claims for traditional environmental pollution is also reasonable. Taken at face value, the policy's definition of a pollutant is broad enough that it could be read to include items such as soap, shampoo, rubbing alcohol, and bleach insofar as these items are capable of reasonably being classified as contaminants or irritants. So, if no limitations are applicable, the pollution exclusion would seem to preclude coverage for any accident stemming from such items, including a person slipping on a puddle of bleach or developing a skin rash from using a bar of soap. Such results would undoubtedly be absurd and contrary to any reasonable policyholder's expectations. *See Reno Club*, 64 Nev. at 325, 182 P.2d at 1017 (explaining that insurance contracts should not be interpreted to require an absurd or unreasonable result). The dictionary definition of "pollutant" supports Casino West's proposed limitation on the absolute pollution exclusion. *See Merriam-Webster's Collegiate Dictionary* 961 (11th ed. 2012) (defining "pollute" as "to contaminate (an environment) esp[ecially] with man-made waste" and a "pollutant" as "something that pollutes"). Therefore, a reasonable policyholder could construe the absolute pollution exclusion to only apply to traditional environmental pollution.

The absolute pollution exclusion's drafting history further supports the conclusion that the exclusion was designed to apply only to outdoor, environmental pollution. *Cf. J.E. Dunn Nw., Inc. v. Corus Constr. Venture, L.L.C.*, 127 Nev. 72, 79, 249 P.3d 501, 505 (2011) (providing that, when interpreting statutes, we look to

the statute's legislative history for guidance to determine the law's proper scope). Other courts have recognized that the pollution exclusion was traditionally included in insurance policies to avoid the potentially grand expense resulting from *environmental* litigation. *Am. States Inc. v. Koloms*, 687 N.E.2d 72, 81 (Ill. 1997). The theory underlying such exclusions appears to be that, if an insured knows that his or her policy covers any type of pollution, he or she may take fewer precautions to ensure that such environmental contaminations do not occur. *Waste Mgmt. of Carolinas, Inc. v. Peerless Ins. Co.*, 340 S.E.2d 374, 381 (N.C. 1986). Thus, in the absence of an exclusion covering environmental pollution, an insurer could incur huge financial costs for litigation stemming from such pollution. *Id.* In light of these principles, courts have determined that—from the insurers' standpoint—the exclusion was designed to protect against the "yawning extent of potential liability arising from the gradual or repeated discharge of hazardous substances *into the environment*." *Id.* (emphasis added).

Moreover, while Century's argument that the building-heater exception demonstrates that the exclusion applies to both external and internal contamination is reasonable, the building-heater exception does not necessarily preclude this court from concluding that Casino West's interpretation is equally reasonable. In particular, one reasonable explanation for the inclusion of the building-heater exception is that it was meant to clarify that the absolute pollution exclusion does not apply to a particular situation, rather than to expand the absolute pollution exclusion's scope beyond the parameters of how that exclusion has previously been interpreted. *See Wolters*, 831 N.W.2d at 635 n.2 (recognizing that courts have limited the absolute pollution exclusion to "situations involving traditional environmental pollution").

In light of the exclusion's ambiguity, we must interpret the provision to effectuate Casino West's reasonable expectations. *See Powell*, 127 Nev. at 161, 252 P.3d at 672. When considering the significant amount of authority interpreting the absolute pollution exclusion to apply only to traditional environmental pollution, *see id.*, one cannot rely on an exception to prove that the exclusion also applies to indoor pollution. To demonstrate that the absolute pollution exclusion applies to nontraditional indoor pollutants, an insurer must plainly state that the exclusion is not limited to traditional environmental pollution. *See id.* at 164, 252 P.3d at 674 (providing that to preclude coverage under an insurance policy, an insurer must draft the exclusion in "obvious and unambiguous language"). Accordingly, we determine that the absolute pollution exclusion does not bar coverage for the injuries caused by carbon monoxide in this case.

*The indoor air quality exclusion*

[Headnote 15]

The indoor air quality exclusion has not been as heavily litigated as the absolute pollution exclusion, so we do not have the benefit of other courts' interpretations of similar provisions. Under the indoor air quality exclusion, Casino West's insurance policy does not apply to

> . . . .
>
> b. "Bodily injury[,]" "property damage[,]" or "personal and advertising injury" arising out of, caused by, or alleging to be contributed to in any way by any toxic, hazardous, noxious, irritating, pathogenic or allergen qualities or characteristics of indoor air regardless of cause . . . .

Century contends that the indoor air quality exclusion is unambiguous and that the "regardless of cause" policy language precludes liability for any injury suffered from indoor air quality issues, without limitation. Casino West argues that Century's interpretation is overly broad and that the air quality exclusion should be limited to preclude only injuries arising from inherent and continuous air quality issues.

Like the pollution exclusion, the indoor air quality exclusion is subject to multiple reasonable interpretations. In line with Century's interpretation, one could read the exclusion's language to exclude coverage for any injury caused by any condition of the air, regardless of whether the condition is permanent or temporary. Specifically, the policy states that it excludes coverage of any bodily injury resulting from hazardous air quality, and the "regardless of cause" language indicates that no limitations restrict the exclusion's applicability. On the other hand, Casino West's interpretation—limiting the exclusion's applicability only to inherent and continuous air quality issues—is also reasonable. As with the pollution exclusion, the indoor air quality provision is drafted so broadly that, if no limitations are applied to it, its applicability could stretch well beyond a reasonable policyholder's expectations and lead to absurd results. For instance, read to exclude coverage for any condition of the air, the policy would not cover any injury resulting from a guest's inhalation of smoke from a fire inside the motel, but would cover any burn injuries caused by that same fire. Such potentially absurd results illustrate the need for some limitations on the exclusion's applicability. *See Reno Club*, 64 Nev. at 325, 182 P.2d at 1017 (insurance contracts should not be interpreted to require an absurd or unreasonable result).

The indoor air quality exclusion's ambiguity requires us interpret the provision to effectuate Casino West's reasonable expectation that the exclusion only applies to inherent and continuous

conditions. The indoor air quality provision excludes coverage for certain types of air "qualities or characteristics." As relevant here, a "quality" refers to the "peculiar and essential character" or "an inherent feature" of something. *See Merriam-Webster's Collegiate Dictionary* 1017 (11th ed. 2012). And a "characteristic" is "a distinguishing trait, quality, or property." *Id.* at 207. These definitions evoke the idea of something that is permanently present in the air, rather than a temporary condition. Thus, a policyholder could reasonably expect that the indoor air quality exclusion applies only to continuously present substances that render the air harmful, and that the policy allows recovery for an unexpected condition that temporarily affects the air quality inside of a building. *See id.* at 207, 1017. Accordingly, we conclude that the indoor air quality exclusion does not bar coverage for the injuries at issue in this case.[2]

## *CONCLUSION*

For the reasons discussed herein, we conclude that neither the absolute pollution exclusion nor the indoor air quality exclusion clearly excludes coverage for carbon monoxide exposure under this case's circumstances. Therefore, we answer the certified questions in the negative.

