quired Social Services to notify the district court if it did receive such a reimbursement in order to allow the district court to amend the restitution order to reflect the reimbursement. Major did not present any evidence that Social Services actually received such a reimbursement.

We conclude that the evidence presented by Social Services for the cost of care is sufficient to support the district court's order. Although the question remains whether Social Services received a reimbursement, Major makes no showing there actually was such a reimbursement, and the district court appears to have imposed on Social Services a continuing obligation to notify the district court if there was a reimbursement to allow the court to revise the restitution order. Given these circumstances, we affirm the judgment of conviction.

PICKERING and SAITTA, JJ., concur.

FRANCHISE TAX BOARD OF THE STATE OF CALIFORNIA, APPELLANT/CROSS-RESPONDENT, *v.* GILBERT P. HYATT, RESPONDENT/CROSS-APPELLANT.

No. 53264

September 18, 2014 335 P.3d 125

Appeal and cross-appeal from a district court judgment on a jury verdict in a tort action and from a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Jessie Elizabeth Walsh, Judge.

Taxpayer brought action against out-of-state franchise tax board, alleging intentional torts and bad-faith conduct during audits. After grant of partial summary judgment to board and jury trial on remaining claims, the district court entered judgment in favor of taxpayer and awarded damages. Board appealed and taxpayer cross-appealed. The supreme court, HARDESTY, J., held that: (1) discretionary-function immunity under state statute does not include intentional torts and bad-faith conduct; (2) taxpayer did not have objective expectation of privacy in his name, address, and social security number, as would be required to support invasion of privacy claim against board arising out of disclosure of such information; (3) the supreme court would officially adopt cause of action for false light invasion of privacy; (4) whether board made specific representations to taxpayer regarding treatment of taxpayer's confidential information during audit, which board intended for taxpayer to rely on but which board did not intend to meet, was jury question in fraud claim; (5) extension of state's statutory cap on liability to board would have

violated state public policy, and thus principles of comity did not require such extension; and (6) as a matter of first impression, under comity principles, board was immune from punitive damages.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied November 25, 2014]

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Robert M. McKenna, Attorney General, Olympia, Washington, for Amicus Curiae State of Washington.

Shirley Sicilian, General Counsel, Washington, D.C., for Amicus Curiae Multistate Tax Commission.

1. COURTS; STATES.
   Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state.
2. STATES.
   Whether to invoke comity is within the forum state's discretion.
3. STATES.
   When a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies.
4. MUNICIPAL CORPORATIONS.
   Discretionary-function immunity under state statute does not include intentional torts and bad-faith conduct. NRS 41.032.
5. APPEAL AND ERROR.
   The supreme court reviews questions of law de novo.
6. APPEAL AND ERROR.
   A jury's verdict will be upheld on appeal if the verdict is supported by substantial evidence.

7. Appeal and Error.
   The supreme court will not reverse an order or judgment unless error is affirmatively shown.
8. Torts.
   The tort of invasion of privacy embraces four different tort actions: (1) unreasonable intrusion upon the seclusion of another, (2) appropriation of the other's name or likeness, (3) unreasonable publicity given to the other's private life, or (4) publicity that unreasonably places the other in a false light before the public. Restatement (Second) of Torts § 652A.
9. Torts.
   Under public records defense, taxpayer did not have objective expectation of privacy in his name, address, and social security number, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where information had been publicly disclosed on several prior occasions, including in court documents from taxpayer's divorce proceedings and by taxpayer himself through various business license applications. Restatement (Second) of Torts § 652D comment.
10. Torts.
    One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records; such materials are public facts, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D comment.
11. Torts.
    Taxpayer did not have objective expectation of privacy in his credit card number, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where parties to which credit card number was disclosed already had the number in their possession from prior dealings with taxpayer. Restatement (Second) of Torts § 652D comment.
12. Torts.
    Taxpayer did not have objective expectation of privacy in licensing contracts of taxpayer's business, as would be required to support invasion of privacy claim against other state's franchise tax board alleging intrusion upon seclusion and public disclosure of private facts, arising out of board's disclosure of taxpayer information during audit process, where parties to which licensing contracts were disclosed already had the information in their possession from prior dealings with taxpayer. Restatement (Second) of Torts § 652D comment.
13. Torts.
    The supreme court would officially adopt cause of action for false light invasion of privacy.
14. Torts.
    Whether to adopt a tort as a viable tort claim is a question of state law.
15. Torts.
    Other state's franchise tax board did not portray taxpayer in false light by including taxpayer's audit case on publicly available litigation roster, despite argument that inclusion of case suggested taxpayer was a "tax cheat" and that taxpayer's case, unlike other cases on roster, was not yet completed, where taxpayer was indeed involved in litigation with board, and roster did not contain any false information.

16. Fraud.

A breach of confidential relationship cause of action arises by reason of kinship or professional, business, or social relationships between the parties.

17. Fraud.

Taxpayer did not have confidential relationship with other state's franchise tax board, as would be required for taxpayer to assert an action for breach of confidential relationship against board arising out of board's disclosure to third parties of certain information during audit of taxpayer; in conducting audits, board was not required to act with taxpayer's interest in mind, but rather had duty to proceed on behalf of state's interest.

18. Process.

A successful abuse of process claim requires: (1) an ulterior purpose by the defendants other than resolving a legal dispute, and (2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.

19. Process.

Other state's franchise tax board did not use legal process in audit dispute with taxpayer, as would be required to support taxpayer's abuse of process claim arising out of board's actions during audit, where board never filed a court action in relation to its demands for information or otherwise during audit.

20. Fraud.

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages.

21. Fraud.

It is the jury's role to make findings on the factors necessary to establish a fraud claim.

22. Appeal and Error.

The supreme court will generally not disturb a jury's verdict that is supported by substantial evidence.

23. Appeal and Error.

Substantial evidence, as would support jury verdict on appeal, is defined as evidence that a reasonable mind might accept as adequate to support a conclusion.

24. Fraud.

Whether other state's franchise tax board made specific representations to taxpayer, regarding treatment of taxpayer's confidential information during audit, that board intended for taxpayer to rely on but which board did not intend to meet was jury question in taxpayer's fraud action against board.

25. States.

Extension of statutory cap on liability, applicable to government agencies in the state, to out-of-state franchise tax board would have violated state public policy, and thus principles of comity did not require such extension; board operated outside the controls of the state, and state's policy interest in providing adequate redress to its citizens was paramount to providing board with statutory cap on damages. NRS 41.035.

26. Damages.

To recover on a claim for intentional infliction of emotional distress, a plaintiff must prove: (1) extreme and outrageous conduct on the part of the

defendant, (2) intent to cause emotional distress or reckless disregard for causing emotional distress, (3) that the plaintiff actually suffered extreme or severe emotional distress, and (4) causation.

27. Damages.

In an intentional infliction of emotional distress claim, the plaintiff must set forth objectively verifiable indicia to establish that the plaintiff actually suffered extreme or severe emotional distress.

28. Damages.

While medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of a claim for intentional infliction of emotional distress, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

29. Damages.

Evidence was sufficient to support verdict that taxpayer suffered severe emotional distress, as would support taxpayer's claim for intentional infliction of emotional distress against other state's franchise tax board arising out of board's conduct during audits, which included release of confidential information, delayed resolution of taxpayer's protests, and allegedly making disparaging remarks about taxpayer and his religion, where three witnesses testified that taxpayer's mood changed dramatically, that he became distant and much less involved in various activities, that he started drinking heavily, and that he suffered severe migraines and had stomach problems.

30. Appeal and Error.

The supreme court reviews both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion.

31. Evidence.

The district court abused its discretion in admitting evidence of fraud penalties imposed on taxpayer pursuant to outcome of audits, in taxpayer's action against out-of-state franchise tax board alleging intentional torts arising out of board's conduct during audit; the district court had already determined that it lacked jurisdiction to address whether the audits' conclusions were accurate, and evidence had no utility in showing any intentional torts unless it was first concluded that audits' determinations were incorrect.

32. Damages; Fraud; Process; Torts.

Jury instruction stating that nothing prevented jury from considering the appropriateness or correctness of analysis conducted by out-of-state franchise tax board in reaching its determination of taxpayer's residency was error, in taxpayer's action against board alleging invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress, arising out of board's conduct during audit process; the district court had already determined that it lacked jurisdiction to address whether the audit's conclusions were accurate, and instruction invited jury to consider whether audit conclusions regarding taxpayer's residency were correct.

33. Evidence.

The district court abused its discretion in precluding out-of-state franchise tax board from presenting evidence explaining steps it had taken to preserve e-mails which were subsequently destroyed in server change, in taxpayer's action against board alleging intentional torts arising out of board's conduct during audits, where taxpayer argued evidence spoliation based on destruction of e-mails, and jury was given an adverse inference instruction.

34. Evidence.

Under a rebuttable presumption that may be imposed when evidence is willfully destroyed, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable; if the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. NRS 47.250(3).

35. Evidence.

A lesser adverse inference, that does not shift the burden of proof, is permissible when evidence is negligently destroyed. NRS 47.250(3).

36. Evidence.

The district court abused its discretion in excluding evidence regarding taxpayer's loss of a patent through an unrelated legal challenge in taxpayer's action for intentional infliction of emotional distress against out-of-state franchise tax board arising out of board's conduct during audit, including disclosure of taxpayer's confidential business information; evidence was probative as to damages, and although evidence may have been prejudicial, it was not unfairly prejudicial. NRS 48.035(1).

37. Evidence.

The district court abused its discretion in excluding evidence regarding additional audit of taxpayer by federal Internal Revenue Service in taxpayer's action for intentional infliction of emotional distress against out-of-state franchise tax board arising out of board's conduct during audit; evidence was probative as to damages, and although evidence may have been prejudicial, it was not unfairly prejudicial.

38. Appeal and Error.

The district court's evidentiary and jury instruction error warranted reversal as to damages element of taxpayer's intentional infliction of emotional distress claim against out-of-state franchise tax board arising out of board's conduct during audits; several assertions made by taxpayer as to board's conduct could only have been made through contesting audits' conclusions, which taxpayer should have been precluded from doing, and board was prejudiced by erroneous exclusion of evidence to rebut adverse inference from negligent destruction of certain e-mail evidence.

39. States.

Under comity principles, other state's franchise tax board was immune from punitive damages for taxpayer's Nevada state law tort claims against board arising out of board's conduct during audits; punitive damages would not have been available against a Nevada government entity. NRS 41.035(1).

40. Damages.

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries.

41. Municipal Corporations.

The general rule is that no punitive damages are allowed against a government entity unless expressly authorized by statute.

42. Costs.

Statutory time limit for filing memorandum of costs by prevailing party is not a jurisdictional requirement, and thus the district court had discretion to allow documentation for costs sought after deadline. NRS 18.110.

43. Damages; Evidence; Fraud.

Taxpayer's evidence was too speculative to support award of economic damages in taxpayer's action against franchise tax board for intentional infliction of emotional distress and fraud in which taxpayer alleged that

board's contacting of two Japanese companies, and thus revealing that taxpayer was under investigation, was cause of decline in taxpayer's patent-licensing business in Japan, where taxpayer only set forth expert testimony detailing what experts believed would happen following contact with board based on Japanese business culture, and no evidence established that any of the hypothetical steps of Japanese business culture actually occurred.

44. DAMAGES.

Damages cannot be based solely upon possibilities and speculative testimony; this is true regardless of whether the testimony comes from the mouth of a lay witness or an expert.

45. EVIDENCE.

When circumstantial evidence is used to prove a fact, the circumstances must be proved, and not themselves be presumed.

Before the Court EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In 1998, inventor Gilbert P. Hyatt sued the Franchise Tax Board of the State of California (FTB) seeking damages for intentional torts and bad-faith conduct committed by FTB auditors during tax audits of Hyatt's 1991 and 1992 state tax returns. After years of litigation, a jury awarded Hyatt $139 million in damages on his tort claims and $250 million in punitive damages. In this appeal, we must determine, among other issues, whether we should revisit our exception to government immunity for intentional torts and bad-faith conduct as a result of this court's adoption of the federal test for discretionary-function immunity, which shields a government entity or its employees from suit for discretionary acts that involve an element of individual judgment or choice and that are grounded in public policy considerations. We hold that our exception to immunity for intentional torts and bad-faith conduct survives our adoption of the federal discretionary-function immunity test because intentional torts and bad-faith conduct are not based on public policy.

Because FTB cannot invoke discretionary-function immunity to protect itself from Hyatt's intentional tort and bad-faith causes of action, we must determine whether Hyatt's claims for invasion of privacy, breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress survive as a matter of law, and if so, whether they are supported by substantial evidence. All of Hyatt's causes of action, except for his fraud and intentional infliction of emotion distress claims, fail as a matter of law, and thus, the judgment in his favor on these claims is reversed.

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

As to the fraud cause of action, sufficient evidence exists to support the jury's findings that FTB made false representations to Hyatt regarding the audits' processes and that Hyatt relied on those representations to his detriment and damages resulted. In regard to Hyatt's claim for intentional infliction of emotional distress, we conclude that medical records are not mandatory in order to establish a claim for intentional infliction of emotional distress if the acts of the defendant are sufficiently severe. As a result, substantial evidence supports the jury's findings as to liability, but evidentiary and jury instruction errors committed by the district court require reversal of the damages awarded for emotional distress and a remand for a new trial as to the amount of damages on this claim only.

In connection with these causes of action, we must address whether FTB is entitled to a statutory cap on the amount of damages that Hyatt may recover from FTB on the fraud and intentional infliction of emotional distress claims under comity. We conclude that Nevada's policy interest in providing adequate redress to its citizens outweighs providing FTB a statutory cap on damages under comity, and therefore, we affirm the $1,085,281.56 of special damages awarded to Hyatt on his fraud cause of action and conclude that there is no statutory cap on the amount of damages that may be awarded on remand on the intentional infliction of emotional distress claim.

We also take this opportunity to address as a matter of first impression whether, based on comity, it is reasonable to provide FTB with the same protection of California law, to the extent that it does not conflict with Nevada law, to grant FTB immunity from punitive damages. Because punitive damages would not be available against a Nevada government entity, we hold, under comity principles, that FTB is immune from punitive damages. Thus, we reverse that portion of the district court's judgment awarding Hyatt punitive damages.

For the reasons discussed below, we affirm in part, reverse in part, and remand this case to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

California proceedings

In 1993, after reading a newspaper article regarding respondent/cross-appellant Hyatt's lucrative computer-chip patent and the large sums of money that Hyatt was making from the patent, a tax auditor for appellant/cross-respondent FTB decided to review Hyatt's 1991 state income tax return. The return revealed that Hyatt did not report, as taxable income, the money that he had earned from the patent's licensing payments and that he had only reported 3.5 percent of his total taxable income for 1991. Hyatt's tax return showed that he had lived in California for nine months in 1991 before relocating

to Las Vegas, Nevada, but Hyatt claimed no moving expenses on his 1991 tax return. Based on these discrepancies, FTB opened an audit on Hyatt's 1991 state income tax return.

The 1991 audit began when Hyatt was sent notice that he was being audited. This notification included an information request form that required Hyatt to provide certain information concerning his connections to California and Nevada and the facts surrounding his move to Nevada. A portion of the information request form contained a privacy notice, which stated in relevant part that "The Information Practices Act of 1977 and the federal Privacy Act require the Franchise Tax Board to tell you why we ask you for information. The Operations and Compliance Divisions ask for tax return information to carry out the Personal Income Tax Law of the State of California." Also included with the notification was a document containing a list of what the taxpayer could expect from FTB: "Courteous treatment by FTB employees[,] Clear and concise requests for information from the auditor assigned to your case[,] Confidential treatment of any personal and financial information that you provide to us[,] Completion of the audit within a reasonable amount of time[.]"

The audit involved written communications and interviews. FTB sent over 100 letters and demands for information to third parties including banks, utility companies, newspapers (to learn if Hyatt had subscriptions), medical providers, Hyatt's attorneys, two Japanese companies that held licenses to Hyatt's patent (inquiring about payments to Hyatt), and other individuals and entities that Hyatt had identified as contacts. Many, but not all, of the letters and demands for information contained Hyatt's social security number or home address or both. FTB also requested information and documents directly from Hyatt. Interviews were conducted and signed statements were obtained from three of Hyatt's relatives—his ex-wife, his brother, and his daughter—all of whom were estranged from Hyatt during the relevant period in question, except for a short time when Hyatt and his daughter attempted to reconcile their relationship. No relatives with whom Hyatt had good relations, including his son, were ever interviewed even though Hyatt had identified them as contacts. FTB sent auditors to Hyatt's neighborhood in California and to various locations in Las Vegas in search of information.

Upon completion of the 1991 audit, FTB concluded that Hyatt did not move from California to Las Vegas in September 1991, as he had stated, but rather, that Hyatt had moved in April 1992. FTB further concluded that Hyatt had staged the earlier move to Nevada by renting an apartment, obtaining a driver's license, insurance, bank account, and registering to vote, all in an effort to avoid state income tax liability on his patent licensing. FTB further determined that the sale of Hyatt's California home to his work assistant was a sham. A

detailed explanation of what factors FTB considered in reaching its conclusions was provided, which in addition to the above, included comparing contacts between Nevada and California, banking activity in the two states, evidence of Hyatt's location in the two states during the relevant period, and professionals whom he employed in the two states. Based on these findings, FTB determined that Hyatt owed the state of California approximately $1.8 million in additional state income taxes and that penalties against Hyatt in the amount of $1.4 million were warranted. These amounts, coupled with $1.2 million in interest, resulted in a total assessment of $4.5 million.

The 1991 audit's finding that Hyatt did not move to Las Vegas until April 1992 prompted FTB to commence a second audit of Hyatt's 1992 California state taxes. Because he maintained that he lived in Nevada that tax year, Hyatt did not file a California tax return for 1992, and he opposed the audit. Relying in large part on the 1991 audit's findings and a single request for information sent to Hyatt regarding patent-licensing payments received in 1992, FTB found that Hyatt owed the state of California over $6 million in taxes and interest for 1992. Moreover, penalties similar to those imposed by the 1991 audit were later assessed.

Hyatt formally challenged the audits' conclusions by filing two protests with FTB that were handled concurrently. Under a protest, an audit is reviewed by FTB for accuracy, or the need for any changes, or both. The protests lasted over 11 years and involved 3 different FTB auditors. In the end, FTB upheld the audits, and Hyatt went on to challenge them in the California courts.[2]

Nevada litigation

During the protests, Hyatt filed the underlying Nevada lawsuit in January 1998. His complaint included a claim for declaratory relief concerning the timing of his move from California to Nevada and a claim for negligence. The complaint also identified seven intentional tort causes of action allegedly committed by FTB during the 1991 and 1992 audits: invasion of privacy—intrusion upon seclusion, invasion of privacy—publicity of private facts, invasion of privacy—false light, intentional infliction of emotional distress, fraud, breach of confidential relationship, and abuse of process. Hyatt's lawsuit was grounded on his allegations that FTB conducted unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt[ing] to extort him," that FTB's audits were "goal-oriented," that the audits were conducted to improve FTB's tax assessment numbers, and that the penalties FTB imposed against

[2]At the time of this appeal, Hyatt was still challenging the audits' conclusions in California courts.

Hyatt were intended "to better bargain for and position the case to settle."

Early in the litigation, FTB filed a motion for partial summary judgment challenging the Nevada district court's jurisdiction over Hyatt's declaratory relief cause of action. The district court agreed on the basis that the timing of Hyatt's move from California to Nevada and whether FTB properly assessed taxes and penalties against Hyatt should be resolved in the ongoing California administrative process. Accordingly, the district court granted FTB partial summary judgment.[3] As a result of the district court's ruling, the parties were required to litigate the action under the restraint that any determinations as to the audits' accuracy were not part of Hyatt's tort action and the jury would not make any findings as to when Hyatt moved to Nevada or whether the audits' conclusions were correct.

FTB also moved the district court for partial summary judgment to preclude Hyatt from seeking recovery for alleged economic damages. As part of its audit investigation, FTB sent letters to two Japanese companies that had licensing agreements with Hyatt requesting payment information between Hyatt and the companies. Included with the letters were copies of the licensing agreements between Hyatt and the Japanese companies. Hyatt asserted that those documents were confidential and that when FTB sent the documents to the companies, the companies were made aware that Hyatt was under investigation. Based on this disclosure, Hyatt theorized that the companies would have then notified the Japanese government, who would in turn notify other Japanese businesses that Hyatt was under investigation. Hyatt claimed that this ultimately ended Hyatt's patent-licensing business in Japan. Hyatt's evidence in support of these allegations included the fact that FTB sent the letters, that the two businesses sent responses, that Hyatt had no patent-licensing income after this occurred, and expert testimony that this chain of events would likely have occurred in the Japanese business culture. FTB argued that Hyatt's evidence was speculative and insufficient to adequately support his claim. Hyatt argued that he had sufficient circumstantial evidence to present the issue to the jury. The district court granted FTB's motion for partial summary judgment, concluding that Hyatt had offered no admissible evidence to support that the theorized chain of events actually occurred and, as a result, his evidence was too speculative to overcome the summary judgment motion.