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

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[2]To the extent that the parties disagree over whether the carbon monoxide in this case was temporarily or continuously present in the air, that question presents a factual issue, which is outside our province in answering the certified questions. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011) (adopting the majority view "that this court is bound by the facts as stated in the certification order and its attachment[s] and that this court cannot make findings of fact in responding to a certified question"). Thus, for the purpose of answering this certified question, we accept the Ninth Circuit's factual conclusion that carbon monoxide entered the decedents' room from Casino West's pool heater room "because the air intake openings had been blocked," which seems to indicate that the condition was temporary and unexpected, rather than a permanent air quality issue.

ULISES J. GOMEZ, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 62151

May 29, 2014 324 P.3d 1226

Appeal from a judgment of conviction, pursuant to a guilty plea agreement, of murder, conspiracy to commit robbery, and conspiracy to commit first-degree kidnapping. Eighth Judicial District Court, Clark County; Jerome T. Tao, Judge.

The supreme court, GIBBONS, C.J., held that: (1) evidentiary hearing was not warranted on defendant's challenge to information contained in presentence investigation report (PSI), and (2) information contained in defendant's PSI regarding affiliation/association with criminal street gang was not based on impalpable and highly suspect evidence.

**Affirmed.**

*Karen A. Connolly, Ltd.*, and *Karen A. Connolly*, Las Vegas, for Appellant.

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

1. SENTENCING AND PUNISHMENT.
   Evidentiary hearing was not warranted on defendant's challenge to information contained in presentence investigation report related to defendant's alleged association with criminal street gang, for purposes of sentencing for murder, conspiracy to commit robbery, and conspiracy to commit kidnapping; the district court reviewed police incident reports and determined that there was factual basis to support them, and it properly ensured that information in police reports was not based on impalpable or highly suspect evidence. NRS 176.156(1).
2. SENTENCING AND PUNISHMENT.
   Information contained in defendant's presentence investigation report regarding affiliation/association with criminal street gang was not based on impalpable and highly suspect evidence, where State produced several field interview cards and incident reports from police department indicating that defendant was known gang member.
3. SENTENCING AND PUNISHMENT.
   Because a court cannot base its sentencing decision on information or accusations that are founded on impalpable or highly suspect evidence, the presentence investigation report must not include information based on impalpable or highly suspect evidence. NRS 176.135(1).

Before the Court EN BANC.

## OPINION

By the Court, GIBBONS, C.J.:

After pleading guilty, appellant Ulises Gomez requested that the district court amend his Presentence Investigation Report (PSI) because it included inaccurate information regarding his gang involvement. The district court refused to do so, finding that the police department's incident reports provided a factual basis for the gang information that was included in the PSI. In this opinion, we address whether the district court properly relied on the incident reports when determining whether to amend the PSI and whether a defendant is entitled to due process protections when erroneous statements in his or her PSI will potentially affect his or her prison classification and compromise whether he or she will be released on parole.

### *FACTS AND PROCEDURAL HISTORY*

Gomez was arrested for his involvement in a robbery and homicide at Llantera Del Norte Tire Shop in North Las Vegas. Gomez ultimately agreed to plead guilty to murder, conspiracy to commit robbery, and conspiracy to commit first-degree kidnapping. Under the plea agreement, the parties agreed to recommend a term of life with the possibility of parole after 20 years for the murder and that the sentences on the other charges run concurrently with the murder sentence. The Nevada Division of Parole and Probation (P&P) prepared a PSI before sentencing as required by NRS 176.135. Gomez's PSI stated, "[p]er contact with the Las Vegas Metropolitan Police Gang Unit, the defendant is a known . . . primary member of, 'Brown Pride Locotes' and a secondary member of '18th Street,' with a last known contact date of July 23, 2009."

Gomez filed an objection to his PSI, arguing that the statements about his gang membership were false and unsupported by "factual information." The district court delayed sentencing and ordered the Las Vegas Metropolitan Police Department (LVMPD) to produce documentation supporting the representation that Gomez was a gang member. In response, LVMPD produced several field interview cards and incident reports. One specific incident report dated February 13, 2002, noted that Gomez "admitted Blythe Street [gang]." Another incident report dated May 8, 2007, noted that Gomez was a known member of the 18th Street gang as determined by his "gang dress/frequents gang area/affiliates w/gang."

After LVMPD produced Gomez's incident reports, the district court heard argument on Gomez's objection. Gomez argued that the incident reports were not sufficiently reliable to demonstrate his

gang membership because they do not explicitly state that Gomez was a gang member and only concluded he was affiliated with gangs because he was "giving a ride to somebody who was a gang member." The district court noted that the incident report stated that Gomez "admitted Blythe—association with the Blythe Street Gang. So that's more than just giving a ride to a guy." Additionally, the district court found that the reports provided a factual basis for the information in the PSI and thus the PSI was not based on "impalpable or highly suspect information." *See Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 213 (2011). In response, Gomez requested an evidentiary hearing in order to ensure that his sentence was "based upon accurate information." The district court denied Gomez's request for an evidentiary hearing, reasoning that it was not sentencing Gomez based on his gang affiliation or a gang enhancement. Rather, the district court stated that the gang information was "not actually even part of the sentence. It's just a classification problem which is an administrative issue." The district court then adjudged Gomez guilty and sentenced him to life in prison with the possibility of parole after 20 years for murder and 28-72 months for each conspiracy offense, with the sentences to run concurrently. Gomez now appeals.

## *DISCUSSION*

### *Gomez was not entitled to an evidentiary hearing*

[Headnote 1]

Gomez argues that he should have been able to challenge the allegations in his PSI through an evidentiary hearing. We disagree.

Nevada law affords a defendant the opportunity to object to factual errors in his or her PSI. NRS 176.156(1). But, as this court acknowledged in *Stockmeier*, "the process by which the district court must resolve objections to a PSI is not entirely clear." 127 Nev. at 250, 255 P.3d at 213. Apart from the provision mandating an opportunity to object to factual errors, Nevada statutes are "silent as to the process to be followed by either [P&P] or the district court for allowing the defendant to make such objections, or for resolving the objections." *Id.* at 250, 255 P.3d at 213-14.

Contrary to Gomez's contention, we conclude that *Stockmeier* does not require the district court to hold evidentiary hearings to address alleged factual errors in a defendant's PSI. Here, the district court reviewed the LVMPD incident reports and determined that there was a factual basis to support them. The district court properly ensured that the information in the reports was not based on impalpable or highly suspect evidence.[1] *See Stockmeier*, 127 Nev. at 248-49, 255 P.3d at 212-14.

[1]Further, we note that the process by which a defendant addresses factual errors in a PSI was not intended to become a small-scale trial.

*The statements in Gomez's PSI were not based on impalpable or highly suspect evidence*

[Headnote 2]

Gomez argues that the incident reports produced by LVMPD do not establish that he was a gang member. We disagree based on the *Stockmeier* standard for PSI information.

[Headnote 3]

NRS 176.135(1) mandates that P&P "prepare a PSI to be used at sentencing for any defendant who pleads guilty to or is found guilty of a felony." *Stockmeier*, 127 Nev. at 248, 255 P.3d at 212. Because a court cannot base its sentencing decision on information or accusations that are founded on " 'impalpable or highly suspect evidence,' " the PSI must not include information based on " 'impalpable or highly suspect evidence.' " *Id.* at 248, 255 P.3d at 213 (quoting *Goodson v. State*, 98 Nev. 493, 495-96, 654 P.2d 1006, 1007 (1982)); *see Goodson*, 98 Nev. at 496, 654 P.2d at 1007 (holding that information in a PSI indicating that the defendant was a drug trafficker was impalpable and highly suspect because it was merely a "bald assertion," and "unsupported by any evidence whatsoever").

We conclude that the district court did not abuse its discretion in ruling that the gang information in Gomez's PSI was not based on impalpable or highly suspect evidence. *See Nunnery v. State*, 127 Nev. at 749, 757, 263 P.3d 235, 241 (2011). LVMPD produced several field interview cards and incident reports indicating that Gomez was a known gang member. The incident report which states that Gomez "admitted Blythe Street [gang]" is especially noteworthy. Admittedly, this would be a closer issue if the State only produced the incident report that concluded Gomez was affiliated with gangs based on his dress and associations. But given the admission, we conclude that the district court did not abuse its discretion in refusing to amend Gomez's PSI. Thus, the information in Gomez's PSI is more than a bald assertion and is supported by the reports. *See Goodson*, 98 Nev. at 496, 654 P.2d at 1007.[2]

*Gomez's remaining arguments are moot*

Gomez does not contend that the allegations of gang membership within his PSI affected his sentence.[3] Rather, Gomez argues that although the alleged inaccuracies in his PSI did not affect his

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[2]Despite Gomez's argument that the State should bear the burden of proving the information in Gomez's PSI, we conclude that the State does not have the burden of proof regarding the information in a defendant's PSI.

[3]Even though Gomez does not argue that the allegations of gang membership within his PSI affected his sentence, we take this opportunity to note that the district court may take many different items into consideration when determining the appropriate sentence for a defendant.

actual sentence, they still are materially prejudicial because of their potential effect on his prison classification or his chances of being released on parole. Based on our conclusion that the district court did not err in finding that the information in Gomez's PSI regarding his gang affiliation was not based on impalpable or highly suspect evidence, we do not need to consider whether the gang affiliation within his PSI could possibly materially prejudice his prison classification or his chances of being released on parole.

*CONCLUSION*

The district court did not abuse its discretion when it determined that the LVMPD reports provided a factual basis for the gang affiliation noted in Gomez's PSI. Further, we decline to consider Gomez's claims that his PSI will affect his parole and prison classification. Accordingly, we affirm Gomez's judgment of conviction.[4]

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

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STEVEN C. JACOBS, APPELLANT, *v.* SHELDON G. ADELSON, IN HIS INDIVIDUAL AND REPRESENTATIVE CAPACITIES, RESPONDENT.

No. 58740

May 30, 2014 325 P.3d 1282

Appeal from a district court order, certified as final under NRCP 54(b), dismissing respondent from a defamation action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Employee brought action against employer and its chief executive officer (CEO), alleging claims for wrongful termination and defamation. The district court dismissed employee's defamation claim, and he appealed. The supreme court, HARDESTY, J., held that in a matter of first impression, purported defamatory statements made by CEO to the media were not absolutely privileged.

**Reversed and remanded.**

[Rehearing denied August 7, 2014]

CHERRY, J., with whom GIBBONS, C.J., and PARRAGUIRRE, J., agreed, dissented.

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

*Pisanelli Bice, PLLC*, and *Todd L. Bice, Debra L. Spinelli*, and *Jarrod L. Rickard*, Las Vegas, for Appellant.

*Morris Law Group* and *Steve L. Morris* and *Ryan M. Lower*, Las Vegas, for Respondent.

1. Appeal and Error.
   The supreme court rigorously reviews a district court order granting a motion to dismiss for failure to state a claim, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. NRCP 12(b)(5).
2. Pretrial Procedure.
   A complaint should be dismissed for failure to state a claim only when it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him or her to relief. NRCP 12(b)(5).
3. Appeal and Error.
   The supreme court reviews de novo the district court's legal conclusions.
4. Appeal and Error.
   The supreme court reviews de novo the applicability of an absolute privilege.
5. Libel and Slander.
   Whether a statement is sufficiently relevant to the judicial proceedings to fall within the absolute privilege from a defamation claim is a question of law for the court.
6. Libel and Slander.
   The privilege for statements made during the course of judicial and quasi-judicial proceedings, which acts as a complete bar to defamation claims based on privileged statements, recognizes that certain communications, although defamatory, should not serve as a basis for liability in a defamation action and are entitled to an absolute privilege because the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.
7. Privileged Communications and Confidentiality.
   An "absolute privilege" constitutes an immunity, which protects against even the threat that a court or jury will inquire into a communication.
8. Libel and Slander.
   In order for the absolute privilege to apply to defamatory statements made in the context of a judicial or quasi-judicial proceeding, (1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation; therefore, the privilege applies to communications made by either an attorney or a nonattorney that are related to ongoing litigation or future litigation contemplated in good faith.
9. Libel and Slander.
   When defamatory communications are made in a litigation setting and are in some way pertinent to the subject of the controversy, the absolute privilege protects them even when the motives behind them are malicious and they are made with knowledge of the communications' falsity.
10. Libel and Slander.
    Purported defamatory statements made by employer's chief executive officer (CEO) to the media were not absolutely privileged, even though the

CEO's statements mentioned ongoing litigation in which employee sued employer for wrongful termination; the media did not have a direct interest in, or connection to, the outcome of proceedings, other than as a spectator, and because the CEO's statements were published to a disinterested party, they were not sufficiently connected to the judicial proceedings to warrant application of the absolute privilege.

11. Libel and Slander.
Statements made to the media are not subject to absolute privilege for judicial or quasi-judicial proceedings; extension of the absolute privilege to cover statements to the media, when the media are not a party to the lawsuit or inextricably intertwined with the lawsuit, would not further the policy underlying the absolute privilege.

12. Libel and Slander.
Assessing the significant interest in a judicial proceeding by the recipient of a defamatory statement, for purposes of determining whether an absolute privilege applies to the statement, requires review of the recipient's legal relationship to the litigation, not their interest as an observer.

13. Libel and Slander.
A nonparty recipient of a defamatory statement must have a relevant interest in, or a connection to, the outcome of the legal proceeding in order to apply an absolute privilege to the statement; moreover, the nature of the recipient's interest in or connection to the litigation is a case-specific, fact-intensive inquiry that must focus on and balance the underlying principles of the privilege.

14. Libel and Slander.
The common law conditional "privilege of reply" grants those who are attacked with defamatory statements a limited right to reply.