One other relevant proceeding that bears discussion in this appeal concerns two original writ petitions filed by FTB in this court

[3]That ruling was not challenged in this court, and consequently, it is not part of this appeal.

in 2000. In those petitions, FTB sought immunity from the entire underlying Nevada lawsuit, arguing that it was entitled to the complete immunity that it enjoyed under California law based on either sovereign immunity, the Full Faith and Credit Clause, or comity. This court resolved the petitions together in an unpublished order in which we concluded that FTB was not entitled to full immunity under any of these principles. But we did determine that, under comity, FTB should be granted partial immunity equal to the immunity a Nevada government agency would receive. In light of that ruling, this court held that FTB was immune from Hyatt's negligence cause of action, but not from his intentional tort causes of action. The court concluded that while Nevada provided immunity for discretionary decisions made by government agencies, such immunity did not apply to intentional torts or bad-faith conduct because to allow it to do so would "contravene Nevada's policies and interests in this case."

This court's ruling in the writ petitions was appealed to and upheld by the United States Supreme Court. *Franchise Tax Bd. of Cal. v. Hyatt*, 538 U.S. 488 (2003). In *Hyatt*, the Supreme Court focused on the issue of whether the Full Faith and Credit Clause of the federal constitution required Nevada to afford FTB the benefit of the full immunity that California provides FTB. *Id.* at 494. The Court upheld this court's determination that Nevada was not required to give FTB full immunity. *Id.* at 499. The Court further upheld this court's conclusion that FTB was entitled to partial immunity under comity principles, observing that this court "sensitively applied principles of comity with a healthy regard for California's sovereign status, relying on the contours of Nevada's own sovereign immunity from suit as a benchmark for its analysis." *Id.* The Supreme Court's ruling affirmed this court's limitation of Hyatt's case against FTB to the intentional tort causes of action.

Ultimately, Hyatt's case went to trial before a jury. The trial lasted approximately four months. The jury found in favor of Hyatt on all intentional tort causes of action and returned special verdicts awarding him damages in the amount of $85 million for emotional distress, $52 million for invasion of privacy, $1,085,281.56 as special damages for fraud, and $250 million in punitive damages. Following the trial, Hyatt sought prejudgment interest and moved the district court for costs. The district court assigned the motion to a special master who, after 15 months of discovery and further motion practice, issued a recommendation that Hyatt be awarded approximately $2.5 million in costs. The district court adopted the master's recommendation.

FTB appeals from the district court's final judgment and the post-judgment award of costs. Hyatt cross-appeals, challenging the district court's partial summary judgment ruling that he could not

seek, as part of his damages at trial, economic damages for the alleged destruction of his patent-licensing business in Japan.[4]

DISCUSSION

We begin by addressing FTB's appeal, which raises numerous issues that it argues entitle it to either judgment as a matter of law in its favor or remand for a new trial. As a threshold matter, we address discretionary-function immunity and whether Hyatt's causes of action against FTB are barred by this immunity, or whether there is an exception to the immunity for intentional torts and bad-faith conduct. Deciding that FTB is not immune from suit, we then consider FTB's arguments as to each of Hyatt's intentional tort causes of action. We conclude our consideration of FTB's appeal by discussing Nevada's statutory caps on damages and immunity from punitive damages. As for Hyatt's cross-appeal, we close this opinion by considering his challenge to the district court's partial summary judgment in FTB's favor on Hyatt's damages claim for economic loss.

FTB is not immune from suit under comity because discretionary-function immunity in Nevada does not protect Nevada's government or its employees from intentional torts and bad-faith conduct

Like most states, Nevada has waived traditional sovereign immunity from tort liability, with some exceptions. NRS 41.031. The relevant exception at issue in this appeal is discretionary-function immunity, which provides that no action can be brought against the state or its employee "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of the State . . . or of any . . . employee . . . , whether or not the discretion involved is abused." NRS 41.032(2). By adopting discretionary-function immunity, our Legislature has placed a limit on its waiver of sovereign immunity. Discretionary-function immunity is grounded in separation of powers concerns and is designed to preclude the judicial branch from "second-guessing," in a tort action, legislative and executive branch decisions that are based on "social, economic, and political policy." *Martinez v. Maruszczak*, 123 Nev. 433, 446, 168 P.3d 720, 729 (2007) (internal quotations omitted); *see also Bailey v. United States*, 623 F.3d 855, 860 (9th Cir. 2010). FTB initially argues on appeal that immunity protects it from Hyatt's intentional tort causes of action based on the application

[4]This court granted permission for the Multistate Tax Commission and the state of Utah, which was joined by other states (Arkansas, Colorado, Delaware, Florida, Idaho, Louisiana, Maine, Maryland, Missouri, New Jersey, North Dakota, Ohio, Oklahoma, Tennessee, Vermont, Virginia, and Washington), to file amicus curiae briefs.

of discretionary-function immunity and comity as recognized in Nevada.

[Headnotes 1-3]

Comity is a legal principle whereby a forum state may give effect to the laws and judicial decisions of another state based in part on deference and respect for the other state, but only so long as the other state's laws are not contrary to the policies of the forum state. *Mianecki v. Second Judicial Dist. Court*, 99 Nev. 93, 98, 658 P.2d 422, 424-25 (1983); *see also Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Ill.*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam v. Estate of Sam*, 134 P.3d 761, 764-66 (N.M. 2006); *Hansen v. Scott*, 687 N.W.2d 247, 250, 250 (N.D. 2004). The purpose behind comity is to "foster cooperation, promote harmony, and build good will" between states. *Hansen*, 687 N.W.2d at 250 (internal quotations omitted). But whether to invoke comity is within the forum state's discretion. *Mianecki*, 99 Nev. at 98, 658 P.2d at 425. Thus, when a lawsuit is filed against another state in Nevada, while Nevada is not required to extend immunity in its courts to the other state, Nevada will consider extending immunity under comity, so long as doing so does not violate Nevada's public policies. *Id.* at 98, 658 P.2d at 424-25. In California, FTB enjoys full immunity from tort actions arising in the context of an audit. Cal. Gov't Code § 860.2 (West 2012). FTB contends that it should receive the immunity protection provided by California statutes to the extent that such immunity does not violate Nevada's public policies under comity.

Discretionary-function immunity in Nevada

This court's treatment of discretionary-function immunity has changed over time. In the past, we applied different tests to determine whether to grant a government entity or its employee discretionary-function immunity. *See, e.g.*, *Arnesano v. State ex rel. Dep't of Transp.*, 113 Nev. 815, 823-24, 942 P.2d 139, 144-45 (1997) (applying planning-versus-operational test to government action), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27; *State v. Silva*, 86 Nev. 911, 913-14, 478 P.2d 591, 592-93 (1970) (applying discretionary-versus-ministerial test to government conduct), *abrogated by Martinez*, 123 Nev. at 443-44, 168 P.3d at 726-27. We also recognized an exception to discretionary-function immunity for intentional torts and bad-faith conduct. *Falline v. GNLV Corp.*, 107 Nev. 1004, 1009 & n.3, 823 P.2d 888, 892 & n.3 (1991) (plurality opinion). More recently, we adopted the federal two-part test for determining the applicability of discretionary-function immunity. *Martinez*, 123 Nev. at 444-47, 168 P.3d at 727-29 (adopting test named after two United States Supreme Court decisions: *Berkovitz v. United States*, 486 U.S. 531 (1988), and *United States v. Gaubert*,

499 U.S. 315 (1991)). Under the *Berkovitz-Gaubert* two-part test, discretionary-function immunity will apply if the government actions at issue "(1) involve an element of individual judgment or choice and (2) [are] based on considerations of social, economic, or political policy." *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729. When this court adopted the federal test in *Martinez*, we expressly dispensed with the earlier tests used by this court to determine whether to grant a government entity or its employee immunity, *id.* at 444, 168 P.3d at 727, but we did not address the *Falline* exception to immunity for intentional torts or bad-faith misconduct.

In the earlier writ petitions filed by FTB in this court, we relied on *Falline* to determine that FTB was entitled to immunity from Hyatt's negligence cause of action, but not the remaining intentional-tort-based causes of action. Because the law concerning the application of discretionary-function immunity has changed in Nevada since FTB's writ petitions were resolved, we revisit the application of discretionary-function immunity to FTB in the present case as it relates to Hyatt's intentional tort causes of action. *Hsu v. Cnty. of Clark*, 123 Nev. 625, 632, 173 P.3d 724, 730 (2007) (stating that "the doctrine of the law of the case should not apply where, in the interval between two appeals of a case, there has been a change in the law by . . . a judicial ruling entitled to deference" (internal quotations omitted)).

FTB contends that when this court adopted the federal test in *Martinez*, it impliedly overruled the *Falline* exception to discretionary-function immunity for intentional torts and bad-faith misconduct. Hyatt maintains that the *Martinez* case did not alter the exception created in *Falline* and that discretionary immunity does not apply to bad-faith misconduct because an employee does not have discretion to undertake intentional torts or act in bad faith.

In *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92, this court ruled that the discretionary-function immunity under NRS 41.032(2) did not apply to bad-faith misconduct. The case involved negligent processing of a workers' compensation claim. Falline injured his back at work and later required surgery. *Falline*, 107 Nev. at 1006, 823 P.2d at 890. Following the surgery, while rising from a seated position, Falline experienced severe lower-back pain. *Id.* at 1006-07, 823 P.2d at 890. Falline's doctor concluded that Falline's back pain was related to his work injury. *Id.* at 1007, 823 P.2d at 890. The self-insured employer, however, refused to provide workers' compensation benefits beyond those awarded for the work injury because it asserted that an intervening injury had occurred. *Id.* After exhausting his administrative remedies, it was determined that Falline was entitled to workers' compensation benefits for both injuries. *Id.* He was nevertheless denied benefits. *Id.* Falline brought suit against the employer for negligence and bad faith in the processing of his workers' compensation claims. *Id.* at 1006, 823 P.2d at 889-

90. The district court dismissed his causes of action, and Falline appealed, arguing that dismissal was improper.

On appeal, after concluding that a self-insured employer should be treated the same as the State Industrial Insurance System, this court concluded that Falline could maintain a lawsuit against the self-insured employer based on negligent handling of his claims. *Id.* at 1007-09, 823 P.2d at 890-92. In discussing its holding, the court addressed discretionary immunity and explained that "if failure or refusal to timely process or pay claims is attributable to bad faith, immunity does not apply whether an act is discretionary or not." *Id.* at 1009, 823 P.2d at 891. The court reasoned that the insurer did not have discretion to act in bad faith, and therefore, discretionary-function immunity did not apply to protect the insurer from suit. *Id.* at 1009, 823 P.2d at 891-92.

The *Falline* court expressly addressed NRS 41.032(2)'s language that there is immunity "whether or not the discretion involved is abused." *Falline*, 107 Nev. at 1009 n.3, 823 P.2d at 892 n.3. The court determined that bad faith is different from an abuse of discretion, in that an abuse of discretion occurs when a person acts within his or her authority but the action lacks justification, while bad faith "involves an implemented attitude that completely transcends the circumference of authority granted" to the actor. *Id.* Thus, the *Falline* court viewed the exception to discretionary immunity broadly.

Following *Falline*, this court adopted, in *Martinez*, the federal test for determining whether discretionary-function immunity applies. 123 Nev. at 446, 168 P.3d at 729. Under the two-part federal test, the first step is to determine whether the government conduct involves judgment or choice. *Id.* at 446-47, 168 P.3d at 729. If a statute, regulation, or policy requires the government employee to follow a specific course of action for which the employee has no option but to comply with the directive, and the employee fails to follow this directive, the discretionary-immunity exception does not apply to the employee's action because the employee is not acting with individual judgment or choice. *Gaubert*, 499 U.S. at 322. On the other hand, if an employee is free to make discretionary decisions when executing the directives of a statute, regulation, or policy, the test's second step requires the court to examine the nature of the actions taken and whether they are susceptible to policy analysis. *Martinez*, 123 Nev. at 445-46, 168 P.3d at 729; *Gaubert*, 499 U.S. at 324. "[E]ven assuming the challenged conduct involves an element of judgment [or choice]," the second step requires the court to determine "whether that judgment [or choice] is of the kind that the discretionary function exception was designed to shield." *Gaubert*, 499 U.S. at 322-23. If "the challenged actions are not the kind of conduct that can be said to be grounded in the policy of the regulatory regime," discretionary-function immunity will not bar the claim. *Id.* at 324-25. The second step focuses on whether the conduct under-

taken is a policymaking decision regardless of the employee's subjective intent when he or she acted. *Martinez*, 123 Nev. at 445, 168 P.3d at 728.

FTB argues that the federal test abolished the *Falline* intentional tort or bad-faith misconduct exception to discretionary-function immunity because the federal test is objective, not subjective. Hyatt asserts that an intentional or bad-faith tort will not meet the two-part discretionary-immunity test because such conduct cannot be discretionary or policy-based.

Other courts addressing similar questions have reached differing results, depending on whether the court views the restriction against considering subjective intent to apply broadly or is limited to determining if the decision is a policymaking decision. Some courts conclude that allegations of intentional or bad-faith misconduct are not relevant to determining if the immunity applies because courts should not consider the employee's subjective intent at all. *Reynolds v. United States*, 549 F.3d 1108, 1112 (7th Cir. 2008); *Franklin Sav. Corp. v. United States*, 180 F.3d 1124, 1135 (10th Cir. 1999); *see also Sydnes v. United States*, 523 F.3d 1179, 1185 (10th Cir. 2008). But other courts focus on whether the employee's conduct can be viewed as a policy-based decision and hold that intentional torts or bad-faith misconduct are not policy-based acts. *Triestman v. Fed. Bureau of Prisons*, 470 F.3d 471, 475 (2d Cir. 2006); *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003); *Coulthurst v. United States*, 214 F.3d 106, 109 (2d Cir. 2000).[5] These courts bar the application of discretionary-function immunity in intentional tort and bad-faith misconduct cases when the government action involved is "unrelated to any plausible policy objective[ ]." *Coulthurst*, 214 F.3d at 111. A closer look at these courts' decisions is useful for our analysis.

Courts that decline to recognize bad-faith conduct that calls for an inquiry into an employee's subjective intent

In *Franklin Savings Corp. v. United States*, 180 F.3d at 1127, 1134-42, the Tenth Circuit Court of Appeals addressed the specific issue of whether a claim for bad faith precludes the application of discretionary-function immunity. In that case, following the de-

[5]*Coulthurst* is affirmatively cited by the Seventh Circuit Court of Appeals in *Palay v. United States*, 349 F.3d 418, 431-32 (7th Cir. 2003). Although the Seventh Circuit in *Reynolds*, 549 F.3d at 1112, stated the proposition that claims of malicious and bad-faith conduct were not relevant in determining discretionary immunity because the courts do not look at subjective intent, the *Palay* court specifically held that discretionary immunity can be avoided if the actions were the result of laziness or carelessness because such actions are not policy-based decisions. *Palay*, 349 F.3d at 431-32. *Reynolds* was published after *Palay*, and while it cites to *Palay* for other unrelated issues, it does not address its holding in connection with the holding in *Palay*.

termination that the Franklin Savings Association was not safe or sound to conduct business, a conservator was appointed. *Id.* at 1127. Thereafter, plaintiffs Franklin Savings Association and its parent company filed suit against defendants the United States government and the conservator to have the conservatorship removed. *Id.* Plaintiffs alleged that the conservator intentionally and in bad faith liquidated the company instead of preserving the company and eventually returning it to plaintiffs to transact business. *Id.* at 1128.

On appeal, the *Franklin Savings* court explained that plaintiffs did not dispute that the conservator had the authority and discretion to sell assets, but the argument was whether immunity for decisions that were discretionary could be avoided because plaintiffs alleged that the conduct was intentionally done to achieve an improper purpose—to deplete capital and retroactively exculpate the conservator's appointment. *Id.* at 1134. Thus, the court focused on the second part of the federal test. In considering whether the alleged intentional misconduct barred the application of discretionary-function immunity under the federal test, the *Franklin Savings* court first noted that the United States Supreme Court had "repeatedly insisted . . . that [tort] claims are not vehicles to second-guess policymaking." *Id.* The court further observed that the Supreme Court's modification to *Berkovitz*, in *Gaubert*, to include a query of whether the nature of the challenged conduct was "susceptible to policy analysis[,] . . . served to emphasize that courts should not inquire into the actual state of mind or decisionmaking process of federal officials charged with performing discretionary functions." *Id.* at 1135 (internal quotations omitted). The *Franklin Savings* court ultimately concluded that discretionary-function immunity attaches to bar claims that "depend[ ] on an employee's bad faith or state of mind in performing facially authorized acts," *id.* at 1140, and to conclude otherwise would mean that the immunity could not effectively function. *Id.* at 1140-41.

Notwithstanding its conclusion, the *Franklin Savings* court noted that such a holding had "one potentially troubling effect"; it created an "irrebuttable presumption" that government employees try to perform all discretionary functions in good faith and that the court's holding would preclude relief in cases where an official committed intentional or bad-faith conduct. *Id.* at 1141. Such a result was necessary, the court reasoned, because providing immunity for employees, so that they do not have to live and act in constant fear of litigation in response to their decisions, outweighs providing relief in the few instances of intentionally wrongful conduct. *Id.* at 1141-42. Thus, the *Franklin Savings* court broadly applied the Supreme Court rule that an actor's subjective intent should not be considered. This broad application led the court to conclude that a bad-faith claim

was not sufficient to overcome discretionary-function immunity's application.

> *Courts that consider whether an employee subjectively intended to further policy by his or her conduct*

Other courts have come to a different conclusion. Most significant is *Coulthurst v. United States*, 214 F.3d 106, in which the Second Circuit Court of Appeals addressed the issue of whether the inspection of weightlifting equipment by prison officials was grounded in policy considerations. In *Coulthurst*, an inmate in a federal prison was injured while using the prison's exercise equipment. *Id.* at 107. The inmate filed suit against the United States government, alleging "'negligence and carelessness'" and a "'fail[ure] to diligently and periodically inspect'" the exercise equipment. *Id.* at 108. The lower court dismissed the complaint, reasoning that the decisions that established the procedures and timing for inspection involved "elements of judgment or choice and a balancing of policy considerations," such that discretionary-function immunity attached to bar liability. *Id.* at 109. Coulthurst appealed.

In resolving the appeal, the Court of Appeals concluded that the complaint could be read to mean different types of negligent or careless conduct. *Id.* The court explained that the complaint asserting negligence or carelessness could legitimately be read to refer to how frequently inspections should occur, which might fall under discretionary-function immunity. *Id.* But the same complaint, the court noted, could also be read to assert negligence and carelessness in the failure to carry out prescribed responsibilities, such as prison officials failing to inspect the equipment out of laziness, haste, or inattentiveness. *Id.* Under the latter reading, the court stated that

> the official assigned to inspect the machine may in laziness or haste have failed to do the inspection he claimed (by his initials in the log) to have performed; the official may have been distracted or inattentive, and thus failed to notice the frayed cable; or he may have seen the frayed cable but been too lazy to make the repairs or deal with the paperwork involved in reporting the damage.

Id. The court concluded that such conduct did not involve an element of judgment or choice nor was it based on policy considerations, and in such an instance, discretionary-function immunity does not attach to shield the government from suit. *Id.* at 109-11. In the end, the *Coulthurst* court held that the inmate's complaint sufficiently alleged conduct by prison officials that was not immunized by the discretionary-function immunity exception, and the court vacated the lower court's dismissal and remanded the case for further proceedings. *Id.*

[Headnote 4]

The difference in the *Franklin Savings* and *Coulthurst* approaches emanates from how broadly those courts apply the statement in *Gaubert* that "[t]he focus of the inquiry is not on the agent's subjective intent in exercising the discretion conferred . . . , but on the nature of the actions taken and on whether they are susceptible to policy analysis." 499 U.S. at 325. *Franklin Savings* interpreted this requirement expansively to preclude any consideration of whether an actor's conduct was done maliciously or in bad faith, whereas *Coulthurst* applied a narrower view of subjective intent, concluding that a complaint alleging a nondiscretionary decision that caused the injury was not grounded in public policy. Our approach in *Falline* concerning immunity for bad-faith conduct is consistent with the reasoning in *Coulthurst* that intentional torts and bad-faith conduct are acts "unrelated to any plausible policy objective[ ]" and that such acts do not involve the kind of judgment that is intended to be shielded from "judicial second-guessing." 214 F.3d at 111 (internal quotations omitted). We therefore affirm our holding in *Falline* that NRS 41.032 does not protect a government employee for intentional torts or bad-faith misconduct, as such misconduct, "by definition, [cannot] be within the actor's discretion." *Falline*, 107 Nev. at 1009, 823 P.2d at 891-92.