15. Libel and Slander.
The conditional privilege of reply to a defamatory statement is not absolute, and it may be lost if the reply: (1) includes substantial defamatory matter that is irrelevant or non-responsive to the initial statement, (2) includes substantial defamatory material that is disproportionate to the initial statement, (3) is excessively publicized, or (4) is made with malice in the sense of actual spite or ill will.

16. Libel and Slander.
The application of the conditional privilege of reply to a defamatory statement is generally a question of law for the court.

Before the Court En Banc.[1]

## OPINION

By the Court, Hardesty, J.:

Appellant sued respondent's companies for wrongful termination, making a number of allegations in the complaint against respondent personally. After respondent published a response to the allega-

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[1]The Honorable Kristina Pickering, Justice, did not participate in the decision of this matter.

**Reporter's Note:** The Honorable Michael Montero, District Judge, was designated by the Governor to sit in place of The Honorable Kristina Pickering, Justice, who voluntarily recused herself from participating in the decision of this matter. Nev. Const. art. 6, § 4(2).

tions in the media, appellant sued him for defamation. The district court dismissed the defamation claim, concluding that respondent was protected from a defamation suit because his statements to the media were made in the context of a judicial action. Although statements made during the course of judicial proceedings are generally considered absolutely privileged and cannot form the basis of a defamation claim, we have yet to consider whether statements made to the media regarding ongoing or contemplated litigation are covered by this absolute privilege. We adopt the majority view that communications made to the media in an extrajudicial setting are not absolutely privileged, at least when the media holds no more significant interest in the litigation than the general public. Thus, we reverse the order of dismissal and remand this matter to the district court for further proceedings.

*FACTS*

Appellant Steven C. Jacobs filed a wrongful termination complaint against Las Vegas Sands Corporation (LVSC) and Sands China, Ltd. (Sands China). LVSC is the controlling shareholder of Sands China. Sheldon G. Adelson is the chief executive officer and majority shareholder of LVSC and Jacobs' former employer. Although Adelson was not originally named as a defendant, Jacobs' complaint alleged that Adelson demanded Jacobs to engage in "illegal" activities while working for LVSC operations in Macau. Jacobs further alleged that his refusal to carry out those "illegal" demands resulted in threats by Adelson and Jacobs' eventual termination. The complaint also contained numerous attacks against Adelson personally, asserting that he made "outrageous demands" and referring to him as "notoriously bellicose" and "mercurial." It also attacked Adelson's behavior as "rude and obstreperous."

LVSC and Sands China filed a motion to dismiss the complaint, which resulted in a hearing that received widespread media attention. After the hearing, the *Wall Street Journal* published an online article about the case. According to the article, Adelson provided an e-mail response that allegedly said:

> While I have largely stayed silent on the matter to this point, the recycling of his allegations must be addressed . . . . We have a substantial list of reasons why Steve Jacobs was fired for cause and interestingly he has not refuted a single one of them. Instead, he has attempted to explain his termination by using outright lies and fabrications which seem to have their origins in delusion.

Jacobs subsequently amended his complaint, adding a claim for defamation per se against Adelson, LVSC, and Sands China. The amended complaint alleged that the statements published in

the *Wall Street Journal* were false and defamatory, unprivileged, published maliciously and known to be false or in reckless disregard of the truth, and necessarily injurious to Jacobs' professional reputation.

Adelson, LVSC, and Sands China all filed motions to dismiss Jacobs' defamation claim, arguing that the statements were absolutely privileged communications made in the course of judicial proceedings or, in the alternative, were protected by the conditional privilege of reply. After a hearing on the motion to dismiss, the district court determined that Adelson's response to the *Wall Street Journal* was an absolutely privileged communication relating to the litigation. Based on its ruling that Adelson's statements were absolutely privileged, the district court declined to consider Adelson's alternative argument that his statements were covered by the conditional privilege of reply. The district court thus granted the motion to dismiss and, because the dismissal resolved all claims against Adelson, certified its order as final under NRCP 54(b) for purposes of this appeal.

## *DISCUSSION*

### *Standard of review*

[Headnotes 1-5]

We rigorously review a district court order granting an NRCP 12(b)(5) motion to dismiss, accepting all of the plaintiff's factual allegations as true and drawing every reasonable inference in the plaintiff's favor to determine whether the allegations are sufficient to state a claim for relief. *State ex rel. Johnson v. Reliant Energy, Inc.*, 128 Nev. 483, 487, 289 P.3d 1186, 1189 (2012). A complaint should be dismissed for failure to state a claim only "when it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him or her to relief." *Id.* We review de novo the district court's legal conclusions. *Buzz Stew, L.L.C. v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). We also review de novo the applicability of an absolute privilege. *Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. 322, 325, 302 P.3d 1099, 1101 (2013). Whether a statement is sufficiently relevant to the judicial proceedings to fall within the absolute privilege is a question of law for the court. *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 62, 657 P.2d 101, 105 (1983).

### *The absolute privilege*

[Headnotes 6, 7]

Nevada has long recognized the existence of an absolute privilege for defamatory statements made during the course of judicial and quasi-judicial proceedings. *See, e.g.*, *Clark Cnty. Sch. Dist. v.*

*Virtual Educ. Software, Inc. (VESI)*, 125 Nev. 374, 382, 213 P.3d 496, 502 (2009); *Fink v. Oshins*, 118 Nev. 428, 432-33, 49 P.3d 640, 643-44 (2002); *Circus Circus Hotels*, 99 Nev. at 60, 657 P.2d at 104. This privilege, which acts as a complete bar to defamation claims based on privileged statements, recognizes that "[c]ertain communications, although defamatory, should not serve as a basis for liability in a defamation action and are entitled to an absolute privilege because 'the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.' " *Cucinotta*, 129 Nev. at 325, 302 P.3d at 1101 (quoting *Circus Circus Hotels*, 99 Nev. at 61, 657 P.2d at 104); *see also Hampe v. Foote*, 118 Nev. 405, 409, 47 P.3d 438, 440 (2002), *overruled on other grounds by Buzz Stew, L.L.C.*, 124 Nev. at 228 n.6, 181 P.3d at 672 n.6. An absolute privilege constitutes "an immunity, which protects against even the threat that a court or jury will inquire into a communication." *Hampe*, 118 Nev. at 409, 47 P.3d at 440.

[Headnotes 8, 9]

In order for the absolute privilege to apply to defamatory statements made in the context of a judicial or quasi-judicial proceeding, "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *VESI*, 125 Nev. at 383, 213 P.3d at 503. Therefore, the privilege applies to communications made by either an attorney or a nonattorney that are related to ongoing litigation or future litigation contemplated in good faith. *Id*. When the communications are made in this type of litigation setting and are in some way pertinent to the subject of the controversy, the absolute privilege protects them even when the motives behind them are malicious and they are made with knowledge of the communications' falsity. *Id.* at 382, 213 P.3d at 502; *Circus Circus Hotels*, 99 Nev. at 60, 657 P.2d at 104. But we have also recognized that "[a]n attorney's statements to someone who is not directly involved with the actual or anticipated judicial proceeding will be covered by the absolute privilege only if the recipient of the communication is 'significantly interested' in the proceeding." *Fink*, 118 Nev. at 436, 49 P.3d at 645-46 (quoting *Andrews v. Elliot*, 426 S.E.2d 430, 433 (N.C. Ct. App. 1993)).