In light of our conclusion, we must now determine whether to grant, under comity principles, FTB immunity from Hyatt's claims. Because we conclude that discretionary-function immunity under NRS 41.032 does not include intentional torts and bad-faith conduct, a Nevada government agency would not receive immunity under these circumstances, and thus, we do not extend such immunity to FTB under comity principles, as to do so would be contrary to the policy of this state.

Hyatt's intentional tort causes of action

Given that FTB may not invoke immunity, we turn next to FTB's various arguments contesting the judgment in favor of Hyatt on each of his causes of action.[6] Hyatt brought three invasion of privacy causes of action—intrusion upon seclusion, publicity of private facts, and false light—and additional causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress. We discuss each of these causes of action below.

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[6]We reject Hyatt's contention that this court previously determined that each of his causes of action were valid as a matter of law based on the facts of the case in resolving the prior writ petitions. To the contrary, this court limited its holding to whether FTB was entitled to immunity, and thus, we did not address the merits of Hyatt's claims.

[Headnotes 5-7]

This court reviews questions of law de novo. *Martinez*, 123 Nev. at 438, 168 P.3d at 724. A jury's verdict will be upheld if it is supported by substantial evidence. *Prabhu v. Levine*, 112 Nev. 1538, 1543, 930 P.2d 103, 107 (1996). Additionally, we "will not reverse an order or judgment unless error is affirmatively shown." *Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994).

Invasion of privacy causes of action

[Headnote 8]

The tort of invasion of privacy embraces four different tort actions: "(a) unreasonable intrusion upon the seclusion of another; or (b) appropriation of the other's name or likeness; or (c) unreasonable publicity given to the other's private life; or (d) publicity that unreasonably places the other in a false light before the public." Restatement (Second) of Torts § 652A (1977) (citations omitted); *PETA v. Bobby Berosini, Ltd.*, 111 Nev. 615, 629, 895 P.2d 1269, 1278 (1995), *overruled on other grounds by City of Las Vegas Downtown Redev. Agency v. Hecht*, 113 Nev. 644, 650, 940 P.2d 134, 138 (1997). At issue in this appeal are the intrusion, disclosure, and false light aspects of the invasion of privacy tort. The jury found in Hyatt's favor on those claims and awarded him $52 million for invasion of privacy damages. Because the parties' arguments regarding intrusion and disclosure overlap, we discuss those privacy torts together, and we follow that discussion by addressing the false light invasion of privacy tort.

Intrusion upon seclusion and public disclosure of private facts

[Headnote 9]

On appeal, Hyatt focuses his invasion of privacy claims on FTB's disclosures of his name, address, and social security number to various individuals and entities. FTB contends that Hyatt's claims fail because the information disclosed had been disseminated in prior public records, and thus, could not form the basis of an invasion of privacy claim.

[Headnote 10]

Intrusion upon seclusion and public disclosure of private facts are torts grounded in a plaintiff's objective expectation of privacy. *PETA*, 111 Nev. at 630, 631, 895 P.2d at 1279 (recognizing that the plaintiff must actually expect solitude or seclusion, and the plaintiff's expectation of privacy must be objectively reasonable); *Montesano v. Donrey Media Grp.*, 99 Nev. 644, 649, 668 P.2d 1081, 1084 (1983) (stating that the public disclosure of a private fact must

be "offensive and objectionable to a reasonable person of ordinary sensibilities"); *see also* Restatement (Second) of Torts § 652B, 652D (1977). One defense to invasion of privacy torts, referred to as the public records defense, arises when a defendant can show that the disclosed information is contained in a court's official records. *Montesano*, 99 Nev. at 649, 668 P.2d at 1085. Such materials are public facts, *id.*, and a defendant cannot be liable for disclosing information about a plaintiff that was already public. Restatement (Second) of Torts § 652D cmt. b (1977).

Here, the record shows that Hyatt's name, address, and social security number had been publicly disclosed on several occasions, before FTB's disclosures occurred, in old court documents from his divorce proceedings and in a probate case. Hyatt also disclosed the information himself when he made the information available in various business license applications completed by Hyatt. Hyatt maintains that these earlier public disclosures were from long ago, and that the disclosures were only in a limited number of documents, and therefore, the information should not be considered as part of the public domain. Hyatt asserts that this results in his objective expectation of privacy in the information being preserved.

[Headnotes 11, 12]

This court has never limited the application of the public records defense based on the length of time between the public disclosure and the alleged invasion of privacy. In fact, in *Montesano*, 99 Nev. 644, 668 P.2d 1081, we addressed disclosed information contained in a public record from 20 years before the disclosure at issue there and held that the protection still applied. Therefore, under the public records defense, as delineated in *Montesano*, Hyatt is precluded from recovering for invasion of privacy based on the disclosure of his name, address, and social security number, as the information was already publicly available, and he thus lacked an objective expectation of privacy in the information.[7]

Because Hyatt cannot meet the necessary requirements to establish his invasion of privacy causes of action for intrusion upon seclusion and public disclosure of private facts, we reverse the district court's judgment based on the jury verdict as to these causes of action.[8]

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[7]Beyond his name, address, and social security number, Hyatt also alleged improper disclosures related to the publication of his credit card number on one occasion and his licensing contracts on another occasion. But this information was only disclosed to one or two third parties, and it was information that the third parties already had in their possession from prior dealings with Hyatt. Thus, we likewise conclude that Hyatt lacked an objective expectation of privacy as a matter of law. *PETA*, 111 Nev. at 631, 895 P.2d at 1279; *Montesano*, 99 Nev. at 649, 668 P.2d at 1084.

[8]Hyatt also argues that FTB violated his right to privacy when its agents looked through his trash, looked at a package on his doorstep, and spoke with

False light invasion of privacy

[Headnotes 13, 14]

Regarding Hyatt's false light claim, he argues that FTB portrayed him in a false light throughout its investigation because FTB's various disclosures portrayed Hyatt as a "tax cheat." FTB asserts that Hyatt failed to provide any evidence to support his claim. Before reaching the parties' arguments as to Hyatt's false light claim, we must first determine whether to adopt this cause of action in Nevada, as this court has only impliedly recognized the false light invasion of privacy tort. *See PETA*, 111 Nev. at 622 n.4, 629, 895 P.2d at 1273 n.4, 1278. "Whether to adopt [this tort] as [a] viable tort claim[ ] is a question of state law." *Denver Publ'g Co. v. Bueno*, 54 P.3d 893, 896 (Colo. 2002).

Adopting the false light invasion of privacy tort

Under the Restatement, an action for false light arises when

> [o]ne who gives publicity to a matter concerning another that places the other before the public in a false light . . . if
>
> (a) the false light in which the other was placed would be highly offensive to a reasonable person, and
>
> (b) the actor had knowledge of or acted in reckless disregard as to the falsity of the publicized matter and the false light in which the other would be placed.

Restatement (Second) of Torts § 652E (1977). The greatest constraint on the tort of false light is its similarity to the tort of defamation.

A majority of the courts that have adopted the false light privacy tort have done so after concluding that false light and defamation are distinct torts.[9] *See Welling v. Weinfeld*, 866 N.E.2d 1051 (Ohio 2007) (explaining the competing views); *West v. Media Gen. Convergence, Inc.*, 53 S.W.3d 640 (Tenn. 2001) (same). For these courts, defamation law seeks to protect an objective interest in one's reputation, "either economic, political, or personal, in the outside world." *Crump v. Beckley Newspapers, Inc.*, 320 S.E.2d 70, 83 (W.

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neighbors, a postal carrier, and a trash collector. Hyatt does not provide any authority to support his assertion that he had a legally recognized objective expectation of privacy with regard to FTB's conduct in these instances, and thus, we decline to consider this contention. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider claims that are not cogently argued or supported by relevant authority).

[9]This court, in *PETA*, while not reaching the false light issue, observed that " '[t]he false light privacy action differs from a defamation action in that the injury in privacy actions is mental distress from having been exposed to public view, while the injury in defamation actions is damage to reputation.' " 111 Nev. at 622 n.4, 895 P.2d at 1274 n.4 (quoting *Rinsley v. Brandt*, 700 F.2d 1304, 1307 (10th Cir. 1983)).

Va. 1984) (internal quotations omitted). By contrast, false light invasion of privacy protects one's subjective interest in freedom from injury to the person's right to be left alone. *Id.* Therefore, according to these courts there are situations (being falsely portrayed as a victim of a crime, such as sexual assault, or being falsely identified as having a serious illness, or being portrayed as destitute) in which a person may be placed in a harmful false light even though it does not rise to the level of defamation. *Welling*, 866 N.E.2d at 1055-57; *West*, 53 S.W.3d at 646. Without recognizing the separate false light privacy tort, such an individual would be left without a remedy. *West*, 53 S.W.3d at 646.

On the other hand, those courts that have declined to adopt the false light tort have done so based on its similarity to defamation. *See, e.g.*, *Sullivan v. Pulitzer Broad. Co.*, 709 S.W.2d 475 (Mo. 1986); *Renwick v. News & Observer Publ'g Co.*, 312 S.E.2d 405 (N.C. 1984); *Cain v. Hearst Corp.*, 878 S.W.2d 577 (Tex. 1994). "The primary objection courts level at false light is that it substantially overlaps with defamation, both in conduct alleged and interests protected." *Denver Publ'g Co.*, 54 P.3d at 898. For these courts, tort law serves to deter "socially wrongful conduct," and thus, it needs "clarity and certainty." *Id.* And because the parameters defining the difference between false light and defamation are blurred, these courts conclude that "such an amorphous tort risks chilling fundamental First Amendment freedoms." *Id.* In such a case, a media defendant would have to "anticipate whether statements are 'highly offensive' to a reasonable person of ordinary sensibilities even though their publication does no harm to the individual's reputation." *Id.* at 903. Ultimately, for these courts, defamation, appropriation, and intentional infliction of emotional distress provide plaintiffs with adequate remedies. *Id*. at 903.

Considering the different approaches detailed above, we, like the majority of courts, conclude that a false light cause of action is necessary to fully protect privacy interests, and we now officially recognize false light invasion of privacy as a valid cause of action in connection with the other three privacy causes of action that this court has adopted. Because we now recognize the false light invasion of privacy cause of action, we address FTB's substantive arguments regarding Hyatt's false light claim.

Hyatt's false light claim

[Headnote 15]

The crux of Hyatt's false light invasion of privacy claim is that FTB's demand-for-information letters, its other contact with third parties through neighborhood visits and questioning, and the inclusion of his case on FTB's litigation roster suggested that he was a "tax cheat," and therefore, portrayed him in a false light. On appeal,

FTB argues that Hyatt presented no evidence that anyone thought that he was a "tax cheat" based on the litigation roster or third-party contacts.

FTB's litigation roster was an ongoing monthly litigation list that identified the cases that FTB was involved in. The list was available to the public and generally contained audit cases in which the protest and appeal process had been completed and the cases were being litigated in court. After Hyatt initiated this litigation, FTB began including the case on its roster, which Hyatt asserts was improper because the protests in his audits had not yet been completed. FTB, however, argues that because the lawsuit was ongoing, it did not place Hyatt in a false light by including him on the roster. Further, FTB argues that the litigation roster that Hyatt relied on was not false. When FTB began including Hyatt on the litigation roster, he was not falsely portrayed because he was indeed involved in litigation with FTB in this case. Hyatt did not demonstrate that the litigation roster contained any false information. Rather, he only argued that his inclusion on the list was improper because his audit cases had not reached the final challenge stage like other cases on the roster.

FTB's contacts with third parties through letters, demands for information, or in person was not highly offensive to a reasonable person and did not falsely portray Hyatt as a "tax cheat." In contacting third parties, FTB was merely conducting its routine audit investigations.

The record before us reveals that no evidence presented by Hyatt in the underlying suit supported the jury's conclusion that FTB portrayed Hyatt in a false light. *See Prabhu*, 112 Nev. at 1543, 930 P.2d at 107. Because Hyatt has failed to establish a false light claim, we reverse the district court's judgment on this claim.[10]

Having addressed Hyatt's invasion of privacy causes of action, we now consider FTB's challenges to Hyatt's remaining causes of action for breach of confidential relationship, abuse of process, fraud, and intentional infliction of emotional distress.

Breach of confidential relationship

[Headnotes 16, 17]

A breach of confidential relationship cause of action arises "by reason of kinship or professional, business, or social relationships between the parties." *Perry v. Jordan*, 111 Nev. 943, 947, 900 P.2d 335, 337 (1995). On appeal, FTB contends that Hyatt could not prevail as a matter of law on his claim for breach of a confidential relationship because he cannot establish the requisite confidential

[10]Based on this resolution, we need not address the parties' remaining arguments involving this cause of action.

relationship. In the underlying case, the district court denied FTB's motion for summary judgment and its motion for judgment as a matter of law, which presented similar arguments, and at trial the jury found FTB liable on this cause of action. Hyatt argues that his claim for breach of confidentiality falls within the parameters of *Perry* because FTB promised to protect his confidential information and its position over Hyatt during the audits established the necessary confidential relationship.[11]

In *Perry*, this court recognized that a confidential relationship exists when a party gains the confidence of another party and purports to advise or act consistently with the other party's interest. *Id.* at 947, 900 P.2d at 338. In that case, store owner Perry sold her store to her neighbor and friend, Jordan, knowing that Jordan had no business knowledge, that Jordan was buying the store for her daughters, not for herself, and that Jordan would rely on Perry to run the store for a contracted one-year period after the sale was complete. *Id.* at 945-46, 900 P.2d at 336-37. Not long after the sale, Perry stopped running the store, and the store eventually closed. *Id.* at 946, 900 P.2d at 337. Jordan filed suit against Perry for, among other things, breach of a confidential relationship. *Id.* A jury found in Jordan's favor and awarded damages. *Id.* Perry appealed, arguing that this court had not recognized a claim for breach of a confidential relationship. *Id.*

On appeal, this court ruled that a breach of confidential relationship claim was available under the facts of the case. *Id.* at 947, 900 P.2d at 338. The court noted that Perry "held a duty to act with the utmost good faith, based on her confidential relationship with Jordan[, and that the] duty requires affirmative disclosure and avoidance of self dealing." *Id.* at 948, 900 P.2d at 338. The court explained that "[w]hen a confidential relationship exists, the person in whom the special trust is placed owes a duty to the other party similar to the duty of a fiduciary, requiring the person to act in good faith and with due regard to the interests of the other party." *Id.* at 947, 900 P.2d at 338.

FTB contends that the relationship between a tax auditor and the person being audited does not create the necessary relationship articulated in *Perry* to establish a breach of confidential relationship cause of action. In support of this proposition, FTB cites to *Johnson v. Sawyer*, which was heard by the Fifth Circuit Court of Appeals. 47 F.3d 716 (5th Cir. 1995) (en banc). In *Johnson*, the plaintiff sought damages from press releases by the Internal Revenue Service (IRS)

[11]FTB initially argues that Hyatt attempts to blend the cause of action recognized in *Perry* with a separate breach of confidentiality cause of action that, while recognized in other jurisdictions, has not been recognized by this court. We reject this contention, as the jury was instructed based on the cause of action outlined in *Perry*.

based on a conviction for filing a fraudulent tax return. *Id.* at 718. Johnson was criminally charged based on erroneous tax returns. *Id.* at 718-19. He eventually pleaded guilty to a reduced charge as part of a plea bargain. *Id.* at 718-20. Following the plea agreement, two press releases were issued that contained improper and private information about Johnson. *Id.* at 720-21. Johnson filed suit against the IRS based on these press releases, arguing that they cost him his job and asserting several causes of action, one being breach of a confidential relationship. *Id.* at 718, 725, 738. On appeal, the Fifth Circuit Court of Appeals affirmed the district court's ruling that a breach of a confidential relationship could not be maintained based on the relationship between Johnson and the IRS, as it was clear that the two parties "stood in an adversarial relationship." *Id.* at 738 n.47.

Hyatt rejects FTB's reliance on this case, arguing that the *Johnson* ruling is inapposite to the present case because, here, FTB made express promises regarding protecting Hyatt's confidential information but then failed to keep those promises. Hyatt maintains that although FTB may not have acted in his best interest in every aspect of the audits, as to keeping his information confidential, FTB affirmatively undertook that responsibility and breached that duty by revealing confidential information.

But in conducting the audits, FTB was not required to act with Hyatt's interests in mind; rather, it had a duty to proceed on behalf of the state of California's interest. *Johnson*, 47 F.3d at 738 n.47. Moreover, the parties' relationship was not akin to a family or business relationship. *Perry*, 111 Nev. at 947, 900 P.2d at 337-38. Hyatt argues for a broad range of relationships that can meet the requirement under *Perry*, but we reject this contention. *Perry* does not provide for so expansive a relationship as Hyatt asks us to recognize as sufficient to establish a claim for a breach of confidential relationship.[12] Thus, FTB and Hyatt's relationship cannot form the basis for a breach of a confidential relationship cause of action, and this cause of action fails as a matter of law. The district court judgment in Hyatt's favor on this claim is reversed.

Abuse of process

[Headnotes 18, 19]

A successful abuse of process claim requires "'(1) an ulterior purpose by the defendants other than resolving a legal dispute, and

[12]Further, we note that the majority of cases that Hyatt cites as authority for a more expansive viewpoint of a confidential relationship involve claims arising from a doctor-patient confidentiality privilege, which does not apply here. *See, e.g.*, *Doe v. Medlantic Health Care Grp., Inc.*, 814 A.2d 939, 950-51 (D.C. 2003); *Humphers v. First Interstate Bank of Or.*, 696 P.2d 527, 533-35 (Or. 1985).

(2) a willful act in the use of the legal process not proper in the regular conduct of the proceeding.'" *LaMantia v. Redisi*, 118 Nev. 27, 30, 38 P.3d 877, 879 (2002) (quoting *Posadas v. City of Reno*, 109 Nev. 448, 457, 851 P.2d 438, 444-45 (1993)). Put another way, a plaintiff must show that the defendant "willfully and improperly *used the legal process* to accomplish" an ulterior purpose other than resolving a legal dispute. *Id.* at 31, 38 P.3d at 880 (emphasis added).

FTB asserts that it was entitled to judgment as a matter of law on Hyatt's abuse of process cause of action because it did not actually use the judicial process, as it never sought to judicially enforce compliance with the demand-for-information forms and did not otherwise use the judicial process in conducting its audits of Hyatt. In response, Hyatt argues that FTB committed abuse of process by sending demand-for-information forms to individuals and companies in Nevada that are not subject to the California law cited in the form.

Because FTB did not use any legal enforcement process, such as filing a court action, in relation to its demands for information or otherwise during the audits, Hyatt cannot meet the requirements for establishing an abuse of process claim. *LaMantia*, 118 Nev. at 31, 38 P.3d at 880; *ComputerXpress, Inc. v. Jackson*, 113 Cal. Rptr. 2d 625, 644 (Ct. App. 2001) (explaining that abuse of process only arises when there is actual "use of *the machinery of the legal system* for an ulterior motive" (internal quotations omitted)); *see also Tuck Beckstoffer Wines L.L.C. v. Ultimate Distribs., Inc.*, 682 F. Supp. 2d 1003, 1020 (N.D. Cal. 2010). On this cause of action, then, FTB is entitled to judgment as a matter of law, and we reverse the district court's judgment.

Fraud

[Headnotes 20-24]

To prove a fraud claim, the plaintiff must show that the defendant made a false representation that the defendant knew or believed was false, that the defendant intended to persuade the plaintiff to act or not act based on the representation, and that the plaintiff had reason to rely on the representation and suffered damages. *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992). It is the jury's role to make findings on the factors necessary to establish a fraud claim. *Powers v. United Servs. Auto. Ass'n*, 114 Nev. 690, 697-98, 962 P.2d 596, 600-01 (1998). This court will generally not disturb a jury's verdict that is supported by substantial evidence. *Taylor v. Thunder*, 116 Nev. 968, 974, 13 P.3d 43, 46 (2000). Substantial evidence is defined as "evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted).

When Hyatt's 1991 audit began, FTB informed him that during the audit process Hyatt could expect FTB employees to treat him with courtesy, that the auditor assigned to his case would clearly and concisely request information from him, that any personal and financial information that he provided to FTB would be treated confidentially, and that the audit would be completed within a reasonable time. FTB contends that its statements in documents to Hyatt, that it would provide him with courteous treatment and keep his information confidential, were insufficient representations to form a basis for a fraud claim, and even if the representations were sufficient, there was no evidence that FTB knew that they were false when made. In any case, FTB argues that Hyatt did not prove any reliance because he was required to participate in the audits whether he relied on these statements or not. Hyatt asserts that FTB knowingly misrepresented its promise to treat him fairly and impartially and to protect his private information. For the reasons discussed below, we reject FTB's argument that it was entitled to judgment as a matter of law on Hyatt's fraud claim.

The record before us shows that a reasonable mind could conclude that FTB made specific representations to Hyatt that it intended for Hyatt to rely on, but which it did not intend to fully meet. FTB represented to Hyatt that it would protect his confidential information and treat him courteously. At trial, Hyatt presented evidence that FTB disclosed his social security number and home address to numerous people and entities and that FTB revealed to third parties that Hyatt was being audited. In addition, FTB sent letters concerning the 1991 audit to several doctors with the same last name, based on its belief that one of those doctors provided Hyatt treatment, but without first determining which doctor actually treated Hyatt before sending the correspondence. Furthermore, Hyatt showed that FTB took 11 years to resolve Hyatt's protests of the two audits. Hyatt alleged that this delay resulted in $8,000 in interest per day accruing against him for the outstanding taxes owed to California. Also at trial, Hyatt presented evidence through Candace Les, a former FTB auditor and friend of the main auditor on Hyatt's audit, Sheila Cox, that Cox had made disparaging comments about Hyatt and his religion, that Cox essentially was intent on imposing an assessment against Hyatt, and that FTB promoted a culture in which tax assessments were the end goal whenever an audit was undertaken. Hyatt also testified that he would not have hired legal and accounting professionals to assist in the audits had he known how he would be treated. Moreover, Hyatt stated that he incurred substantial costs that he would not otherwise have incurred by paying for professional representatives to assist him during the audits.

The evidence presented sufficiently showed FTB's improper motives in conducting Hyatt's audits, and a reasonable mind could conclude that FTB made fraudulent representations, that it knew the representations were false, and that it intended for Hyatt to rely on the representations.[13] What's more, the jury could reasonably conclude that Hyatt relied on FTB's representations to act and participate in the audits in a manner different than he would have otherwise, which resulted in damages. Based on this evidence, we conclude that substantial evidence supports each of the fraud elements and that FTB is not entitled to judgment as a matter of law on this cause of action.[14]

Fraud damages

[Headnote 25]

Given our affirmance of the district court's judgment on the jury verdict in Hyatt's favor on his fraud claim, we turn to FTB's challenge as to the special damages awarded Hyatt on his fraud claim.[15] In doing so, we address whether FTB is entitled to statutory caps on the amount of damages recoverable to the same extent that a Nevada government agency would receive statutory caps under principles of comity.[16] NRS 41.035 provides a statutory cap on li-

[13]FTB's argument concerning government agents making representations beyond the scope of law is without merit.

[14]FTB further argues that several evidentiary errors by the district court warrant a new trial. These errors include admitting evidence concerning whether the audit conclusions were correct and excluding FTB's evidence seeking to rebut an adverse inference for spoliation of evidence. FTB also asserts that the district court improperly instructed the jury by permitting it to consider the audit determinations. Although we agree with FTB that the district court abused its discretion in these evidentiary rulings and in its jury instruction number 24, as discussed more fully below in regard to Hyatt's intentional infliction of emotional distress claim, we conclude that these errors were harmless as to Hyatt's fraud claim because sufficient evidence of fraud existed for the jury to find in Hyatt's favor on each required element for fraud. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1006, 194 P.3d 1214, 1219 (2008) (holding that when there is error in a jury instruction, "prejudice must be established in order to reverse a district court judgment," and this is done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand).

[15]The jury verdict form included a separate damage award for Hyatt's fraud claim. We limit our discussion of Hyatt's fraud damages to these special damages that were awarded. To the extent that Hyatt argues that he is entitled to other damages for his fraud claim beyond the special damages specified in the jury verdict form, we reject this argument and limit any emotional distress damages to his recovery under his intentional infliction of emotional distress claim, as addressed below.

[16]FTB argues that under the law-of-the-case doctrine, comity applies to afford it a statutory cap on damages and immunity from punitive damages based

ability damages in tort actions "against a present or former officer or employee of the State or any political subdivision." FTB argues that because it is immune from liability under California law, and Nevada provides a statutory cap on liability damages, it is entitled to the statutory cap on its liability to the extent that the law does not conflict with Nevada policy. Hyatt asserts that applying the statutory caps would in fact violate Nevada policy because doing so would not sufficiently protect Nevada residents. According to Hyatt, limitless compensatory damages are necessary as a means to control non-Nevada government actions. Hyatt claims that statutory caps for Nevada government actions work because Nevada can control its government entities and employees through other means, such as dismissal or other discipline, that are not available to control an out-of-state government entity. Additionally, Hyatt points out that there are other reasons for the statutory caps that are specific only to Nevada, such as attracting state employees by limiting potential liability. Therefore, Hyatt argues that FTB is not entitled to statutory caps under comity because it would violate Nevada's superior policy of protecting its residents from injury.

The parties base their arguments on precedent from other courts that have taken different approaches to the issue. FTB primarily relies on a New Mexico Supreme Court case, *Sam v. Estate of Sam*, 134 P.3d 761 (N.M. 2006), and Hyatt supports his arguments by mainly relying on *Faulkner v. University of Tennessee*, 627 So. 2d 362 (Ala. 1992).

In *Sam*, an employee of an Arizona government entity accidentally backed over his child while driving his employer's vehicle at his home in New Mexico. 134 P.3d at 763. In a lawsuit arising out of this accident, the issue before the *Sam* court was whether Arizona's one-year statute of limitation for government employees, or New Mexico's two-year statute of limitation for government employees or three-year general tort statute of limitation law should apply. *Id.* at 764. The court discussed the comity doctrine and concluded that New Mexico's two-year statute of limitations for government employees applied because by doing so it was recognizing Arizona's law to the extent that it did not conflict with New Mexico's law. *Id.* at 764-68.

In reaching this conclusion, the *Sam* court relied on the United States Supreme Court's holdings in *Nevada v. Hall*, 440 U.S. 410 (1979), and *Franchise Tax Board of California v. Hyatt*, 538 U.S. 488 (2003). *Sam*, 134 P.3d at 765-66. The *Sam* court stated that "[b]oth these cases stand for the principle that a forum state is not required to extend immunity to other states sued in its courts, but the

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on this court's conclusions in the earlier writ petitions. But this court did not previously address these issues and the issues are different, thus, law of the case does not apply. *Dictor v. Creative Mgmt. Servs.*, 126 Nev. 41, 44-45, 223 P.3d 332, 334-35 (2010).

forum state should extend immunity as a matter of comity if doing so will not violate the forum state's public policies." *Id.* at 765. Based on this framework for comity, the *Sam* court concluded that Arizona should be entitled to the statute of limitations for government agencies that New Mexico would provide to its government agencies. Most courts appear to follow FTB's argument regarding how comity applies and that a state should recognize another state's laws to the extent that they do not conflict with its own. *See generally Solomon v. Supreme Court of Fla.*, 816 A.2d 788, 790 (D.C. 2002); *Schoeberlein v. Purdue Univ.*, 544 N.E.2d 283, 285 (Ill. 1989); *McDonnell v. Illinois*, 748 A.2d 1105, 1107 (N.J. 2000); *Sam*, 134 P.3d at 765; *Hansen v. Scott*, 687 N.W.2d 247, 250 (N.D. 2004).

In *Faulkner*, the plaintiff filed a lawsuit against the University of Tennessee after it threatened to revoke plaintiff's doctoral degree. 627 So. 2d at 363-64. The issue in *Faulkner* was whether the University of Tennessee (UT) was entitled to discretionary immunity under comity, when both Tennessee and Alabama had similar discretionary-immunity provisions for their states' government entities. *Id.* at 366. Considering the policy of allowing residents legal redress, compared to the immunity policies that both states had, the *Faulkner* court observed that

> [w]e cannot, absent some overriding policy, leave Alabama residents without redress within this State, relating to alleged acts of wrongdoing by an agency of another State, where those alleged acts are associated with substantial commercial activities in Alabama. We conclude that comity is not such an overriding policy in this instance.

Id. The court rejected the argument that granting comity would not violate Alabama policy because its residents were used to Alabama government entities receiving immunity:

> Agencies of the State of Alabama are subject to legislative control, administrative oversight, and public accountability in Alabama; UT is not. Actions taken by an agency or instrumentality of this state are subject always to the will of the democratic process in Alabama. UT, as an instrumentality of the State of Tennessee, operates outside such controls in this State.

Id. The *Faulkner* court ultimately declined to grant UT immunity under comity. We are persuaded by the *Faulkner* court's reasoning.

This state's policy interest in providing adequate redress to Nevada citizens is paramount to providing FTB a statutory cap on damages under comity. Therefore, as we conclude that allowing FTB a statutory cap would violate this state's public policy in this

area, comity does not require this court to grant FTB such relief. *Id.*; *Sam*, 134 P.3d at 765 (recognizing that a state is not required to extend immunity and comity only dictates doing so if it does not contradict the forum state's public policy). As this is the only argument FTB raised in regard to the special damages awarded under the fraud cause of action, we affirm the amount of damages awarded for fraud. The prejudgment interest awarded is vacated and remanded to the district court for a recalculation based on the damages for fraud that we uphold. In light of our ruling that only the special award of damages for fraud is affirmed, FTB's argument that prejudgment interest is not allowed because future damages were interwoven with past damages is moot.

Intentional infliction of emotional distress

During discovery in the underlying case, Hyatt refused to disclose his medical records. As a result, he was precluded at trial from presenting any medical evidence of severe emotional distress. Nevertheless, at trial, Hyatt presented evidence designed to demonstrate his emotional distress in the form of his own testimony regarding the emotional distress he experienced, along with testimony from his son and friends detailing their observation of changes in Hyatt's behavior and health during the audits. Based on this testimony, the jury found in Hyatt's favor on his intentional infliction of emotional distress (IIED) claim and awarded him $82 million for emotional distress damages.

[Headnotes 26, 27]

To recover on a claim for IIED, a plaintiff must prove "(1) extreme and outrageous conduct on the part of the defendant; (2) intent to cause emotional distress or reckless disregard for causing emotional distress; (3) that the plaintiff actually suffered extreme or severe emotional distress; and (4) causation." *Miller v. Jones*, 114 Nev. 1291, 1299-1300, 970 P.2d 571, 577 (1998); *see also Barmettler v. Reno Air, Inc.*, 114 Nev. 441, 447, 956 P.2d 1382, 1386 (1998). A plaintiff must set forth "objectively verifiable indicia" to establish that the plaintiff "actually suffered extreme or severe emotional distress." *Miller*, 114 Nev. at 1300, 970 P.2d at 577.

On appeal, FTB argues that Hyatt failed to establish that he actually suffered severe emotional distress because he failed to provide any medical evidence or other objectively verifiable evidence to establish such a claim. In response, Hyatt contends that the testimony provided by his family and other acquaintances sufficiently established objective proof of the severe and extreme emotional distress he suffered, particularly in light of the facts of this case demonstrating the intentional harmful treatment he endured from FTB. Hyatt

asserts that the more severe the harm, the lower the amount of proof necessary to establish that he suffered severe emotional distress. While this court has held that objectively verifiable evidence is necessary in order to establish an IIED claim, *id.*, we have not specifically addressed whether this necessarily requires medical evidence or if other objective evidence is sufficient.

The Restatement (Second) of Torts § 46 (1977), in comments j and k, provide for a sliding-scale approach in which the increased severity of the conduct will require less in the way of proof that emotional distress was suffered in order to establish an IIED claim. Restatement (Second) of Torts § 46 cmt. j (1977) ("The intensity and the duration of the distress are factors to be considered in determining its severity. Severe distress must be proved; but in many cases the extreme and outrageous character of the defendant's conduct is in itself important evidence that the distress has existed."); Restatement (Second) of Torts § 46 cmt. k (1977) (stating that "if the enormity of the outrage carries conviction that there has in fact been severe emotional distress, bodily harm is not required"). This court has also impliedly recognized this sliding-scale approach, although stated in the reverse. *Nelson v. City of Las Vegas*, 99 Nev. 548, 665 P.2d 1141 (1983). In *Nelson*, this court explained that "[t]he less extreme the outrage, the more appropriate it is to require evidence of physical injury or illness from the emotional distress." *Id.* at 555, 665 P.2d at 1145.

Further, other jurisdictions that require objectively verifiable evidence have determined that such a mandate does not always require medical evidence. *See Lyman v. Huber*, 10 A.3d 707 (Me. 2010) (stating that medical testimony is not mandatory to establish an IIED claim, although only in rare, extreme circumstances); *Buckman-Peirson v. Brannon*, 822 N.E.2d 830, 840-41 (Ohio Ct. App. 2004) (stating that medical evidence is not required, but also holding that something more than just the plaintiff's own testimony was necessary); *see also Dixon v. Denny's, Inc.*, 957 F. Supp. 792, 796 (E.D. Va. 1996) (stating that plaintiff failed to establish an IIED claim because plaintiff did not provide objective evidence, such as medical bills "or even the testimony of friends or family"). Additionally, in *Farmers Home Mutual Insurance Co. v. Fiscus*, 102 Nev. 371, 725 P.2d 234 (1986), this court upheld an award for mental and emotional distress even though the plaintiffs' evidence did not include medical evidence or testimony. *Id.* at 374-75, 725 P.2d at 236. While not specifically addressing an IIED claim, the *Fiscus* court addressed the recovery of damages for mental and emotional distress that arose from an insurance company's unfair settlement practices when the insurance company denied plaintiffs' insurance claim after their home had flooded. *Id.* at 373, 725 P.2d at 235. In support of the claim for emotional and mental distress damages, the

husband plaintiff testified that he and his wife lost the majority of their personal possessions and that their house was uninhabitable, that because the claim had been rejected they lacked the money needed to repair their home and the house was condemned, and after meeting with the insurance company's representative the wife had an emotional breakdown. *Id.* at 374, 725 P.2d at 236. This court upheld the award of damages, concluding that the above evidence was sufficient to prove that plaintiffs had suffered mental and emotional distress. *Id.* at 374-75, 725 P.2d at 236. In so holding, this court rejected the insurance company's argument that there was insufficient proof of mental and emotional distress because there was no medical evidence or independent witness testimony. *Id.*

[Headnote 28]

Based on the foregoing, we now specifically adopt the sliding-scale approach to proving a claim for IIED. Under this sliding-scale approach, while medical evidence is one acceptable manner in establishing that severe emotional distress was suffered for purposes of an IIED claim, other objectively verifiable evidence may suffice to establish a claim when the defendant's conduct is more extreme, and thus, requires less evidence of the physical injury suffered.

[Headnote 29]

Turning to the facts in the present case, Hyatt suffered extreme treatment from FTB. As explained above in discussing the fraud claim, FTB disclosed personal information that it promised to keep confidential and delayed resolution of Hyatt's protests for 11 years, resulting in a daily interest charge of $8,000. Further, Hyatt presented testimony that the auditor who conducted the majority of his two audits made disparaging remarks about Hyatt and his religion, was determined to impose tax assessments against him, and that FTB fostered an environment in which the imposition of tax assessments was the objective whenever an audit was undertaken. These facts support the conclusion that this case is at the more extreme end of the scale, and therefore less in the way of proof as to emotional distress suffered by Hyatt is necessary.

In support of his IIED claim, Hyatt presented testimony from three different people as to the how the treatment from FTB caused Hyatt emotional distress and physically affected him. This included testimony of how Hyatt's mood changed dramatically, that he became distant and much less involved in various activities, started drinking heavily, suffered severe migraines and had stomach problems, and became obsessed with the legal issues involving FTB. We conclude that this evidence, in connection with the severe treatment experienced by Hyatt, provided sufficient evidence from which a jury could reasonably determine that Hyatt suffered severe emo-

tional distress.[17] Accordingly, we affirm the judgment in favor of Hyatt on this claim as to liability. As discussed below, however, we reverse the award of damages on this claim and remand for a new trial as to damages on this claim only.

A new trial is warranted based on evidentiary and jury instruction errors[18]

Early in this case, the district court granted FTB partial summary judgment and dismissed Hyatt's declaratory relief cause of action concerning when he moved from California to Nevada. The district court reached this conclusion because the audits were still under review in California, and therefore, the Nevada court lacked jurisdiction to address whether the audits' conclusions were accurate. The partial summary judgment was not challenged by Hyatt at any point to this court, and thus, the district court's ruling was in effect throughout the trial. Consequently, whether the audits' determinations were correct was not an issue in the Nevada litigation.

[Headnote 30]

On appeal, FTB argues that the district court erroneously allowed evidence and a jury instruction that went directly to whether the audits were properly determined. FTB frames this issue as whether the district court exceeded the case's jurisdictional boundaries, but the issue more accurately involves the admissibility of evidence and whether a jury instruction given by the district court was proper in light of the jurisdictional ruling. We review both the admissibility of evidence and the propriety of jury instructions for an abuse of discretion. *See Hansen v. Universal Health Servs.*, 115 Nev. 24, 27, 974 P.2d 1158, 1160 (1999) (evidence); *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 319, 212 P.3d 318, 331 (2009) (jury instruction).

Evidence improperly permitted challenging audits' conclusions

[Headnote 31]

FTB argues that the district court violated its jurisdictional restriction governing this case, because by allowing Hyatt's claims to go forward based on the evidence presented at trial, the jury was in effect required to make findings on Hyatt's residency and whether

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[17]To the extent FTB argues that it was prejudiced by its inability to obtain Hyatt's medical records, we reject this argument as the rulings below on this issue specifically allowed FTB to argue to the jury the lack of any medical treatment or evidence by Hyatt.

[18]While we conclude, as discussed below, that evidentiary and jury instruction errors require a new trial as to damages on Hyatt's IIED claim, we hold that sufficient evidence supports the jury's finding as to liability on this claim regardless of these errors. Thus, these errors do not alter our affirmance as to liability on this claim.

he owed taxes. FTB points to the testimony of a number of Hyatt's witnesses that focused on whether the audits' results were correct: (1) Hyatt's tax accountant and tax attorney, who were his representatives during the audits, testified to their cooperation with FTB and that they did not attempt to intimidate the auditor to refute two bases for the imposition of penalties by FTB for lack of cooperation and intimidation; (2) an expert tax attorney witness testified about Hyatt's representatives' cooperation during the audits to refute the lack of cooperation allegation; (3) an expert witness testified as to the lifestyles of wealthy people to refute the allegation that Hyatt's actions of living in a low-income apartment building in Las Vegas and having no security were "implausible behaviors"; and especially, (4) expert testimony of former FTB agent Malcom Jumulet regarding audit procedures, and Jumulet's testimony as to how FTB analyzed and weighed the information obtained throughout the audits as challenging the results of the audits reached by FTB. Further, FTB points to Hyatt's arguments regarding an alleged calculation error as to the amount of taxable income, which FTB argues is an explicit example of Hyatt challenging the conclusions of the audits. Hyatt argues that all the evidence he presented did not challenge the audits, but was proffered to demonstrate that the audits were conducted in bad faith and in an attempt to "trump up a case against Hyatt and extort a settlement."

While much of the evidence presented at trial would not violate the restriction against considering the audits' conclusions, there are several instances in which the evidence does violate this ruling. These instances included evidence challenging whether FTB made a mathematical error in the amount of income that it taxed, whether an auditor improperly gave credibility to certain interviews of estranged family members, whether an auditor appropriately determined that certain information was not credible or not relevant, as well as the testimony outlined above that Hyatt presented, which challenged various aspects of the fraud penalties.

The expert testimony regarding the fraud penalties went to the audits' determinations and had no utility in showing any intentional torts unless it was first concluded that the audits' determinations were incorrect. For example, the expert testimony concerning typical lifestyles of wealthy individuals had relevance only to show that FTB erroneously concluded that Hyatt's conduct, such as renting an apartment in a low-income complex, was fraudulent because he was wealthy and allegedly only rented the apartment to give the appearance of living in Nevada. Whether such a conclusion was a correct determination by FTB is precisely what this case was not allowed to address. The testimony does not show wrongful intent or bad faith without first concluding that the decisions were wrong, unless it was proven that FTB knew wealthy individuals' tendencies, that they

applied to all wealthy individuals, and that FTB ignored them. None of this was established, and thus, the testimony only went to the audits' correctness, which was not allowed. These are instances where the evidence went solely to challenging whether FTB made the right decisions in its audits. As such, it was an abuse of discretion for the district court to permit this evidence to be admitted. *Hansen*, 115 Nev. at 27, 974 P.2d at 1160.