Here, even though Adelson's statements mentioned ongoing litigation, Jacobs argues that the district court improperly applied the absolute privilege because the statements were made outside of the judicial proceedings to disinterested persons, including the media and the press, and are thus unrelated to the litigation. Jacobs avers that the press lacks any legal interest in the outcome of this case and has no functional ties to his claims or Adelson's defenses. Adelson, in contrast, contends that the district court properly dismissed

Jacobs' defamation claim because his statements are absolutely privileged since they were made during the course of this judicial proceeding and were directly related to the subject of this lawsuit—Jacobs' claim for wrongful termination. Adelson also argues that statements made to the media should be included in the scope of Nevada's absolute privilege rule. Because we decline Adelson's invitation to treat the media as "significantly interested" in the litigation, we agree with Jacobs' assessment that absolute privilege does not apply here.

*Application of the absolute privilege in the media context*

[Headnote 10]

This court has not previously addressed whether the absolute privilege applies when the media is the recipient of the statement. We have, however, recognized that communications are not sufficiently related to judicial proceedings when they are made to someone without an interest in the outcome. *See Fink*, 118 Nev. at 436, 49 P.3d at 645-46.

The majority of states have determined that the absolute privilege does not apply when the communications are made to the media.[2] " 'Communications made to newspapers and during press conferences have been almost universally found to be excluded from the protection of absolute privilege.' " *Med. Informatics Eng'g, Inc. v. Orthopaedics Ne., P.C.*, 458 F. Supp. 2d 716, 724 (N.D. Ind. 2006) (quoting *Williams v. Kenney*, 877 A.2d 277, 288 (N.J. Super. Ct. App. Div. 2005)); *see, e.g.*, *Asay v. Hallmark Cards, Inc.*, 594 F.2d 692, 697 (8th Cir. 1979) ("Publication to the news media is not ordinarily sufficiently related to a judicial proceeding to constitute a privileged occasion."); *Green Acres Trust v. London*, 688 P.2d 617, 622 (Ariz. 1984) (same); *Rothman v. Jackson*, 57 Cal. Rptr. 2d 284, 294-95 (Ct. App. 1996) (stating that the absolute privilege generally should not be extended to "litigating in the press"); *see also Milford Power Ltd. P'ship v. New England Power Co.*, 918 F. Supp. 471, 486 (D. Mass. 1996); *Seidl v. Greentree Mortg. Co.*, 30 F. Supp. 2d

[2]A few jurisdictions have held that, under certain circumstances, an attorney's statements to the media are absolutely privileged. *See, e.g.*, *Prokop v. Cannon*, 583 N.W.2d 51, 58 (Neb. Ct. App. 1998) (extending the privilege to statements made by an attorney to a reporter after the dismissal of the first lawsuit). Other jurisdictions have found exceptions to the majority rule based on unique circumstances. *See, e.g.*, *Johnston v. Cartwright*, 355 F.2d 32, 37 (8th Cir. 1966) (applying absolute privilege to a statement to a newspaper when all signs pointed to emerging litigation and the newspaper was a potential party); *Jones v. Clinton*, 974 F. Supp. 712, 731-32 (E.D. Ark. 1997) (applying absolute privilege to a lawyer's statements to the press denying allegations and questioning the plaintiff's motives, where the plaintiff publicly solicited a response); *Helena Chem. Co. v. Uribe*, 281 P.3d 237, 239-40 (N.M. 2012) (holding that an attorney's prelitigation statements to the press are absolutely privileged if a class action lawsuit is contemplated).

1292, 1313-14 (D. Colo. 1998); *Kelley v. Bonney*, 606 A.2d 693, 707 (Conn. 1992); *Kennedy v. Zimmermann*, 601 N.W.2d 61, 64-65 (Iowa 1999); *Kennedy v. Cannon*, 182 A.2d 54, 58 (Md. 1962).

These courts have concluded that the policy considerations underlying the absolute privilege rule are not applicable to statements made to the media. Statements made to the media "do little, if anything, to promote the truth finding process in a judicial proceeding . . . . [They] do not generally encourage open and honest discussion between the parties and their counsel in order to resolve disputes; indeed, such statements often do just the opposite." *Pratt v. Nelson*, 164 P.3d 366, 381 (Utah 2007). And allowing defamation claims for statements made to the media will not generally hinder investigations or the detailing of claims. *Milford Power*, 918 F. Supp. at 486; *see also Asay*, 594 F.2d at 698. Thus, the need for absolute privilege evaporates. *Milford Power*, 918 F. Supp. at 486. Because the privilege's purpose is not to protect those making defamatory comments but "to lessen the chilling effect on those who seek to utilize the judicial process to seek relief," these courts have declined to extend the privilege in this context. *Kirschstein v. Haynes*, 788 P.2d 941, 952-53 (Okla. 1990).

[Headnote 11]

Based on the policy considerations underlying the absolute privilege, we adopt the majority view that statements made to the media are not subject to absolute privilege. Extension of the absolute privilege to cover statements to the media, when the media are not a party to the lawsuit or inextricably intertwined with the lawsuit, would not further the policy underlying the absolute privilege. This position is also in line with our previous caselaw acknowledging that the privilege was created in part because the public interest in free speech during litigation outweighs the possibility of abuse of the privilege through the making of false and malicious statements. *See Cucinotta*, 129 Nev. at 325, 302 P.3d at 1101; *Circus Circus Hotels*, 99 Nev. at 61, 657 P.2d at 104. However, protecting speech made during a judicial proceeding does not warrant allowing the dissemination of defamatory communications outside of the judicial proceedings. *See Kelley*, 606 A.2d at 707; *Asay*, 594 F.2d at 697.

Here, there has been no cogent argument that the *Wall Street Journal* has any other interest than that of an observer in the litigation such that the communications were made outside the judicial proceedings. While Adelson's statements were connected to the litigation in that they addressed Jacobs' contentions, we "draw the line between bona fide litigation activities and a public relations campaign" as it concerns the absolute privilege. *Williams v. Kenney*, 877 A.2d 277, 290-91 (N.J. Super. Ct. App. Div. 2005). The dissent argues that the extensive media coverage of the underlying judicial proceedings in this case has resulted in both the media and the

public becoming "significantly interested" in the proceedings, thus triggering the absolute privilege to Adelson's contested statements. We cannot agree.