Jury instruction permitting consideration of audits' determinations

[Headnote 32]

FTB also argues that the district court wrongly instructed the jury. Specifically, it asserts that the jury instruction given at the end of trial demonstrates that the district court allowed the jury to improperly consider FTB's audit determinations. Hyatt counters FTB's argument by relying on an earlier instruction that was given to the jury that he argues shows that the district court did not allow the jury to determine the appropriateness of the audits' results, as it specifically instructed the jury not to consider the audits' conclusions.

As background, before trial began, and at various times during the trial, the district court read an instruction to the jury that it was not to consider whether the audits' conclusions were correct:

> Although this case arises from the residency tax audit conducted by FTB, it is important for you to understand that you will not be asked, nor will you be permitted to make any determinations related to Mr. Hyatt's residency or the correctness of the tax assessments, penalties and interest assessed by FTB against Mr. Hyatt. Thus, although you may hear evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments, you are not permitted to make any determinations regarding Mr. Hyatt's residency such as when he became or did not become a resident of Nevada.

When jury instructions were given, this instruction was intended to be part of the jury instructions, but somehow the instruction was altered and a different version of this instruction was read as Jury Instruction 24. To correct the error, the district court read a revised Jury Instruction 24:

> You have heard evidence during the course of this trial that may be related to the determinations and conclusions reached by FTB regarding Mr. Hyatt's residency and tax assessments. You are not permitted to make any determinations regarding Mr. Hyatt's residency, such as when he became or did not become a resident of Nevada. Likewise, you are not permitted

> to make any determinations related to the propriety of the tax assessments issued by FTB against Mr. Hyatt, including but not limited to, the correctness or incorrectness of the amount of taxes assessed, or the determinations of FTB to assess Mr. Hyatt penalties and/or interest on those tax assessments.
>
> The residency and tax assessment determinations, and all factual and legal issues related thereto, are the subject matter of a separate administrative process between Mr. Hyatt and FTB in the State of California and will be resolved in that administrative process. You are not to concern yourself with those issues.
>
> Counsel for the FTB read and presented argument from the inaccurate Jury Instruction No. 24. To the extent FTB's counsel's arguments cited and relied on statements that are not contained in the correct Jury Instruction No. 24, they are stricken and you must disregard them. You are not to consider the stricken statements and arguments in your deliberations. *There is nothing in the correct Jury Instruction No. 24 that would prevent you during your deliberations from considering the appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion. There is nothing in Jury Instruction No. 24 that would prevent Malcolm Jumulet from rendering an opinion about the appropriateness or correctness of the analysis conducted by FTB employees in reaching its residency determinations and conclusions*.

(Emphasis added.) Based on the italicized language, FTB argues that the district court not only allowed, but invited the jury to consider whether the FTB's audit conclusions were correct.

Jury Instruction 24 violated the jurisdictional limit that the district court imposed on this case. The instruction specifically allowed the jury to consider the "appropriateness or correctness of the analysis conducted by the FTB employees in reaching its residency determination and conclusion." As a result, the district court abused its discretion in giving this jury instruction. *Allstate Ins. Co.*, 125 Nev. at 319, 212 P.3d at 331.

Exclusion of evidence to rebut adverse inference

[Headnote 33]

FTB also challenges the district court's exclusion of evidence that it sought to introduce in an effort to rebut an adverse inference sanction for spoliation of evidence. The evidentiary spoliation arose when FTB changed its e-mail server in 1999, and it subsequently destroyed backup tapes from the old server. Because the server change occurred during the pendency of this litigation, FTB sent multiple e-mails to its employees, before the change, requesting that they

print or otherwise save any e-mails related to Hyatt's case. Backup tapes containing several weeks' worth of e-mails were made from the old system to be used in the event that FTB needed to recover the old system. FTB, at some point, overwrote these tapes, however, and Hyatt eventually discovered the change in e-mail servers and requested discovery of the backup tapes, which had already been deleted. Because FTB had deleted the backup tapes, Hyatt filed a pretrial motion requesting sanctions against FTB. The district court ruled in Hyatt's favor and determined that it would give an adverse inference jury instruction. An adverse inference allows, but does not require, the jury to infer that evidence negligently destroyed by a party would have been harmful to that party. *See, e.g.*, *Bass-Davis v. Davis*, 122 Nev. 442, 446, 452, 134 P.3d 103, 106, 109 (2006).

At trial, FTB sought to introduce evidence explaining the steps it had taken to preserve any relevant e-mails before the server change. Hyatt challenged this evidence, arguing that it was merely an attempt to reargue the evidence spoliation. The district court agreed with Hyatt and excluded the evidence. FTB does not challenge the jury instruction, but it does challenge the district court's exclusion of evidence that it sought to present at trial to rebut the adverse inference.

On this point, FTB argues that it was entitled to rebut the adverse inference, and therefore, the district court abused its discretion in excluding the rebuttal evidence. Hyatt counters that it is not proper evidence because in order to rebut the inference FTB had to show that the destroyed evidence was not harmful and FTB's excluded evidence did not demonstrate that the destroyed e-mails did not contain anything harmful.

[Headnotes 34, 35]

This court has recognized that a district court may impose a rebuttable presumption, under NRS 47.250(3), when evidence was willfully destroyed, or the court may impose a permissible adverse inference when the evidence was negligently destroyed. *Bass-Davis*, 122 Nev. at 447-48, 134 P.3d at 106-07. Under a rebuttable presumption, the burden shifts to the spoliating party to rebut the presumption by showing that the evidence that was destroyed was not unfavorable. 122 Nev. at 448, 134 P.3d at 107. If the party fails to rebut the presumption, then the jury or district court may presume that the evidence was adverse to the party that destroyed the evidence. *Id.* A lesser adverse inference, that does not shift the burden of proof, is permissible. *Id.* at 449, 134 P.3d at 107. The lesser inference merely allows the fact-finder to determine, based on other evidence, that a fact exists. *Id.*

In the present case, the district court concluded that FTB's conduct was negligent, not willful, and therefore the lesser adverse inference applied, and the burden did not shift to FTB. But the district

court nonetheless excluded the proposed evidence that FTB sought to admit to rebut the adverse inference. The district court should have permitted FTB to explain the steps that it took to collect the relevant e-mails in an effort to demonstrate that none of the destroyed information contained in the e-mails was damaging to FTB. Because the district court did not allow FTB to explain the steps taken, we are not persuaded by Hyatt's contention that FTB's evidence was actually only an attempt to reargue the spoliation issue. To the contrary, FTB could use the proposed evidence related to its efforts to collect all relevant e-mails to explain why nothing harmful was destroyed. Therefore, we conclude that the district court abused its discretion in excluding the evidence, and we reverse the district court's ruling in this regard.

Other evidentiary errors

[Headnotes 36, 37]

FTB additionally challenges the district court's exclusion of evidence regarding Hyatt's loss of his patent through a legal challenge to the validity of his patent and his being audited for his federal taxes by the IRS, both of which occurred during the relevant period associated with Hyatt's IIED claim. Hyatt asserts that the district court properly excluded the evidence because it was more prejudicial than probative.

Under NRS 48.035(1), "[a]lthough relevant, evidence is not admissible if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Hyatt argues that this provides a basis for the district court's exclusion of this evidence. We conclude, however, that the district court abused its discretion in excluding the evidence of Hyatt's patent loss and federal tax audit on this basis. Although the evidence may be prejudicial, it is doubtful that it is *unfairly* prejudicial as required under the statute. And in any event, the probative value of this evidence as to Hyatt's IIED claim, in particular in regard to damages caused by FTB as opposed to other events in his life, is more probative than unfairly prejudicial. Accordingly, the district court abused its discretion in excluding this evidence.

Evidentiary and jury instruction errors warrant reversal and remand for a new trial on damages only on the IIED claim

[Headnote 38]

Because the district court abused its discretion in making the evidentiary and jury instruction rulings outlined above, the question becomes whether these errors warrant reversal and remand for a new trial on the IIED claim, or whether the errors were harmless such that the judgment on the IIED claim should be upheld. *See Cook v. Sunrise Hosp. & Med. Ctr., L.L.C.*, 124 Nev. 997, 1006, 194 P.3d

1214, 1219 (2008) (holding that when there is error in a jury instruction "prejudice must be established in order to reverse a district court judgment," which can be done by "showing that, but for the error, a different result might have been reached"); *El Cortez Hotel, Inc. v. Coburn*, 87 Nev. 209, 213, 484 P.2d 1089, 1091 (1971) (stating that an evidentiary error must be prejudicial in order to warrant reversal and remand). We hold that substantial evidence exists to support the jury's finding as to liability against FTB on Hyatt's IIED claim regardless of these errors, but we conclude that the errors significantly affected the jury's determination of appropriate damages, and therefore, these errors were prejudicial and require reversal and remand for a new trial as to damages.

In particular, the record shows that at trial Hyatt argued that FTB promised fairness and impartiality in its auditing processes but then, according to Hyatt, proceeded to conduct unfair audits that amounted to FTB "seeking to trump up a tax claim against him or attempt to extort him." In connection with this argument, Hyatt asserted that the penalties FTB imposed against Hyatt were done "to better bargain for and position the case to settle." Hyatt also argued that FTB unfairly refused to correct a mathematical error in the amount assessed against him when FTB asserted that there was no error.

None of these assertions could be made without contesting the audits' conclusions and determining that they were incorrect, which Hyatt was precluded from doing. Further, excluding FTB's evidence to rebut the adverse inference was prejudicial because Hyatt relied heavily on the adverse inference, and it is unknown how much weight the jury gave the inference in making its damages findings. The exclusion of evidence concerning Hyatt's loss of his patent and his federal tax audit, both occurring during the relevant period, relate to whether Hyatt's emotional distress was caused by FTB's conduct or one of these other events. As for the jury instruction, Instruction 24 gave the jury permission to consider the audits' determinations, which the district court had previously precluded it from reaching. As such, all of these errors resulted in prejudice to FTB directly related to the amount of damages Hyatt may be entitled to on his IIED claim. Therefore, a new trial as to the IIED damages is warranted.

Recoverable damages on remand

As addressed above in regard to damages for Hyatt's fraud claim, we reject FTB's argument that it should be entitled to Nevada's statutory cap on damages for government entities under comity principles. Based on our above analysis on this issue, we conclude that providing statutory caps on damages under comity would conflict with our state's policy interest in providing adequate redress to Nevada citizens. Thus, comity does not require this court to grant FTB such relief. *Faulkner v. Univ. of Tenn.*, 627 So. 2d 362, 366

(Ala. 1992); *see also Sam v. Estate of Sam*, 134 P.3d 761, 765 (N.M. 2006) (recognizing that a state is not required to extend immunity and comity, and only dictating doing so if it does not contradict the forum state's public policy). As a result, any damages awarded on remand for Hyatt's IIED claim are not subject to any statutory cap on the amount awarded. As to FTB's challenges concerning prejudgment interest in connection with Hyatt's emotional distress damages, these arguments are rendered moot by our reversal of the damages awarded for a new trial and our vacating the prejudgment interest award.

Punitive damages

[Headnote 39]

The final issue that we must address in FTB's appeal is whether Hyatt can recover punitive damages from FTB. The district court allowed the issue of punitive damages to go to the jury, and the jury found in Hyatt's favor and awarded him $250 million.

[Headnotes 40, 41]

Punitive damages are damages that are intended to punish a defendant's wrongful conduct rather than to compensate a plaintiff for his or her injuries. *Bongiovi v. Sullivan*, 122 Nev. 556, 580, 138 P.3d 433, 450 (2006). But "[t]he general rule is that no punitive damages are allowed against a [government entity] unless *expressly* authorized by statute." *Long v. City of Charlotte*, 293 S.E.2d 101, 114 (N.C. 1982) (emphasis added). In Nevada, NRS 41.035(1) provides that "[a]n award for damages [against a government entity] in an action sounding in tort . . . may not include any amount as exemplary or punitive." Thus, Nevada has not waived its sovereign immunity from suit for such damages.

FTB argues that it is entitled to immunity from punitive damages based on comity because, like Nevada, California law has expressly waived such damages against its government entities. California law provides full immunity from punitive damages for its government agencies. Cal. Gov't Code § 818 (West 2012). Hyatt maintains that punitive damages are available against an out-of-state government entity, if provided for by statute, and Nevada has a statute authorizing such damages—NRS 42.005.[19]

[19]Hyatt also argues that punitive damages are proper because the IRS is subject to punitive damages for conduct similar to that alleged here under the IRS code, 26 U.S.C. § 7431(c)(1)(B)(ii) (2012), which allows for punitive damages for intentional or grossly negligent disclosure of a private taxpayer's information. Thus, Hyatt maintains that it is reasonable to impose punitive damages against FTB when the federal law permits punitive damages against the IRS for similar conduct. *Id.* But as FTB points out, this argument fails because there is a statute that expressly allows punitive damages against the IRS, and such a statute does not exist here.

NRS 42.005(1) provides that punitive damages may be awarded when a defendant "has been guilty of oppression, fraud or malice, express or implied." Hyatt acknowledges that punitive damages under NRS 42.005 are not applicable to a Nevada government entity based on NRS 41.035(1), but he contends that because FTB is not a Nevada government agency, the protection against punitive damages for Nevada agencies under NRS 41.035(1) does not apply, and thus, FTB comes within NRS 42.005's purview. FTB counters by citing a federal district court holding, *Georgia v. City of East Ridge, Tennessee*, 949 F. Supp. 1571, 1581 (N.D. Ga. 1996), in which the court concluded that a Tennessee government entity could not be held liable for punitive damages under Georgia state law (which applied to the case) because, even though Georgia law had a statute allowing punitive damages, Georgia did not allow such damages against government entities. Therefore, the court gave the Tennessee government entity the protection of this law. *Id.*

The broad allowance for punitive damages under NRS 42.005 does not authorize punitive damages against a government entity. Further, under comity principles, we afford FTB the protections of California immunity to the same degree as we would provide immunity to a Nevada government entity as outlined in NRS 41.035(1). Thus, Hyatt's argument that Nevada law provides for the award of punitive damages against FTB is unpersuasive. Because punitive damages would not be available against a Nevada government entity, we hold that under comity principles FTB is immune from punitive damages. We therefore reverse the portion of the district court's judgment awarding punitive damages against FTB.

Costs

Since we reverse Hyatt's judgments on several of his tort causes of action, we must reverse the district court's costs award and remand the costs issue for the district court to determine which party, if any, is the prevailing party based on our rulings. *See Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 494-95, 215 P.3d 709, 726 (2009) (stating that the reversal of costs award is required when this court reverses the underlying judgment); *Glenbrook Homeowners Ass'n v. Glenbrook Co.*, 111 Nev. 909, 922, 901 P.2d 132, 141 (1995) (upholding the district court's determination that neither party was a prevailing party because each party won some issues and lost some issues). On remand, if costs are awarded, the district court should consider the proper amount of costs to award, including allocation of costs as to each cause of action and recovery for only the successful causes of action, if possible. *Cf. Mayfield v. Koroghli*, 124 Nev. 343, 353, 184 P.3d 362, 369 (2008) (holding that the district court should apportion costs award when there are multiple defendants, unless it is "rendered impracticable by the interrelationship of the

claims"); *Bergmann v. Boyce*, 109 Nev. 670, 675-76, 856 P.2d 560, 563 (1993) (holding that the district court should apportion attorney fees between causes of action that were colorable and those that were groundless and award attorney fees for the groundless claims).

Because this issue is remanded to the district court, we also address FTB's challenges on appeal to the procedure used by the district court in awarding costs. Hyatt moved for costs after trial, which FTB opposed. FTB's opposition revolved in part around its contention that Hyatt failed to properly support his request for costs with necessary documentation as to the costs incurred. The district court assigned the costs issue to a special master. During the process, Hyatt supplemented his request for costs on more than one occasion to provide additional documentation to support his claimed costs. After approximately 15 months of discovery, the special master issued a recommendation to award Hyatt approximately $2.5 million in costs. FTB sought to challenge the special master's recommendation, but the district court concluded that FTB could not challenge the recommendation under the process used, and the court ultimately adopted the special master's recommendation.

[Headnote 42]

FTB argues that Hyatt was improperly allowed to submit, under NRS 18.110, documentation to support the costs he sought after the deadline. This court has previously held that the five-day time limit established for filing a memorandum for costs is not jurisdictional because the statute specifically allows for "such further time as the court or judge may grant" to file the costs memorandum. *Eberle v. State ex rel. Nell J. Redfield Trust*, 108 Nev. 587, 590, 836 P.2d 67, 69 (1992). In *Eberle*, this court stated that even if no extension of time was granted by the district court, the fact that it favorably awarded the costs requested demonstrated that it impliedly granted additional time. *Id.* The *Eberle* court ruled that this was within the district court's discretion and would not be disturbed on appeal. *Id.* Based on the *Eberle* holding, we reject FTB's contention that Hyatt was improperly allowed to supplement his costs memorandum.

FTB also contends that the district court erred when it refused to let FTB file an objection to the master's report and recommendation. The district court concluded that, under NRCP 53(e)(3), no challenge was permitted because there was a jury trial. While the district court could refer the matter to a special master, the district court erroneously determined that FTB was not entitled to file an objection to the special master's recommendation. Although this case was a jury trial, the costs issue was not placed before the jury. Therefore, NRCP 53(e)(2) applied to the costs issue, not NRCP 53(e)(3). NRCP 53(e)(2) specifically provides that "any party may serve written objections" to the master's report. Accordingly, the district court erred when it precluded FTB from filing its objections. On remand, if the

district court concludes that Hyatt is still entitled to costs, the court must allow FTB to file its objections to the report before the court enters a cost award. Based on our reversal and remand of the costs award, and our ruling in this appeal, we do not address FTB's specific challenges to the costs awarded to Hyatt, as those issues should be addressed by the district court, if necessary, in the first instance.

Hyatt's cross-appeal

[Headnote 43]

The final issues that we must resolve concern Hyatt's cross-appeal. In his cross-appeal, Hyatt challenges the district court's summary judgment ruling that prevented him from seeking economic damages as part of his recovery for his intentional tort claims.

As background, during the first audit, FTB sent letters to two Japanese companies with whom Hyatt had patent-licensing agreements asking the companies for specific dates when any payments were sent to Hyatt. Both companies responded to the letters and provided the requested information. In the district court, Hyatt argued that sending these letters to the Japanese companies was improper because they revealed that Hyatt was being audited by FTB and that he had disclosed the licensing agreements to FTB. Hyatt theorized that he suffered economic damages by losing millions of dollars of potential licensing revenue because he alleges that the Japanese market effectively abandoned him based on the disclosures. FTB moved the district court for summary judgment to preclude Hyatt from seeking economic loss damages, arguing that Hyatt did not have sufficient evidence to present this claim for damages to the jury. The district court agreed and granted FTB summary judgment.

[Headnotes 44, 45]

Damages "cannot be based solely upon possibilities and speculative testimony." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 425 (1993). This is true regardless of " 'whether the testimony comes from the mouth of a lay witness or an expert.' " *Gramanz v. T-Shirts & Souvenirs, Inc.*, 111 Nev. 478, 485, 894 P.2d 342, 347 (1995) (quoting *Advent Sys. Ltd. v. Unisys Corp.*, 925 F.2d 670, 682 (3d Cir. 1991)). When circumstantial evidence is used to prove a fact, "the circumstances must be proved, and not themselves be presumed." *Horgan v. Indart*, 41 Nev. 228, 231, 168 P. 953, 953 (1917); *see also Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000). A party cannot use one inference to support another inference; only the ultimate fact can be presumed based on actual proof of the other facts in the chain of proof. *Horgan*, 41 Nev. at 231, 168 P. at 953. Thus, "a complete chain of circumstances must be proven, and not left to inference, from which the ultimate fact may be presumed." *Id.*

Here, Hyatt argued that as a result of FTB sending letters to the two Japanese companies inquiring about licensing payments, the companies in turn would have notified the Japanese government about FTB investigating Hyatt. Hyatt theorized that the Japanese government would then notify other Japanese businesses about Hyatt being under investigation, with the end result being that the companies would not conduct any further licensing business with Hyatt. Hyatt's evidence to support this alleged chain of events consisted of the two letters FTB sent to the two companies and the fact that the companies responded to the letters, the fact that his licensing business did not obtain any other licensing agreements after the letters were sent, and expert testimony regarding Japanese business culture that was proffered to establish this potential series of events.

Hyatt claims that the district court erroneously ruled that he had to present direct evidence to support his claim for damages, *e.g.*, evidence that the alleged chain of events actually occurred and that other companies in fact refused to do business with Hyatt as a result. Hyatt insists that he had sufficient circumstantial evidence to support his damages, and in any case, asserts that circumstantial evidence alone is sufficient and that causation requirements are less stringent and can be met through expert testimony under the circumstances at issue here. FTB responds that the district court did not rule that direct evidence was required, but instead concluded that Hyatt's evidence was speculative and insufficient. FTB does not contest that damages can be proven through circumstantial evidence, but argues that Hyatt did not provide such evidence. It also argues that there is no different causation standard under the facts of this case.

The issue we must decide is whether Hyatt set forth sufficient circumstantial evidence to support his economic damages claim, or if the evidence he presented was instead either too speculative or failed to create a sufficient question of material fact as to his economic damages. To begin with, we reject Hyatt's contention that reversal is necessary because the district court improperly ruled that direct evidence was mandatory. Hyatt's limited view of the district court's ruling is unavailing.

The ultimate fact that Hyatt seeks to establish through circumstantial evidence, that the downfall of his licensing business in Japan resulted from FTB contacting the two Japanese companies, however, cannot be proven through reliance on multiple inferences—the other facts in the chain must be proven. Here, Hyatt only set forth expert testimony detailing what his experts believed would happen based on the Japanese business culture. No evidence established that any of the hypothetical steps actually occurred. Hyatt provided no proof that the two businesses that received FTB's letters contacted the Japanese government, nor did Hyatt prove that the Japanese government in turn contacted other businesses regarding the investigation

of Hyatt. Therefore, Hyatt did not properly support his claim for economic damages with circumstantial evidence. *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1030-31 (2005) (recognizing that to avoid summary judgment once the movant has properly supported the summary judgment motion, the nonmoving party may not rest upon general allegations and conclusions, but must instead set forth by affidavit or otherwise specific facts demonstrating the existence of a genuine issue of material fact for trial); *see* NRCP 56(e). Accordingly, summary judgment was proper and we affirm the district court's summary judgment on this issue.

CONCLUSION

Discretionary-function immunity does not apply to intentional and bad-faith tort claims. But while FTB is not entitled to immunity, it is entitled to judgment as a matter of law on each of Hyatt's causes of action except for his fraud and IIED claims. As to the fraud claim, we affirm the district court's judgment in Hyatt's favor, and we conclude that the district court's evidentiary and jury instruction errors were harmless. We also uphold the amount of damages awarded, as we have determined that FTB is not entitled to a statutory cap on damages under comity principles because this state's interest in providing adequate relief to its citizens outweighs providing FTB with the benefit of a damage cap under comity. In regard to the IIED claim, we affirm the judgment in favor of Hyatt as to liability, but conclude that evidentiary and jury instruction errors require a new trial as to damages. Any damages awarded on remand are not subject to a statutory cap under comity. We nevertheless hold that Hyatt is precluded from recovering punitive damages against FTB. The district court's judgment is therefore affirmed in part and reversed and remanded in part. We also remand the prejudgment interest and the costs awards to the district court for a new determination in light of this opinion. Finally, we affirm the district court's prior summary judgment as to Hyatt's claim for economic damages on Hyatt's cross-appeal. Given our resolution of this appeal, we do not need to address the remaining arguments raised by the parties on appeal or cross-appeal.

Gibbons, C.J., and Pickering, Parraguirre, Douglas, and Cherry, JJ., concur.

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, DBA LITTLE DARLINGS; K-KEL, INC., DBA SPEARMINT RHINO GENTLEMEN'S CLUB; OLYMPUS GARDEN, INC., DBA OLYMPUS GARDEN; SHAC, LLC, DBA SAPPHIRE; THE POWER COMPANY, INC., DBA CRAZY HORSE TOO GENTLEMEN'S CLUB; AND D. WESTWOOD, INC., DBA TREASURES, APPELLANTS, *v.* NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; AND THE STATE OF NEVADA BOARD OF EXAMINERS, RESPONDENTS.

No. 59752

September 18, 2014 334 P.3d 387

Appeal from a district court order dismissing a tax action for failure to properly follow administrative procedures by filing a petition for judicial review in the district court. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Taxpayers, live exotic dancing establishments, filed separate actions seeking declaration that Nevada Live Entertainment Tax was facially unconstitutional, injunction against enforcement, and refund of taxes paid under statute. Upon consolidation of cases, the district court dismissed entirety of claims asserted in second case for lack of subject matter jurisdiction, and taxpayers appealed. The supreme court, DOUGLAS, J., held that: (1) petition for judicial review, not de novo trial, was exclusive means of obtaining judicial review of Tax Commission's order affirming denial of refunds; (2) Nevada Live Entertainment Tax provided no statutory exception to petition for judicial review; and (3) Department of Taxation and Tax Commission were not judicially estopped from asserting that petition for judicial review was exclusive remedy for taxpayers' challenge to denial of requests for tax refund.

Affirmed.

Greenberg Traurig, LLP, and *Mark E. Ferrario* and *Brandon E. Roos*, Las Vegas, for Appellant SHAC, LLC.

Lambrose Brown and *William H. Brown*, Las Vegas; *Shafer and Associates* and *Bradley J. Shafer*, Lansing, Michigan, for Appellants Deja Vu Showgirls of Las Vegas, LLC; Little Darlings of Las Vegas; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; and D. Westwood, Inc.

Catherine Cortez Masto, Attorney General, *David J. Pope* and *Blake A. Doerr*, Senior Deputy Attorneys General, and *Vivienne Rakowsky*, Deputy Attorney General, Carson City, for Respondents.

1. Public Amusement and Entertainment.
   Petition for judicial review of Nevada Tax Commission's affirmance of Department of Taxation's denial of exotic live dancing establishments' requests for tax refunds under Nevada's Live Entertainment Tax, not de novo action in district court challenging denial of refund requests, was exclusive means for judicial review of Commission's final order. NRS 233B.130(6), 368A.010 *et seq.*
2. Taxation.
   Whether a party must file a petition for judicial review when challenging a decision by the Nevada Tax Commission that denies a refund-of-taxes-paid request is a question of statutory construction that the supreme court reviews de novo and requires the court to consider how the Administrative Procedure Act and the tax statute relate. NRS 233B.130.
3. Public Amusement and Entertainment.
   Provision of Nevada's Live Entertainment Tax that, within 90 days of final decision of Nevada Tax Commission, claimant may bring action against Nevada Tax Department in court of competent jurisdiction for recovery of whole or any part of amount to which claim was disallowed did not provide statutory exception to requirement that claimant file petition for judicial review of Commission's decision under Administrative Procedure Act. NRS 233B.130, 368A.290.
4. Estoppel.
   Department of Taxation and Tax Commission were not judicially estopped from asserting that petition for judicial review, and not de novo action filed in district court, was exclusive remedy for judicial review of Commission's denial of exotic live dancing establishments' request for refunds of Nevada Live Entertainment Tax, where Department and Commission did not ever assert or mislead establishments into believing that their remedy was trial de novo.
5. Estoppel.
   Judicial estoppel is an equitable doctrine used to protect the judiciary's integrity and is invoked by a court at its discretion.
6. Appeal and Error.
   Whether judicial estoppel applies is a question of law that the supreme court reviews de novo.
7. Estoppel.
   Judicial estoppel does not preclude a party's change in position that is not intended to sabotage the judicial process.

Before the Court En Banc.

OPINION

By the Court, Douglas, J.:

In this opinion, we address whether the district court erred by concluding that, after exhausting their administrative remedies for seeking a refund under Nevada's Live Entertainment Tax (NLET), appellants were limited to a petition for judicial review, rather than a de novo action. We also consider whether the district court committed error by refusing to invoke judicial estoppel in lieu of granting respondents' motion to dismiss the underlying de novo action

for lack of subject matter jurisdiction. We conclude that the district court properly limited appellants to a petition for judicial review and was correct in refusing to invoke judicial estoppel. Accordingly, we affirm the district court's decision.

BACKGROUND

This appeal involves the same parties as the appeal in *Deja Vu Showgirls v. State, Department of Taxation*, 130 Nev. 719, 334 P.3d 392 (2014) (hereinafter *Deja Vu II*). However, unlike *Deja Vu II*, which primarily addresses whether NLET violates the First Amendment to the United States Constitution, this appeal focuses on the procedural processes available to a claimant challenging an unfavorable decision regarding his or her tax refund request.

On April 18, 2006, appellants filed suit in the United States District Court for the District of Nevada seeking a declaration that NLET is facially unconstitutional, an injunction against its enforcement, and a refund for all taxes paid under the statute. The federal court dismissed that suit because appellants failed to show that Nevada's court and administrative systems deprived them of a plain, speedy, and efficient remedy.[1]

On December 19, 2006, following the dismissal of their federal case, appellants filed a de novo action (Case 1) in the Eighth Judicial District Court seeking similar remedies to those sought in federal court, including declaratory and injunctive relief, damages, attorney fees, and costs. Appellants later amended their Case 1 complaint to include an as-applied constitutional challenge to NLET. While Case 1 was pending in district court, appellants K-Kel, Olympus Garden, SHAC, The Power Company, and D. Westwood filed individual tax refund requests with the Nevada Department of Taxation (the Department), arguing that NLET is facially unconstitutional for violating the First Amendment. The Department denied those refund requests on April 3, 2007, and the Nevada Tax Commission (the Commission) affirmed the Department's decision by written order on October 12, 2007.

On January 9, 2008, appellants filed a second de novo action in the Eighth Judicial District Court challenging the administrative denials of their refund requests. In this new action (Case 2), appellants sought declaratory and injunctive relief, the refund of taxes paid, and damages based on NLET's alleged facial unconstitutionality. Appellants later amended their Case 2 complaint to include an as-applied constitutional challenge to NLET—that issue having never been raised during their administrative proceedings. Because of their similarities, the district court consolidated the declaratory

[1]The United States Court of Appeals for the Ninth Circuit later affirmed that dismissal.

relief claims in Cases 1 and 2, and coordinated the remaining issues in those cases.

Thereafter, on respondents' motion for partial summary judgment, the district court limited Case 1 to appellants' facial constitutional challenge to NLET and permanent injunction request, and dismissed appellants' remaining Case 1 claims, including their as-applied challenge. In that same order, the district court dismissed the entirety of Case 2 for lack of subject matter jurisdiction because appellants failed to follow proper procedure when they filed a de novo action in the district court after the completion of their administrative proceedings, rather than filing a petition for judicial review as required by NRS 233B.130. This appeal challenging the district court's dismissal of Case 2 followed.[2]

DISCUSSION

Nevada law required appellants to file a petition for judicial review

[Headnote 1]

On appeal, appellants argue that the district court erred by dismissing their case for failure to file a petition for judicial review in line with the Nevada Administrative Procedure Act (APA) found in NRS Chapter 233B because their de novo action was properly brought in district court per NRS 368A.290. Respondents disagree, asserting that, when read together, the APA and NRS 368A.290 required appellants to challenge the denial of their refund request through a petition for judicial review and not the de novo action initiated below.

[Headnote 2]

Whether a party must file a petition for judicial review when challenging a decision by the Commission that denies a refund-of-taxes-paid request under NLET is a question of statutory construction that we review de novo, *see PERS v. Reno Newspapers, Inc.*, 129 Nev. 833, 836, 313 P.3d 221, 223 (2013), and requires us to consider how the APA and NRS 368A.290 relate.

In enacting the APA, the Legislature stated that the chapter's purpose is "to establish minimum procedural requirements for the regulation-making and adjudication procedure of all agencies . . . and for judicial review of both functions, except those agencies expressly exempted pursuant to the provisions of this chapter." NRS 233B.020(1). Neither the Department nor the Commission is exempted from the APA's purview. NRS 233B.039. In line with its purpose, the APA provides that a party aggrieved by a final agency

[2]Following their Case 2 appeal, the district court resolved all of appellants' remaining Case 1 claims, and appellants subsequently appealed from that determination. Appellants' challenge to the resolution of their Case 1 claims is addressed in the companion case. *Deja Vu II*, 130 Nev. 719, 334 P.3d 392 (2014).

decision in a contested case who is identified as a party of record by an agency in an administrative proceeding is entitled to review of that decision by filing a *petition for judicial review* in the appropriate court. *See* NRS 233B.130(1)-(2). Moreover, the APA states that its provisions "are the exclusive means of judicial review of, or judicial action concerning, a final decision in a contested case involving an agency to which [NRS Chapter 233B] applies." NRS 233B.130(6).

It is undisputed that appellants are parties of record aggrieved by a final agency decision in a contested case, and that "[a] decision of the Nevada Tax Commission is a final decision for the purposes of judicial review." NRS 360.245(5). Furthermore, we have construed NRS 360.245(5) and NRS 233B.130(6) as meaning "that all final decisions by the Commission be subject to the provisions of NRS Chapter 233B." *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 283, 255 P.3d 231, 235-36 (2011) (holding that a petition for judicial review is the sole remedy after a final decision by the Commission). Accordingly, absent explicit legislative direction to the contrary, the APA's procedures, including the requirement to file a petition for judicial review, apply to all final Commission decisions, including those addressing refund requests under NLET. *See id.*; NRS 233B.020; NRS 233B.130(6).

[Headnote 3]

Recognizing that a party aggrieved by a final Commission decision is limited to a petition for judicial review, we now consider whether the Legislature provided an exception to that rule in NLET's relevant provision. NRS 368A.290 provides:

> 1. Within 90 days after a final decision upon a claim filed pursuant to this chapter is rendered by:
>
> . . . .
>
> (b) The Nevada Tax Commission, the claimant may bring an action against the [Nevada Tax] Department on the grounds set forth in the claim.
>
> 2. An action brought pursuant to subsection 1 must be brought in a court of competent jurisdiction in Carson City, the county of this State where the claimant resides or maintains his or her principal place of business or a county in which any relevant proceedings were conducted by the Board or the Department, for the recovery of the whole or any part of the amount with respect to which the claim has been disallowed.
>
> . . . .

A review of NRS 368A.290 makes clear that nothing in that statute provides an exception to the express statutory requirement identified in *Edison* that a tax claimant can seek review of a final Commission decision only by filing a petition for judicial review under NRS 233B.130. *Edison*, 127 Nev. at 285, 255 P.3d at 237.

And contrary to appellants' position, nothing in NRS 368A.290 indicates that the Legislature intended to allow taxpayers seeking refunds under NLET to file a de novo action, rather than a petition for judicial review.

Accordingly, the sole remedy for a taxpayer aggrieved by a final decision from the Commission concerning a tax refund request under NRS Chapter 368A is to file a petition for judicial review pursuant to NRS 233B.130. Based on this determination, we conclude that the district court did not err by determining that it lacked subject matter jurisdiction to consider the de novo challenge below because NRS 368A.290 required appellants to file a petition for judicial review.[3] *See Edison*, 127 Nev. at 285, 255 P.3d at 233, 237; *see also Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 25, 769 P.2d 66, 68 (1989) (stating that noncompliance with statutory requirements for judicial review of an administrative decision divests a court of jurisdiction and is grounds for dismissal).[4] Having made this determination, we now consider whether judicial estoppel barred the district court from dismissing appellants' action despite their failure to file a petition for judicial review.

The district court correctly declined to apply judicial estoppel

[Headnotes 4-6]

Judicial estoppel is an equitable doctrine used to protect the judiciary's integrity and is invoked by a court at its discretion. *See NOLM, L.L.C. v. Cnty. of Clark*, 120 Nev. 736, 743, 100 P.3d 658, 663 (2004). Whether judicial estoppel applies is a question of law that we review de novo. *Id.*

[Headnote 7]

We have explained that judicial estoppel "should be applied only when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." *Id.* (alteration in original) (internal quotation omitted); *see also Edison*, 127 Nev. at 285, 255 P.3d at 237. Notably, judicial estoppel "does not preclude

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[3]Appellants' contention that *Edison* cannot be applied to their de novo action because the underlying case was active at the time this court decided *Edison* lacks merit. *See Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014) (rejecting an argument that a decision issued after the close of trial could not be applied to a party's case because "retroactivity is the default rule in civil cases").

[4]With regard to appellants Deja Vu and Little Darlings, the record demonstrates that these parties failed to exhaust their administrative remedies before filing the underlying de novo action. Thus, the district court lacked subject matter jurisdiction over their claims and we necessarily affirm the dismissal of these parties, albeit for reasons other than those relied on by the district court. *See Malecon Tobacco, L.L.C. v. State ex. rel. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002); *see also Bongiovi v. Sullivan*, 122 Nev. 556, 575 n.44, 138 P.3d 433, 447 n.44 (2006). Accordingly, we need not address arguments presented by Deja Vu and Little Darlings.

a change in position that is not intended to sabotage the judicial process." *Id.*; *NOLM, L.L.C.*, 120 Nev. at 743, 100 P.3d at 663. Moreover, we have stated that

> [j]udicial estoppel may apply when (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position . . . ; (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Edison, 127 Nev. at 285-86, 255 P.3d at 237 (second alteration in original) (internal quotation omitted).

In *Edison*, despite concluding that a petition for judicial review constituted the taxpayer's sole remedy for challenging the denial of its refund request, we ordered the district court to permit a de novo action because judicial estoppel barred the Department from changing its position with respect to the taxpayer. *Id.* at 286-87, 255 P.3d at 237-38. In that case, we recognized that the Department, both in the present and past, took inconsistent positions in quasi-judicial proceedings regarding the means of review available to a taxpayer wanting to challenge a refund denial. *Id.* at 285, 255 P.3d at 237. Notably, in *Edison*, the Department stated in its brief to the Commission that the taxpayer could file a de novo action against the Department under NRS 372.680. *Id.* Additionally, an administrative law judge from the Department told the parties' counsel that "[i]n the event that this matter is appealed to district court, it will be reviewed de novo and additional discovery will likely be allowed at that time." *Id.* at 286 (alteration in original) (internal quotation omitted). Yet, in the proceedings before this court, the Department reversed its position and asserted that de novo review was unavailable to challenge the Commission's denial of a refund request. *Id.* at 281, 255 P.3d at 234. Based on those facts, we concluded that judicial estoppel applied because "it would be highly inequitable to . . . allow the Department to change its position," and therefore, ordered the court to grant the taxpayer a trial de novo in district court. *Id.* at 286-87, 255 P.3d at 237-38.

Here, appellants contend that, under *Edison*, the district court was required to apply judicial estoppel and preclude dismissal for failure to file a petition for judicial review because respondents engaged in inconsistent actions both generally as a department and specifically in this case. In reply, respondents assert that appellants' case is distinguishable from *Edison* on this issue because respondents never intentionally misled appellants into believing that their remedy was a trial de novo. We agree with respondents' position.

Unlike the taxpayer in *Edison*, appellants have failed to show that respondents made any statement during a judicial or quasi-judicial

proceeding promising or providing for a reasonable probability that de novo review would be available to appellants. Instead, the record shows that as early as their federal district court case in 2006, respondents identified that a petition for judicial review was the appropriate remedy, citing to the APA. Appellants correctly note that respondents did not directly reference the APA in their answering brief to the Ninth Circuit, but said that a taxpayer may bring an action in court within 90 days of a refund denial by the Commission. While there is arguably some ambiguity as to the nature of the action that could be brought in court, *i.e.*, whether it is a trial de novo or a petition for judicial review, respondents' representations do not amount to a misleading statement similar to those made in *Edison*. Moreover, any confusion caused by that ambiguity in these circumstances cannot be characterized as "intentional wrongdoing or an attempt to obtain an unfair advantage." *NOLM, L.L.C.*, 120 Nev. at 743, 100 P.3d at 663 (internal quotation omitted). Accordingly, we conclude that the district court committed no error by refusing to invoke judicial estoppel.

Based on the foregoing analysis, we affirm the district court's decision to dismiss this case for lack of subject matter jurisdiction.[5]

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

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[5]Appellants also challenge the district court's dismissal of their as-applied challenge to NLET in Case 2. Although the district court did not explain why appellants' as-applied challenge was dismissed, the dismissal was nonetheless proper because the district court lacked subject matter jurisdiction over that challenge as appellants failed to raise this issue during their administrative proceedings. *See Deja Vu II*, 130 Nev. 719, 334 P.3d 392 (2014). We have considered all of appellants' other arguments and conclude that they lack merit.

DEJA VU SHOWGIRLS OF LAS VEGAS, LLC, A NEVADA LIMITED LIABILITY COMPANY, DBA DEJA VU SHOWGIRLS; LITTLE DARLINGS OF LAS VEGAS, DBA LITTLE DARLINGS; K-KEL, INC., DBA SPEARMINT RHINO GENTLEMEN'S CLUB; OLYMPUS GARDEN, INC., DBA OLYMPUS GARDEN; SHAC, LLC, DBA SAPPHIRE; THE POWER COMPANY, INC., DBA CRAZY HORSE TOO GENTLEMEN'S CLUB; AND D. WESTWOOD, INC., DBA TREASURES, APPELLANTS, *v.* NEVADA DEPARTMENT OF TAXATION; NEVADA TAX COMMISSION; AND THE STATE OF NEVADA BOARD OF EXAMINERS, RESPONDENTS.