[Headnote 12]

As the dissent points out, we have previously determined that the absolute privilege only covers statements made to those without direct involvement in the judicial proceeding if the recipients of the communication are "significantly interested in the proceeding." *Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640, 645-46 (2002) (internal quotations omitted).[3] While we have yet to examine what constitutes a "significant interest" in judicial proceedings, drawing from our analysis in *Fink*, the policy underlying the absolute privilege, and other relevant caselaw, we conclude that assessing the significant interest of the recipient requires review of the recipient's legal relationship to the litigation, not their interest as an observer. *See id.* at 436, 49 P.3d at 645-46; *cf. Hall v. Smith*, 152 P.3d 1192, 1197 (Ariz. Ct. App. 2007) (stating that resolution of the judicial privilege issue pivots on relationship of recipient to the legal proceedings).

[Headnote 13]

A nonparty recipient must have a relevant interest in, or a connection to, the outcome of the proceeding. *See, e.g.*, *Kanengiser v. Kanengiser*, 590 A.2d 1223, 1237 (N.J. Super. Ct. Law Div. 1991) (establishing that trustees and beneficiaries of a trust had a significant interest in potential litigation regarding the trust); *DeVivo v. Ascher*, 550 A.2d 163, 168 (N.J. Super. Ct. App. Div. 1988) (indicating that nonparty recipient was significantly interested because the records sought in the litigation were relevant to the amount owed to the recipient and the recipient "could properly have been joined as a party"); *cf. Theiss v. Scherer*, 396 F.2d 646, 648 (6th Cir. 1968) (noting that letter written by attorney was absolutely privileged because it was addressed to an attorney who represented a party with a financial interest in the proceeding, and copies were sent to individuals with direct financial interests in proceeding). Moreover, the nature of the recipient's interest in or connection to the litigation is a "case-specific, fact-intensive inquiry" that must focus on and balance the underlying principles of the privilege. *Hall*, 152 P.3d at 1199.

Looking then at the relationship between the *Wall Street Journal* and the underlying district court proceedings in this case, we conclude that the newspaper does not have a direct interest in, or connection to, the outcome of the proceedings, other than as a spectator.

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[3]Other jurisdictions do not have this requirement. *See, e.g.*, *Helena Chem.*, 281 P.3d at 242 ("[P]ublishing a statement to a person with a direct interest in the judicial proceeding is not an independent element in the absolute privilege analysis." (internal quotation omitted)).

*See Fink*, 118 Nev. at 436, 49 P.3d at 646; *Green Acres Trust*, 688 P.2d at 623; *Hall*, 152 P.3d at 1197. As explained by the Arizona Supreme Court in *Green Acres Trust v. London*, generally, "reporter[s] play[ ] no role in the actual litigation other than that of a concerned observer." 688 P.2d 617, 623 (Ariz. 1984). Accordingly, we conclude that the *Wall Street Journal* does not have any legal or financial interest in the underlying litigation, and thus, it is not significantly interested in the litigation for purposes of the absolute privilege. Essentially, because Adelson's statements were published to a disinterested party, they are not sufficiently connected to the judicial proceedings to warrant application of the absolute privilege.

*The conditional privilege of reply*

Adelson also argues that this court should affirm the district court's decision because he had a privileged right to reply to the defamatory allegations made by Jacobs. Adelson contends that his statements were directly responsive, proportionate, and relevant to Jacobs' defamatory statements made against him in the complaint. Jacobs responds by arguing that questions of qualified privilege cannot be determined at this point, as this affirmative defense turns on facts and a record that has not yet been developed.

[Headnotes 14, 15]

The common law conditional privilege of reply "grants those who are attacked with defamatory statements a limited right to reply." *State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 149, 42 P.3d 233, 239 (2002). To illustrate the conditional privilege of reply, this court has previously explained that "'[i]f I am attacked in a newspaper, I may write to that paper to rebut the charges, and I may at the same time retort upon my assailant, when such retort is a necessary part of my defense, or fairly arises out of the charges he has made against me.'" *Id.* at 149, 42 P.3d at 239 (quoting *Foretich v. Capital Cities/ABC, Inc.*, 37 F.3d 1541, 1559 (4th Cir. 1994)). This privilege is not absolute, however. It may be lost "if the reply: (1) includes substantial defamatory matter that is irrelevant or non-responsive to the initial statement; (2) includes substantial defamatory material that is disproportionate to the initial statement; (3) is excessively publicized; or (4) is made with malice in the sense of actual spite or ill will." *Anzalone*, 118 Nev. at 149-50, 42 P.3d at 239.

[Headnote 16]

The conditional privilege's application is generally a question of law for the court. *Anzalone*, 118 Nev. at 149, 42 P.3d at 239 (citing *Lubin v. Kunin*, 117 Nev. 107, 115, 17 P.3d 422, 428 (2001)). Although Adelson argued that the conditional privilege of reply applied to his statement, the district court specifically declined to

consider these arguments. The factual record has not yet been developed, and we decline to address the applicability of the conditional privilege for the first time on appeal.[4] *See Lubin*, 117 Nev. at 115, 17 P.3d at 428 (declining to determine whether a conditional privilege applied because, at the motion to dismiss stage, the defendants had not yet "alleged the privilege by answer, let alone established facts to show that the privilege applies").

For the foregoing reasons, we vacate the district court's dismissal order, and we remand this case to the district court for further proceedings consistent with this opinion.

DOUGLAS and SAITTA, JJ., and MONTERO, D.J., concur.

CHERRY, J., with whom GIBBONS, C.J., and PARRAGUIRRE, J., agree, dissenting:

I would affirm the district court's decision to apply the absolute privilege to Adelson's statement and would conclude that the privilege extends to statements made to the media. *See Prokop v. Cannon*, 583 N.W.2d 51, 58 (Neb. Ct. App. 1998).

As the majority acknowledges, the absolute privilege was created to protect certain types of communications "because 'the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.' " *Cucinotta v. Deloitte & Touche, L.L.P.*, 129 Nev. 325, 302 P.3d 1099, 1101 (2013) (quoting *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 61, 657 P.2d 101, 104 (1983)). To effectuate the underlying policy behind the absolute privilege, it must be applied to statements made to the media during the judicial process.

The now-pervasive media coverage of judicial proceedings has resulted in the media and the public becoming significantly interested in the proceedings. *See Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640, 645-46 (2002) (requiring that the recipient of the communication be either directly involved or significantly interested in the proceeding). In this era of the unrelenting 24-hour news cycle, the public interest would be served by hearing both sides of a legal dispute. When the media is covering a case, replies to allegations should be allowed as a right and should not subject the declarant to having to prove that he or she was acting in self-defense. People are

[4]Adelson also claims that his statements are not actionable because only factual assertions, not mere opinions, may sustain a defamation claim. While Adelson raised this issue in the district court, the district court resolved the motion to dismiss solely based on absolute privilege. Because this is an assessment for the fact-finder, we decline to address it here. Adelson may raise this issue on remand to the district court. *See State v. Eighth Judicial Dist. Court (Anzalone)*, 118 Nev. 140, 150-51, 42 P.3d 233, 240 (2002); *Wynn v. Smith*, 117 Nev. 6, 18, 16 P.3d 424, 431 (2001).

often judged not on the outcome of their case, but on the media's portrayal of them during the proceedings. To tie their hands would unduly subject parties to restrictions on their personal and/or professional need for freedom of speech at a time when the world is watching.