No. 60037

September 18, 2014 334 P.3d 392

Appeal from a district court summary judgment rejecting a facial challenge to the constitutionality of Nevada's Live Entertainment Tax and denying injunctive relief as to the enforcement of that tax. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Exotic live dancing establishments filed separate suits raising facial and as-applied challenges to constitutionality of Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission, food, refreshments, and merchandise provided in live-entertainment facility with maximum occupancy of less than 7,500, and sought injunctive relief. Upon consolidation, the district court dismissed as-applied challenge for lack of subject matter jurisdiction, then entered summary judgment for Nevada Department of Taxation and denied injunctive relief. Establishments appealed. The supreme court, DOUGLAS, J., held that: (1) as-applied challenge to constitutionality of tax was subject to requirement that establishments exhaust administrative remedies, as prerequisite to suit; (2) tax was not prior restraint on speech triggering strict scrutiny under First Amendment and Nevada Constitution; (3) tax did not discriminate against exotic dancing establishments based on content of speech, triggering strict scrutiny; (4) tax did not target small group of speakers, thus triggering strict scrutiny; (5) tax did not threaten to suppress ideas or taxpayers' viewpoints, triggering strict scrutiny; and (6) establishments failed to rebut presumption that was constitutional on its face under rational basis review.

Affirmed.

Lambrose Brown and *William H. Brown*, Las Vegas; *Shafer and Associates* and *Bradley J. Shafer*, Lansing, Michigan, for Appellants Deja Vu Showgirls of Las Vegas, LLC; Little Darlings of Las Vegas; K-Kel, Inc.; Olympus Garden, Inc.; The Power Company, Inc.; and D. Westwood, Inc.

Greenberg Traurig, LLP, and *Mark E. Ferrario* and *Brandon E. Roos*, Las Vegas, for Appellant SHAC, LLC.

Catherine Cortez Masto, Attorney General, *Blake A. Doerr* and *David J. Pope*, Senior Deputy Attorneys General, and *Vivienne Rakowsky*, Deputy Attorney General, Carson City, for Respondents.

1. Public Amusement and Entertainment.
   Challenge to constitutionality of Nevada's Live Entertainment Tax under First Amendment right of free speech as applied to exotic dancing establishments was subject to requirement that establishments exhaust administrative remedies as prerequisite to suit. U.S. Const. amend. 1; NRS 233B.130, 368A.200.
2. Taxation.
   In Nevada, a district court lacks subject matter jurisdiction to consider a taxpayer's claim for judicial relief unless that taxpayer has exhausted its administrative remedies.
3. Appeal and Error.
   Whether the district court erred by dismissing an as-applied challenge to the constitutionality of a statute for lack of subject matter jurisdiction is a question of law that the supreme court reviews de novo.
4. Constitutional Law; Taxation.
   While facial constitutional challenges to a tax may bypass the administrative exhaustion requirement, as-applied constitutional challenges hinging on factual determinations cannot. NRS 233B.130.
5. Constitutional Law.
   The Nevada Constitution affords no greater protection to speech activity than does the First Amendment to the United States Constitution. Const. art. 1, § 9; U.S. Const. amend. 1.
6. Appeal and Error.
   The supreme court reviews constitutional challenges to a statute de novo.
7. Constitutional Law.
   In the First Amendment context, there is a strong presumption in favor of duly enacted taxation schemes. U.S. Const. amend. 1.
8. Taxation.
   Inherent in the power to tax is the power to discriminate in taxation, and thus, legislatures have especially broad latitude in creating classifications and distinctions in tax statutes.
9. Constitutional Law.
   A tax statute's presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes.
10. Constitutional Law.
    When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid, but if a court concludes that a heightened level of scrutiny applies, the general presumption regarding a statute's constitutionality is reversed, and the state bears the burden of demonstrating the statute's constitutionality.
11. Constitutional Law; Public Amusement and Entertainment.
    Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission, food, refreshments, and merchan-

dise provided in live-entertainment facility with maximum occupancy of less than 7,500, was not prior restraint on speech triggering strict scrutiny under First Amendment and Nevada Constitution; tax did not regulate live entertainment nor inhibit or burden expressive conduct occurring at establishments. Const. art. 1, § 9; U.S. CONST. amend. 1; NRS 368A.200(1).

12. CONSTITUTIONAL LAW.
To the extent that nude dancing is protected under the First Amendment, society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate. U.S. CONST. amend. 1.

13. CONSTITUTIONAL LAW; PUBLIC AMUSEMENT AND ENTERTAINMENT.
Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission and for food, refreshments, and merchandise provided in live-entertainment facility with maximum occupancy of less than 7,500, did not discriminate against exotic dancing establishments based on content of speech, despite exemptions from tax provided for more family-oriented establishments, such as facilities for car races and professional baseball events, and thus, was not subject to strict scrutiny under First Amendment and Nevada Constitution, where statute did not refer to content of taxpayer's message, other family-oriented establishments were subject to tax, and multiple facilities furnishing adult-oriented live entertainment were exempted from tax. Const. art. 1, § 9; U.S. CONST. amend. 1; NRS 233B.130.

14. CONSTITUTIONAL LAW.
A tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas. U.S. CONST. amend. 1.

15. CONSTITUTIONAL LAW.
A tax that discriminates between speakers on a basis other than ideas is not by itself constitutionally suspect. U.S. CONST. amend. 1.

16. CONSTITUTIONAL LAW.
To determine whether a taxing statute discriminates on the basis of ideas, in violation of the First Amendment, the supreme court will primarily look to the statute's language and secondarily consider the difference in the messages of those who are and are not being taxed. U.S. CONST. amend. 1.

17. CONSTITUTIONAL LAW; PUBLIC AMUSEMENT AND ENTERTAINMENT.
Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission and for food, refreshments, and merchandise provided in live-entertainment facility with maximum occupancy of less than 7,500, did not target small group of speakers, and thus, did not trigger strict scrutiny review under First Amendment and Nevada Constitution; over 90 live-entertainment facilities were subject to and paid excise tax, including raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events. Const. art. 1, § 9; U.S. CONST. amend. 1; NRS 368A.200(1).

18. CONSTITUTIONAL LAW.
The danger from a tax scheme that targets a small number of speakers is the danger of censorship triggering First Amendment protections. U.S. CONST. amend. 1.

19. CONSTITUTIONAL LAW; PUBLIC AMUSEMENT AND ENTERTAINMENT.
Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission and for food, refreshments, and merchandise provided in live-entertainment facility with maximum occupancy of less than 7,500, did not threaten to suppress ideas or taxpayers' viewpoints, as basis for triggering heightened scrutiny under First Amend-

ment and Nevada Constitution. Const. art. 1, § 9; U.S. CONST. amend. 1; NRS 368A.200(1).

20. CONSTITUTIONAL LAW.
Unless a classification is a hostile and oppressive discrimination against particular persons and classes, it will not trigger heightened scrutiny.

21. CONSTITUTIONAL LAW.
Inquiries into Congressional motives or purposes are a hazardous matter, and such speculation should not be the basis of voiding legislation under the Constitution, which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a wiser speech about it.

22. CONSTITUTIONAL LAW; PUBLIC AMUSEMENT AND ENTERTAINMENT.
Exotic live-dancing establishments failed to rebut presumption that Nevada's Live Entertainment Tax, which imposed ten-percent excise tax on any amounts paid for admission and for food, refreshments, and merchandise provided in live-entertainment facility with maximum occupancy of less than 7,500, was constitutional on its face, under First Amendment Free Speech Clause and Nevada Constitution, absent showing that statute was not rationally related to legitimate government interest. Const. art. 1, § 9; U.S. CONST. amend. 1; NRS 368A.200(1).

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this opinion, we consider whether, on its face, Nevada's Live Entertainment Tax violates free speech rights under Article 1, Section 9 of the Nevada Constitution or the First Amendment to the United States Constitution. We also address whether the district court was required to entertain appellants' as-applied challenge to the Tax when they failed to exhaust their administrative remedies on that issue. Regarding appellants' facial challenge, we conclude that the Tax does not violate the First Amendment as related to speech (*i.e.*, dance), and we therefore affirm the district court's summary judgment as to this issue. As for appellants' as-applied challenge, we hold that appellants were required to exhaust their administrative remedies on this issue before seeking relief in the district court, and thus, we affirm the district court's dismissal of the as-applied challenge for lack of subject matter jurisdiction.

BACKGROUND

In 2003, the Nevada Legislature enacted the Live Entertainment Tax, which imposes an excise tax on certain business transactions completed at facilities providing "live entertainment." *See* NRS 368A.200(1). " 'Live entertainment' means any activity provided for pleasure, enjoyment, recreation, relaxation, diversion or other simi-

lar purpose by a person or persons who are physically present when providing that activity to a patron or group of patrons who are physically present." NRS 368A.090(1). Nevada's Live Entertainment Tax (NLET) imposes a ten-percent tax on any amounts paid for admission and for food, refreshments, and merchandise provided within a live-entertainment facility having a maximum occupancy of less than 7,500 persons. NRS 368A.200(1). When a live-entertainment facility has a maximum occupancy of at least 7,500 persons, however, NLET only imposes a five-percent tax on admission charges. *Id.*

At its inception, NLET provided ten exemptions dependent on, *inter alia*, the location and size of a facility providing live entertainment, the entity status of a provider,[1] and, in several instances, the type of entertainment provided.[2] NRS 368A.200(5) (2003). Among other things, the 2003 version of NLET included an exemption for "[l]ive entertainment that [was] not provided at a licensed gaming establishment if the facility in which the live entertainment [was] provided [had] a maximum seating capacity of less than 300." NRS 368A.200(5)(d) (2003). The initial statutory scheme also provided an exemption for gaming establishments "licensed for less than 51 slot machines, less than six games, or any combination of slot machines and games within those respective limits, if the facility in which the live entertainment [was] provided [had] a maximum seating capacity of less than 300." NRS 368A.200(5)(e) (2003).

Since its enactment, the Legislature has amended NLET's provisions on multiple occasions. In 2005, the Legislature, among other things, created eight exceptions to NLET's definition of "live entertainment."[3] NRS 368A.090(2)(b) (2005). Additionally, the Legislature changed the maximum seating capacity language in NRS 368A.200(5)(d)-(e) (2003) to "maximum occupancy," and reduced that provision's occupancy from 300 to 200. NRS 368A.200(5)(d)-(e) (2005). The Legislature also added six new exemptions, including exempting certain National Association for Stock Car Auto Racing (NASCAR) events from being subject to the tax. NRS 368A.200(5)(k)-(p) (2005). Two years later, the Legislature added another exemption from the tax for profession-

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[1]NLET exempted "[l]ive entertainment that is provided by or entirely for the benefit of a nonprofit religious, charitable, fraternal or other organization that qualifies as a tax-exempt organization . . . ." from being subject to the tax. NRS 368A.200(5)(b) (2003).

[2]NLET also exempted "[a]ny boxing contest or exhibition governed by the provisions of chapter 467 of NRS" from being subject to the tax. *See* NRS 368A.200(5)(c) (2003).

[3]For example, the statute was amended to exclude "[t]elevision, radio, closed circuit or Internet broadcasts of live entertainment" and "[a]nimal behaviors induced by animal trainers or caretakers primarily for the purpose of education and scientific research" from NLET's definition of "live entertainment." NRS 368A.090(2)(b)(5), (7) (2005).

al minor league baseball contests, events, and exhibitions. NRS 368A.200(5)(p) (2007).[4]

In April 2006, appellants, which are all exotic dancing establishments filed suit against respondents in the United States District Court for the District of Nevada seeking a declaration that NLET is facially unconstitutional for violating the First Amendment to the United States Constitution, an injunction against its enforcement, and a refund of all taxes paid under the statute. The federal district court later dismissed this action on respondents' motion, concluding that appellants had failed to show that Nevada's state court and administrative systems deprived them of a plain, speedy, and efficient remedy. Appellants appealed that decision to the United States Court of Appeals for the Ninth Circuit, which later affirmed the lower court's determination.

While the appeal of the dismissal of their federal action was still pending before the Ninth Circuit, appellants filed a de novo action in the Eighth Judicial District Court seeking a declaration that NLET is facially unconstitutional, injunctive relief, a refund of all taxes paid under NLET, and attorney fees and costs (Case 1). Appellants later amended their complaint in Case 1 to include an as-applied constitutional challenge to NLET. Even though Case 1 was pending in the district court, appellants K-Kel, Olympus Garden, SHAC, The Power Company, and D. Westwood filed individual tax refund requests with the Nevada Department of Taxation pursuant to NRS 368A.260(1) on the ground that NLET was facially unconstitutional under the First Amendment. The Department later denied these refund requests and the Nevada Tax Commission affirmed the Department's decision by a written order entered on October 12, 2007, determining that NLET was facially constitutional.

Based on the Department's and Commission's denials of their refund requests, appellants filed a second de novo action in the Eighth Judicial District Court on January 9, 2008 (Case 2). In this complaint, appellants argued that NLET was facially unconstitutional and sought a refund, declaratory and injunctive relief, and damages. Nearly three years later, appellants amended their Case 2 complaint to include an as-applied challenge to NLET. The district court then entered an order coordinating Cases 1 and 2 and consolidating their declaratory relief claims.

After hearing arguments on respondents' re-noticed motion for partial summary judgment and motion to dismiss the as-applied challenge, the district court entered an order limiting Case 1 to only appellants' facial challenge to NLET and permanent injunction request. In doing so, the district court dismissed the pending

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[4]In the Legislature's 2007 amendment, NRS 368A.200(5)(p) (2005) was moved to NRS 368A.200(5)(q), with the baseball exemption designated as NRS 368A.200(5)(p). 2007 Nev. Stat., ch. 547, § 1, at 3434.

as-applied challenge in Case 1 for lack of subject matter jurisdiction based on appellants' failure to exhaust their administrative remedies and dismissed Case 2 in its entirety, also on subject matter jurisdiction grounds, because appellants had filed a de novo action instead of a petition for judicial review per NRS 233B.130. appellants subsequently appealed the dismissal of Case 2 to this court, and that appeal is before us in the companion case addressed in *Deja Vu Showgils v. State, Department of Taxation (Deja Vu I)*, 130 Nev. 711, 334 P.3d 387 (2014).

Appellants and respondents ultimately filed competing motions for summary judgment on the remaining issues in Case 1. The district court granted respondents' summary judgment motion, denying appellants' summary judgment motion in the process. The district court concluded that NLET did not facially violate the First Amendment because it is a content-neutral and generally applicable tax that does not target constitutionally protected activity. In making its determination, the district court only considered the statute's language. Additionally, as a consequence of its decision, the district court necessarily rejected appellants' request for a permanent injunction.

DISCUSSION

I.

[Headnote 1]

We first address whether the district court erred by dismissing appellants' as-applied challenge from Case 1 for lack of subject matter jurisdiction.

[Headnotes 2, 3]

In Nevada, a district court lacks subject matter jurisdiction to consider a taxpayer's claim for judicial relief unless that taxpayer has exhausted its administrative remedies. *State v. Scotsman Mfg. Co., Inc.*, 109 Nev. 252, 254, 849 P.2d 317, 319 (1993).[5] We have recognized limited exceptions to that rule, however, when a statute's interpretation or constitutionality is at issue, or when the initiation of administrative proceedings would be futile. *Id.* at 255, 849 P.2d at 319. With those exceptions in mind, appellants contend that the district court improperly dismissed their as-applied challenge to NLET because that challenge involved constitutional issues.[6] Whether the

[5]*Scotsman* uses "subject matter jurisdiction" with reference to a party's failure to exhaust administrative remedies. We note but do not decide the question of whether the failure to exhaust administrative remedies is jurisdictional or a claim prerequisite. *See* II Richard J. Pierce, Jr., *Administrative Law Treatise* §§ 15.2, 15.3 (5th ed. 2010 & Supp. 2014).

[6]We reject appellants' assertion that initiating administrative proceedings for their as-applied constitutional challenge to NLET before the Department would have been futile because they offer no cogent argument. *See Berkson v. LePome*, 126 Nev. 492, 501, 245 P.3d 560, 566 (2010) (stating that "[i]t is well established

district court erred by dismissing appellants' as-applied challenge for lack of subject matter jurisdiction is a question of law that we review de novo. *See Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

[Headnote 4]

It is undisputed that appellants failed to exhaust their administrative remedies for their as-applied constitutional challenge. And while appellants argue that there is a general exception for claims involving constitutional issues, this argument ignores the distinction drawn by Nevada authority between facial and as-applied challenges in this context. *See Malecon Tobacco, L.L.C. v. State ex rel. Dep't of Taxation*, 118 Nev. 837, 841, 59 P.3d 474, 477 (2002). While facial constitutional challenges may bypass the administrative exhaustion requirement, we have held that as-applied constitutional challenges hinging on factual determinations cannot. *Id.* In making that determination, we reasoned that given an agency's expertise in the area of the dispute, it is in the best position to make the factual determinations necessary to resolve that dispute. *See id.* at 840-41, 59 P.3d at 476-77. Thus, because appellants failed to raise their as-applied challenge to NLET before the Department—a challenge that hinges on factual determinations not yet made—we conclude that they were required to exhaust their administrative remedies, and therefore, we affirm the district court's dismissal of appellants' as-applied challenge.

II.

[Headnote 5]

With appellants' as-applied challenge no longer before us, we now consider whether NLET is facially unconstitutional for violating free speech rights (*i.e.*, dance) under Article 1, Section 9 of the Nevada Constitution or the First Amendment to the United States Constitution.[7]

[Headnotes 6-9]

This court reviews constitutional challenges to a statute de novo. *Busefink v. State*, 128 Nev. 525, 528, 286 P.3d 599, 602 (2012). In

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that this court need not consider issues not supported by cogent argument . . . ."). Appellants' one-sentence argument on this issue does not support the proposition that the Department, having never had appellants' as-applied challenge before it, would not have fully considered that challenge if it had been properly raised.

[7]We note that Article 1, Section 9 of the Nevada Constitution "affords no greater protection to speech activity than does the First Amendment to the United States Constitution." *Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 722, 100 P.3d 179, 187 (2004). Accordingly, our resolution of appellants' challenge to NLET based on the United States Constitution also resolves appellants' challenge under the Nevada Constitution.

the First Amendment context, there is a "strong presumption in favor of duly enacted taxation schemes." *Leathers v. Medlock*, 499 U.S. 439, 451 (1991). As the Supreme Court has stated, "Inherent in the power to tax is the power to discriminate in taxation," and thus, "[l]egislatures have especially broad latitude in creating classifications and distinctions in tax statutes." *Id.* (internal quotation omitted). Accordingly, in such circumstances, a statute's "presumption of constitutionality can be overcome only by the most explicit demonstration that a classification is a hostile and oppressive discrimination against particular persons and classes." *Id.* at 451-52 (internal quotations omitted).

[Headnote 10]

When making a facial challenge to a statute, the challenger generally bears the burden of demonstrating that there is no set of circumstances under which the statute would be valid. *See Busefink*, 128 Nev. at 528-29, 286 P.3d at 602. But if a court concludes that a heightened level of scrutiny applies, the general presumption regarding a statute's constitutionality is reversed, and the State bears the burden of demonstrating the statute's constitutionality.[8] *See United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 817 (2000). With the aforementioned standards in mind, our analysis will focus on determining what level of scrutiny applies in our review of NLET's constitutionality.

A.

[Headnote 11]

Before reaching the heart of this appeal, we must first dispose of appellants' assertion that, under *Murdock v. Pennsylvania*, 319 U.S. 105 (1943), NLET violates the First Amendment because it directly taxes live entertainment, which they maintain is categorically protected under the First Amendment. In *Murdock*, multiple Jehovah's Witnesses challenged their convictions for violating an ordinance that prohibited all soliciting and canvassing without first obtaining a license by paying a flat license tax. 319 U.S. at 106-07. In concluding that the ordinance was unconstitutional as applied to the petitioners, and therefore reversing their convictions, the Supreme Court recognized that "a person cannot be compelled to purchase, through a license fee or a license tax, the privilege freely granted by the constitution." *Id.* at 114 (internal quotation omitted).

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[8]Although not discussed by the parties, we note that appellants' allegation that NRS 368A.200 violates the First Amendment satisfies the preliminary state actor requirement. *See S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 409-10, 23 P.3d 243, 247 (2001) (explaining that the First Amendment, applied to the states through the Fourteenth Amendment, only provides protection from a government's abridgment of free speech rights).

Appellants' interpretation and application of the *Murdock* case to NLET is fundamentally flawed. First, the tax at issue in *Murdock* was a flat license tax, which was required to be paid before the petitioners in that case could exercise their rights under the First Amendment. The Supreme Court specifically distinguished that kind of tax from taxes on income, property, and other taxes that relate to the scope of activities or realized revenues. *Id.* at 112-13. Appellants' attempt to expand the applicability of *Murdock*'s holding to NLET, which is an excise tax on admission fees and the sale of certain products, disregards this distinction. Moreover, appellants' expansion argument was expressly rejected by the Court in a later decision that limited *Murdock*'s holding "to apply only where a flat license tax operates as a prior restraint on the free exercise of religious beliefs." *Jimmy Swaggart Ministries v. Bd. of Equalization of Cal.*, 493 U.S. 378, 389 (1990) (holding that California's six-percent sales tax on retail sales of personal property was not unconstitutional as applied to a religious organization's sale of religious books, tapes, records, and nonreligious materials).