Through the media's access to the judicial process, Jacobs was allowed to tell his side of the story with impunity. To say that Adelson must wait to respond through a legal channel is absurd. There is no reason to constrain Adelson's response to future legal briefs and motions. It makes no difference if Adelson's statements were made in his legal briefs or directly to the media—the result is the same, widespread dissemination to the public. Adelson should not be subject to defamation claims in this instance merely based on the platform that he used.

As recognized in the election context, "it is our law and our tradition that more speech, not less, is the governing rule." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 361 (2010). Because of this, I would decline to limit the scope of the absolute privilege rule in Nevada. The natural avenue of response to the allegations covered in media is likewise through the media. Accordingly, I would conclude that Adelson's statement is absolutely privileged because it was made during the course of this judicial proceeding and directly relates to the subject of this lawsuit.

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ALL STAR BAIL BONDS, INC.; AND SAFETY NATIONAL CASUALTY CORP., PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE JENNIFER P. TOGLIATTI, DISTRICT JUDGE, RESPONDENTS, AND CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 62866

June 5, 2014 326 P.3d 1107

Original petition for a writ of mandamus challenging a district court order that denied a motion to exonerate a bail bond and entered judgment against the surety.

Bail bond surety petitioned for a writ of mandamus to compel the district court to exonerate surety for bond posted on behalf of alien defendant after defendant, who had traveled to Mexico after entering guilty plea to fraudulent use of credit card but prior to sentencing, was not allowed reentry into United States. The supreme court, CHERRY, J., held that: (1) defendant who was detained at border

while attempting to reenter United States and who was detained and determined to be inadmissible, was not "deported," within meaning of bail bond exoneration statute; and (2) the district court lacked discretion under principles of contract to exonerate surety under circumstances falling outside scope of statute.

**Petition denied.**

*Mayfield, Gruber & Sheets* and *Damian R. Sheets*, Las Vegas, for Petitioners.

*Catherine Cortez Masto*, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Bart Pace*, Deputy District Attorney, Clark County, for Real Party in Interest.

1. Courts.
   The proper mode of review for orders entered in ancillary bail bond proceedings is by an original petition for writ of mandamus.
2. Mandamus.
   A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion.
3. Appeal and Error.
   The supreme court will not disturb a district court's findings of fact unless they are clearly erroneous and not based on substantial evidence.
4. Appeal and Error.
   The district court's conclusions of law, such as its construction of statutes, are reviewed de novo.
5. Bail.
   Alien defendant was not "deported," within meaning of statute permitting exoneration of bail bond of surety if defendant has been deported, when, in attempt to reenter United States for sentencing following guilty plea to fraudulent use of credit card, he was stopped at border and detained pending determination of admissibility, and then had nonimmigrant visa revoked upon determination of inadmissibility. NRS 178.509(1)(b)(5); Immigration and Nationality Act, § 212, 8 U.S.C. § 1182(a)(2)(A)(i)(I).
6. Aliens, Immigration, and Citizenship.
   "Deportation" is the removal of an alien out of the country, simply because his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent or under those of the country to which he is taken.
7. Aliens, Immigration, and Citizenship.
   Deportation requires not only a legal expulsion from the country, but also a crossing of the border.
8. Aliens, Immigration, and Citizenship.
   A border stop is not a deportation.
9. Aliens, Immigration, and Citizenship.
   The law treats deportation and exclusion differently, in that those with the status of deportable aliens are constitutionally entitled to rights in the deportation context that are inapplicable to exclusion proceedings.
10. Bail.
    A bail bond is a contract between the state and the surety of the accused.

11. BAIL.

The statutes governing bail bonds are incorporated into the agreement of the parties. NRS 178.484 *et seq.*

12. BAIL.

Bail bond agreement between State and defendant's bail surety incorporated bail bond statute, which provided that the district court "shall not" exonerate surety except under five enumerated circumstances, and thus, the district court had no discretion under principles of contract to exonerate surety on bail bond under circumstances falling outside scope of statute. NRS 178.509(1).

Before HARDESTY, DOUGLAS and CHERRY, JJ.

## OPINION

By the Court, CHERRY, J.:

NRS 178.509 allows the district court to exonerate a surety's bail bond obligations only in certain enumerated circumstances. One of those circumstances is when the defendant has been deported. NRS 178.509(1)(b)(5). In this original writ proceeding, we consider whether the defendant, who left the country voluntarily but was denied admission when he tried to return, was deported for purposes of NRS 178.509(1)(b)(5). We also consider whether common law contract defenses, such as impossibility, permit the district court to exonerate a bond. On both issues, we decide negatively. The defendant here was excluded, not deported. And the district court may not exonerate a bond without a statutory basis for doing so. Accordingly, we deny the surety's petition for extraordinary relief from the district court's order denying the motion for exoneration.

### *FACTS*

Real Party in Interest Clark County (the State) charged Rodrigo Rascon-Flores with multiple counts relating to fraudulent use of a credit card. He appeared at his arraignment and pleaded guilty in district court. The court continued sentencing for more than six months after the guilty plea. Petitioners All Star Bail Bonds, Inc., and Safety National Casualty Corporation (collectively, the surety) posted a bond for Rascon-Flores's release.[1]

Sometime after the arraignment, Rascon-Flores traveled to Mexico. Rascon-Flores attempted to return to Las Vegas just days before his scheduled sentencing. At the border, he was stopped by U.S. Customs and Border Protection because the U.S. Arrival System indicated a "hit," presumably due to his charges in Las Vegas. Rascon-Flores admitted his arrest and charges, and admitted to behavior consistent with his guilty plea on those charges.

[1]All Star Bail Bonds, Inc., posted the bond as an agent for Safety National Casualty Corp.

Customs and Border Protection detained Rascon-Flores before deciding that he was inadmissible under section 212(a)(2)(A)(i)(I) of the Immigration and Nationality Act (INA), codified at 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012). Under the INA, federal law prohibits admitting an alien "who admits committing acts which constitute the essential elements of—(I) a crime involving moral turpitude . . . ." 8 U.S.C. § 1182(a)(2)(A)(i)(I) (2012). Federal officers then revoked Rascon-Flores's nonimmigrant visa due to his inadmissibility. Officers verified his return to Mexico.

After Rascon-Flores missed his sentencing, the district court sent a notice of intent to forfeit bond to the surety. The surety filed a motion to exonerate the bond. The government opposed the motion and the surety replied. After a hearing, the district court denied the motion but stayed entry of judgment on the forfeiture for 30 days in order to give the surety time to petition for writ relief. The surety could not file for writ relief within 30 days, however, because it did not receive the hearing transcript and written order until after that time period had elapsed. The surety subsequently paid the forfeiture and now seeks relief in this court by extraordinary writ.

## *DISCUSSION*

[Headnotes 1-4]

"[T]he proper mode of review for orders entered in ancillary bail bond proceedings is by an original writ petition." *Int'l Fid. Ins. Co. ex rel. Blackjack Bonding, Inc. v. State*, 122 Nev. 39, 41, 126 P.3d 1133, 1133 (2006). "A writ of mandamus is available to compel the performance of an act that the law requires or to control a manifest abuse of discretion." *Id.* at 42, 126 P.3d at 1134. Therefore, in an original proceeding such as this one, we ask whether the district court manifestly abused its discretion in deciding whether to exonerate a bail bond. *Id.* at 43, 126 P.3d at 1135. We "will not disturb a district court's findings of fact unless they are clearly erroneous and not based on substantial evidence." *Id.* at 42, 126 P.3d at 1134-35. The district court's conclusions of law, such as its construction of statutes, are reviewed de novo. *See, e.g.*, *Emerson v. Eighth Judicial Dist. Court*, 127 Nev. 672, 677, 263 P.3d 224, 227 (2011).

The surety petitions us to order exoneration of the bond under the terms of NRS 178.509 because it asserts that Flores was deported. The surety also asks for exoneration under common law contract defenses.

### *Deportation*

[Headnotes 5-7]

NRS 178.509(1)(b)(5) permits a court to exonerate a bond upon application of the surety if the defendant has been deported. " 'Deportation' is the removal of an alien out of the country, simply be-

cause his presence is deemed inconsistent with the public welfare, and without any punishment being imposed or contemplated, either under the laws of the country out of which he is sent, or under those of the country to which he is taken." *Fong Yue Ting v. United States*, 149 U.S. 698, 709 (1893). Accordingly, deportation requires not only a legal expulsion from the country, *cf. Yamataya v. Fisher (The Japanese Immigrant Case)*, 189 U.S. 86, 100-01 (1903) (holding that due process principles apply to deportation), but also a crossing of the border, *United States v. Romo-Romo*, 246 F.3d 1272, 1276 (9th Cir. 2001) ("[A] person who never set foot outside this country was never deported . . . .").

[Headnotes 8, 9]

A border stop is not a deportation. The U.S. Supreme Court has recognized that immigration law distinguishes between "exclusion" and "deportation." *See Landon v. Plasencia*, 459 U.S. 21, 25 (1982) ("The deportation hearing is the usual means of proceeding against an alien already physically in the United States, and the exclusion hearing is the usual means of proceeding against an alien outside the United States seeking admission."). Historically, detention at the border has not been considered entry into the country, *Leng May Ma v. Barber*, 357 U.S. 185, 188 (1958), and, thus, someone who is denied entry at the border generally cannot be considered deported. The law treats deportation and exclusion differently: "[T]hose with the status of deportable aliens are constitutionally entitled to rights in the deportation context that are inapplicable to exclusion proceedings." *Jean v. Nelson*, 727 F.2d 957, 972 (11th Cir. 1984) (en banc), *affirmed on other grounds*, 472 U.S. 846 (1985).

In this case, the federal government prevented Rascon-Flores from entering at the port of entry. He was excluded, not deported. *Cf. Landon*, 459 U.S. at 25, 28 (exclusion hearings occur at port of entry and apply to people who are entering). Therefore, NRS 178.509(1)(b)(5), permitting exoneration in the case of deportation, does not apply here.

*Common law contract defenses*

The surety argues that the bond should have been exonerated under common law contract defenses. We disagree.

[Headnotes 10, 11]

" 'A bail bond is a contract between the State and the surety of the accused.' " *All Star Bonding v. State*, 119 Nev. 47, 49, 62 P.3d 1124, 1125 (2003) (quoting *State v. Eighth Judicial Dist. Court*, 97 Nev. 34, 35, 623 P.2d 976, 976 (1981)). The statutes governing bail bonds are therefore incorporated into the agreement of the parties. *See Gilman v. Gilman*, 114 Nev. 416, 426, 956 P.2d 761, 767 (1998) (explaining that "[p]arties are presumed to contract with reference to

existing statutes," and thus, "[a]pplicable statutes will generally be incorporated into the contract").

[Headnote 12]

Because the statutes governing bail bonds are incorporated into the agreement of the parties, interpreting the language of the bail bond statutes is of utmost importance. NRS 178.509(1) states that "the court *shall not* exonerate the surety before the date of forfeiture prescribed in NRS 178.508 *unless*" one of the five conditions listed in the statute is present (emphases added). Use of the words "shall not" "imposes a prohibition against acting." NRS 0.025(1)(f). "[T]he Legislature's use of 'shall' . . . demonstrates its intent to prohibit judicial discretion . . . ." *Otak Nev., L.L.C. v. Eighth Judicial Dist. Court*, 127 Nev. 593, 598, 260 P.3d 408, 411 (2011). Thus, under a plain reading of the text, NRS 178.509(1) prohibits courts from exonerating a bond for any other reasons.

The legislative history shows that the original understanding of the "shall not" language was that it prevented courts from considering other reasons for exoneration. The "shall not" language was added by amendment in 1979. *See* 1979 Nev. Stat., ch. 649, §§ 2-3, at 1400-02. At a committee hearing on that amendment, Joe Reynolds, a representative of four surety companies, opposed the bill. He indicated that the bill would not allow the court to exonerate a bond unless certain very strict criteria were met. Hearing on A.B. 808 Before the Assembly Commerce Comm., 60th Leg. (Nev., May 4, 1979). Jay MacIntosh, an insurance agent who worked with bail bonds, stated that the bill would make it more difficult to underwrite these kinds of policies because of the inability of the courts to set aside forfeiture in the event of just cause and other reasons. *Id.* Proponents of the bill understood the language as intended to remove courts' discretion because some bailbondsmen had made deals with some judges and not all bondsmen were being treated equally and fairly. *Id.* Proponents understood the proposed law as tightening up the present law because bail should be forfeited unless there are exonerating circumstances. *Id.*

Furthermore, our decision in *State v. Stu's Bail Bonds*, 115 Nev. 436, 440, 991 P.2d 469, 471 (1999), though not directly addressing a contract defense argument, supports the principle that the district court did not have discretion to exonerate without a statutory ground. In that case, it was argued that NRS 178.509(2), which states that "[i]f the requirements of subsection 1 are met, the court may exonerate the surety upon such terms as may be just," supported the notion that equitable grounds may be applied by a court. We held that a court has no discretion to consider equity before the statutory grounds in NRS 178.509(1) are met. *Stu's Bail Bonds*, 115 Nev. at 440, 991 P.2d at 471.

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***Reporter's Note:** The court issued its decision in this matter on June 5, 2014. The opinion printed here is the amended opinion issued on October 2, 2014.

Here, the surety is not entitled to exoneration based on common law contract defenses because there is no such statutory ground for exoneration. Accordingly, we deny the petition.

HARDESTY and DOUGLAS, JJ., concur.