Second, in making their facial challenge, appellants rely on the unsubstantiated assertion that NLET, in all of its applications, infringes on the First Amendment by regulating protected activities because entertainment is presumptively protected as a category. In rejecting appellants' argument, we note that NLET does not regulate live entertainment. Moreover, despite its misnomer, NLET does not actually tax live entertainment. Instead, it imposes an excise tax on business transactions which neither inhibits nor burdens the expressive conduct occurring at live-entertainment facilities. *See* NRS 368A.200. Therefore, because NLET does not operate as a prior restraint on constitutionally protected activities, we reject appellants' arguments on this issue. *See Jimmy Swaggart Ministries*, 439 U.S. at 386.

B.

The remainder of our analysis addresses appellants' arguments that NLET is a differential tax of speakers protected under the First Amendment that triggers strict scrutiny because it discriminates on the basis of the content of taxpayer speech, targets a small group of speakers, and threatens to suppress speech. Accordingly, we will address those arguments in that order.

[Headnote 12]

Preliminarily, we recognize that the degree of protection afforded to erotic dance under the First Amendment is uncertain. *See City of Las Vegas v. Eighth Judicial Dist. Court*, 122 Nev. 1041, 1052, 146 P.3d 240, 247 (2006) ("Arguably, erotic dance is expressive conduct that communicates, which could be deserving of some level of First Amendment protection."). This uncertainty arises from the Supreme Court's plurality opinion in *Barnes v. Glen Theatre, Inc.*, which

states that "nude dancing . . . is expressive conduct within the *outer perimeters* of the First Amendment," and therefore is subject to only an intermediate level of scrutiny. 501 U.S. 560, 565-67 (1991) (emphasis added). To the extent that nude dancing is protected under the First Amendment, we acknowledge that "society's interest in protecting this type of expression is of a wholly different, and lesser, magnitude than the interest in untrammeled political debate." *Young v. Am. Mini Theatres, Inc.*, 427 U.S. 50, 70 (1976) (plurality opinion). With that said, we note that the line of cases that appellants rely on and that we use in the remainder of this disposition deal exclusively with taxes on the press, which raise "concerns about censorship of critical information and opinion." *Leathers*, 499 U.S. at 447. Accordingly, we are confident that if NLET satisfies those legal standards, the statute is constitutional on its face.

[Headnote 13]

We now turn to appellants' assertion that NLET discriminates based on the content of taxpayer speech. Appellants contend that, in enacting and amending NLET, the Legislature discriminated against taxpayers providing adult-oriented entertainment and favored taxpayers presenting family-oriented live entertainment. In making this argument, appellants focus on NRS 368A.090's exceptions to the definition of "[l]ive entertainment" and NRS 368A.200(5)'s exemptions for certain live entertainment facilities identified by their size, location, entity status, and in some cases, the type of entertainment being provided. Appellants allege that NLET's exemptions for NASCAR, professional baseball, and boxing events are examples of content-based discrimination. Respondents disagree, arguing that NLET is a generally applicable tax and not discriminatory, and that no classifications are based on the content of taxpayers' messages.

[Headnotes 14-16]

We begin our consideration of appellants' arguments by emphasizing that "a tax scheme that discriminates among speakers does not implicate the First Amendment unless it discriminates on the basis of ideas." *Leathers*, 499 U.S. at 450. Thus, a tax that discriminates between speakers on a basis other than ideas is not by itself constitutionally suspect. To determine whether a taxing statute discriminates on the basis of ideas, we primarily look to the statute's language and secondarily consider the difference in the messages of those who are and are not being taxed. *See id.* at 449.

For example, in *Arkansas Writers' Project, Inc. v. Ragland*, 481 U.S. 221 (1987), the Supreme Court looked to the language of Arkansas's tax on receipts from sales of tangible personal property and concluded that the tax violated the First Amendment because it discriminated based on the content of taxpayer speech. In reaching this conclusion, the Court focused on the tax's content-based exemption for religious, professional, trade, and sports publications.

See id. at 224, 229-31. The Court emphasized that Arkansas's tax "is particularly repugnant to First Amendment principles" because "a magazine's *tax status depends entirely on its content*." *Id.* at 229 (emphasis added).

Unlike the tax at issue in *Arkansas Writers*, it cannot be said that whether a live-entertainment provider is subject to NLET depends exclusively or even primarily on the content of the entertainment being provided. *See generally* NRS 368A.090; NRS 368A.200. While NLET exempts certain performances, the statute's language does not refer to the content of any taxpayer's message. *See Leathers*, 499 U.S. at 449. Additionally, the Supreme Court has expressed that discrimination among taxpayers, whether those taxpayers are speakers or nonspeakers, is inherent and permissible in creating tax classifications that allow states the flexibility needed to fit their tax programs to local needs. *See id.* at 451. Although, as appellants point out, several exemptions include speakers, *i.e.*, NASCAR, boxing, and professional baseball events, unless based on those speakers' ideas, such discrimination is insufficient to make NLET constitutionally suspect. *Id.* at 444, 451.

Having analyzed NLET's language, we now consider the messages of those who are and are not taxed under the statute. Appellants argue that NLET's exemptions and exceptions are based on family-oriented versus adult-oriented messages provided at live entertainment facilities. This assertion lacks merit. Many facilities providing what appellants would classify as family-oriented live entertainment are subject to NLET, including concert venues, circuses, and fashion shows. *Compare* NRS 368A.090(2)(a), *and* 368A.200(1), *with* NRS 368A.090(2)(b), *and* NRS 368A.200(5). Additionally, multiple facilities furnishing adult-oriented live entertainment, such as boxing and charity events, are exempted. NRS 368A.200(5)(b)-(c). Thus, facilities subject to NLET provide a variety of entertainers who in turn bring diverse messages. Based on NLET's language and the messages of those who are and are not taxed under its provisions, we conclude that the statute does not discriminate based on the content of taxpayer speech.

[Headnote 17]

Appellants next argue that NLET, through its exceptions and exemptions, impermissibly targets a small group of speakers, including appellants, to bear the full burden of the tax. We disagree.

[Headnote 18]

In *Minneapolis Star & Tribune Co. v. Minnesota Commissioner of Revenue*, 460 U.S. 575, 579, 592 (1983), the Supreme Court concluded that a use tax resembled a "penalty for a few" and was unconstitutional because only 13 publishers producing 16 out of 374 paid circulation papers were obligated to pay the tax. Later, in *Arkansas Writers*, the Court determined that the sales tax at issue

was unconstitutional, in part, because at most only three publications were obligated to pay the tax. *See* 481 U.S. at 229. Further, as explained by the Court in a different case, "[t]he danger from a tax scheme that targets a small number of speakers is the danger of censorship . . . ." *Leathers*, 499 U.S. at 448.

As will be explained below, closer by comparison to this case is *Leathers v. Medlock*. In *Leathers,* the Supreme Court considered the constitutionality of Arkansas's state sales tax on tangible property and specified services that excluded or exempted certain segments of the media and not others. *Id.* at 441-42. Cable service providers challenged the tax after they became subject to its provisions by a legislative amendment. *Id.* at 442. In concluding that Arkansas's tax was constitutional and did not impermissibly target a small group of speakers, the Court determined that the use tax was of general applicability and posed no danger of censorship given the wide variety of programming subject to its provisions. *See id.* at 447, 449.

Although NLET is not a generally applicable sales tax like the tax addressed in *Leathers*, it reaches a much broader base than the taxes at issue in *Arkansas Writers* and *Minneapolis Star*. As evidence, the record demonstrates that in 2004 over 90 live-entertainment facilities were subject to and paid taxes under NLET. These tax payments came from a variety of live entertainment establishments, including raceways, nightclubs, performing arts centers, gentlemen's clubs, and facilities hosting sporting and one-time events. While we acknowledge that these numbers were from 2004 and thus predate NLET's additional exemptions and exceptions, we remain convinced that, even with those amendments, NLET does not impermissibly target a small group of speakers and therefore does not pose any danger of censorship.[9]

[Headnotes 19-21]

Appellants lastly claim that based on its exemptions and exceptions, the only possible purpose behind NLET was to suppress speech.[10] But this assertion ignores the idea that "[i]nherent in the power to tax is the power to discriminate in taxation," and that

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[9]We note that the 2005 amendments to the exemptions found in NRS 368A.200(5)(d)-(e) reducing the qualifying maximum occupancy levels from 300 to 200 actually expanded NLET's tax base. 2005 Nev. Stat., ch. 484, § 10, at 2483; 2005 Nev. Stat., ch. 9, § 38, at 142.

[10]Appellants also assert that the Legislature's inclusion of exotic dancing establishments was intentional and therefore unconstitutional. We note that delving into legislative intent in this context is neither required nor prudent. We agree with the Supreme Court when it stated, "[i]nquiries into congressional motives or purposes are a hazardous matter," and such speculation should not be the basis of voiding legislation "which Congress had the undoubted power to enact and which could be reenacted in its exact form if the same or another legislator made a 'wiser' speech about it." *United States v. O'Brien*, 391 U.S. 367, 383-84 (1968). Accordingly, we decline appellants' invitation to scrutinize NLET's legislative history.

unless "a classification is a hostile and oppressive discrimination against particular persons and classes," it will not trigger heightened scrutiny. *Leathers*, 499 U.S. at 451-52 (internal quotations omitted).

In *Leathers*, the Supreme Court determined that Arkansas's choice to exclude and exempt certain media from a generally applicable tax was not hostile or oppressive because it did not suggest an intention to suppress any ideas. *Id.* at 452-53. Similarly, the Nevada Legislature has decided to exempt and exclude certain venues and live entertainment from an otherwise broadly applicable tax. A facial examination of NLET's provisions reveals that this taxation scheme is neither directed at nor presents the danger of suppressing particular ideas. *See generally* NRS Chapter 368A. Moreover, nothing in the record gives us reason to believe that NLET poses any danger of suppressing ideas.

[Headnote 22]

Because NLET does not discriminate on the basis of the content of taxpayer speech, target a small group of speakers, or otherwise threaten to suppress ideas or viewpoints, we determine that heightened scrutiny does not apply. Instead, rational basis review applies, and the statute is presumed to be constitutional. We conclude that NLET is constitutional on its face because appellants have failed to demonstrate that NLET is not rationally related to a legitimate government purpose. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 301, 183 P.3d 895, 903-04 (2008); *see also Arata v. Faubion*, 123 Nev. 153, 159-60, 161 P.3d 244, 249 (2007) (explaining that as long as a reasonable factual situation can be conceived to justify it, a statute will be upheld under rational basis review).

Based on the foregoing analysis, we affirm the district court's decisions dismissing appellants' as-applied challenge to NLET and concluding that NLET is facially constitutional.[11]

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

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[11]We have considered all of appellants' other arguments, including those seeking additional discovery and an injunction, and conclude that they lack merit.

MAX ZOHAR, A MINOR; AND DAFNA NOURY, INDIVIDUALLY AND AS THE NATURAL MOTHER OF MAX ZOHAR, APPELLANTS, *v.* MICHAEL ZBIEGIEN, M.D., AN INDIVIDUAL; EMCARE, INC., A FOREIGN CORPORATION; EMCARE PHYSICIAN SERVICES, INC., A FOREIGN CORPORATION; EMCARE PHYSICIAN PROVIDERS, INC., A FOREIGN CORPORATION; AND RACHEL LOVERA, R.N., AN INDIVIDUAL, RESPONDENTS.

No. 60050

September 18, 2014 334 P.3d 402

Appeal from a district court order, certified as final under NRCP 54(b), dismissing respondents from a medical malpractice action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Infant patient and his mother brought medical malpractice action against, among others, physician, nurse, and physician's medical practice. The district court granted motion to dismiss the claims against physician, nurse, and medical practice for failure to comply with the statutory affidavit of merit requirement. Patient and mother appealed. The supreme court, GIBBONS, C.J., held that expert affidavit filed by patient and mother was sufficient to satisfy the affidavit of merit requirement.

Reversed and remanded.

Eglet Wall Christiansen and *Artemus W. Ham* and *Erica D. Entsminger*, Las Vegas, for Appellants.

Alverson, Taylor, Mortensen & Sanders and *David J. Mortensen* and *Ian M. Houston*, Las Vegas, for Respondents Michael Zbiegien, M.D.; EmCare, Inc.; EmCare Physician Services, Inc.; and EmCare Physician Providers, Inc.

Hall Prangle & Schoonveld, LLC, and *Michael E. Prangle* and *Casey W. Tyler*, Las Vegas, for Respondent Rachel Lovera, R.N.

1. APPEAL AND ERROR.
   The supreme court reviews a district court order granting a motion to dismiss de novo.
2. APPEAL AND ERROR.
   A district court order granting a motion to dismiss will be affirmed only when it appears beyond a doubt that the plaintiff could prove no set of facts that would entitle him or her to relief.
3. APPEAL AND ERROR.
   The supreme court reviews issues of statutory construction de novo.
4. STATUTES.
   If a statute is clear on its face, the supreme court will not look beyond its plain language; but when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and the supreme court must resolve that ambiguity by looking to the statute's legislative history and construing the statute in a manner that conforms to reason and public policy.

5. Health.
   Statute requiring a medical malpractice action to be filed with "an affidavit, supporting the allegations contained in the action" was ambiguous as to the level of support required, and thus the supreme court would look to legislative history, reason, and public policy to resolve the ambiguity; term could reasonably be interpreted as merely requiring some substantiation or foundation for the underlying facts within the complaint or as requiring the affidavit to corroborate every fact within the complaint. NRS 41A.071.
6. Health.
   Medical malpractice statute's affidavit of merit requirement was implemented to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion. NRS 41A.071.
7. Health.
   Expert affidavit attached to medical malpractice complaint filed by infant patient and his mother was sufficient to satisfy the statutory affidavit of merit requirement with respect to their claims against physician, nurse, and physician's medical practice, even though physician and nurse were not identified by name in the affidavit; affidavit was to be read together with the complaint, which did identify physician and nurse, and under such a reading, physician, nurse, and medical practice were on sufficient notice of the nature and basis of the medical malpractice claims against them, and the district court had sufficient information to determine whether action should be allowed to proceed. NRS 41A.071.
8. Health.
   Reason and public policy dictate that courts should read the complaint and the plaintiff's expert affidavit together when determining whether the expert affidavit meets the requirements of the medical malpractice statute; such a reading ensures that the courts are dismissing only frivolous cases, furthers the purposes of the notice-pleading standard, and comports with the rules of civil procedure. NRS 41A.071; NRCP 10(c).
9. Health.
   Medical malpractice statute's affidavit of merit requirement is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be liberally construed in a manner that is consistent with jurisprudence on rule governing defenses and objections. NRS 41A.071; NRCP 12.
10. Health.
    Given that the purpose of a complaint is to give fair notice of the nature and basis of a legally sufficient claim and the relief requested, and the purpose of the expert affidavit in medical malpractice cases is to further enable the district court to determine whether the medical malpractice claims within the complaint have merit, both policy considerations are served when the sufficiency of the expert affidavit is determined by reading it in conjunction with the complaint. NRS 41A.071.

Before the Court En Banc.

OPINION

By the Court, Gibbons, C.J.:

In this opinion, we consider whether an expert affidavit attached to a medical malpractice complaint, which otherwise properly sup-

ports the allegations of medical malpractice contained in the complaint but does not identify all the defendants by name and refers to them only as staff of the medical facility, complies with the requirements of NRS 41A.071. We conclude that in order to achieve NRS 41A.071's purpose of deterring frivolous claims and providing defendants with notice of the claims against them, while also complying with the notice-pleading standards for complaints, the district court should read a medical malpractice complaint and affidavit of merit together when determining whether the affidavit meets the requirements of NRS 41A.071. In this case, the expert affidavit, while omitting several names, adequately supported the allegations of medical malpractice against respondents contained in the complaint and provided adequate notice to respondents of the claims against them. We therefore reverse the district court's order of dismissal and remand this case to the district court for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellant Dafna Noury, mother of then-16-month-old Max Zohar (collectively, the Zohars), took Max to the emergency room at Summerlin Hospital for treatment of a parrot bite on his right middle finger. The medical staff at Summerlin Hospital, including respondents Michael Zbiegien, M.D., and Rachel Lovera, R.N., irrigated Max's finger, repaired it, then dressed and bandaged the finger. Several days later, Dr. Zbiegien and a nurse examined Max's finger again, and Noury asserts that they only removed and reapplied the outer dressing while the original wound dressing was left in place. When Max returned several days later to have the dressing removed, the Zohars allege that the hospital staff was unable to remove the inner dressing from Max's finger because it was stuck to Max's laceration. As a result, the dressings had to be soaked off. Once the staff removed the dressing, they noted that Max's finger was discolored. The emergency team consulted two hand specialists—who are not parties to this appeal—who noted that Max's finger was "dusky," swollen, and had "venous/arterial flow compromise." Max underwent a series of surgeries but eventually required a partial amputation of his finger.

The Zohars filed a medical malpractice complaint against multiple defendants, including Summerlin Hospital Medical Center, Zbiegien, and Lovera, as well as EmCare, Inc.; EmCare Physician Services, Inc.; and EmCare Physician Providers, Inc. (collectively, the EmCare entities).[1] The Zohars' complaint asserted claims of medical malpractice and professional negligence against Zbiegien and Lovera, as well as vicarious liability against the EmCare en-

[1]The EmCare entities appear to be related entities within Zbiegien's physicians group.

tities. The Zohars attached an expert affidavit of Burton Bentley II, M.D., F.A.A.E.M., to the complaint pursuant to NRS 41A.071. Dr. Bentley's affidavit stated that, to a reasonable degree of medical probability, the medical staff in the emergency department at Summerlin Hospital breached the standard of care when Max's finger was dressed too tightly. Dr. Bentley chronologically described Max's treatment and summarized the relevant medical records and photos that were the basis of his opinions. The affidavit specified the allegedly negligent activities of several individuals, as well as the activities of "the staff of the emergency department of Summerlin Hospital Medical Center, including but not limited to the responsible physician or physicians, nurse or nurses, and/or ancillary emergency department staff."[2] The affidavit did not identify Zbiegien, Lovera, or the EmCare entities by name.

Zbiegien, Lovera, and the EmCare entities filed motions to dismiss, arguing that Dr. Bentley's affidavit was deficient because it did not specifically name them as negligent parties.[3] The Zohars opposed the motions, arguing that the affidavit, when read together with the complaint, properly supported all allegations contained in the complaint. In the alternative, the Zohars requested leave to amend their complaint and expert affidavit. The district court granted the motions to dismiss and denied the Zohars' motion to amend.[4] The Zohars now appeal.

DISCUSSION

The district court erred in determining that the Zohars' expert affidavit was inadequate to support the allegations of medical malpractice

[Headnotes 1, 2]

We review a district court order granting a motion to dismiss de novo. *Munda v. Summerlin Life & Health Ins. Co.*, 127 Nev. 918, 923, 267 P.3d 771, 774 (2011). Such an order will be affirmed only where " 'it appears beyond a doubt that the plaintiff could prove no set of facts . . . [that] would entitle him [or her] to relief.' " *Id*. (quoting *Vacation Vill., Inc. v. Hitachi Am., Ltd.*, 110 Nev. 481, 484, 874 P.2d 744, 746 (1994)).

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[2]Dr. Bentley also noted that he would need further discovery to precisely implicate a single treatment date as having been more causative than the others.

[3]Summerlin Hospital also moved to dismiss. The district court denied Summerlin Hospital's motion to dismiss because it found that Summerlin Hospital was properly named in the affidavit. Thus, the Zohars' claims against Summerlin Hospital are still pending in the district court.

[4]The district court found that the Zohars knew of Zbiegien's and Lovera's identities and actions, "given the medical records at their disposal and as evidenced by their naming of such parties in their [c]omplaint, however, their expert failed to identify either party by name or to address either's care with any specificity within his affidavit."

[Headnotes 3, 4]

Similarly, we review issues of statutory construction de novo. *Pub. Agency Comp. Trust v. Blake*, 127 Nev. 863, 866, 265 P.3d 694, 696 (2011). If a statute is clear on its face, we will not look beyond its plain language. *Wheble v. Eighth Judicial Dist. Court*, 128 Nev. 119, 122, 272 P.3d 134, 136 (2012). But when a statute is susceptible to more than one reasonable interpretation, it is ambiguous, and this court must resolve that ambiguity by looking to the statute's legislative history and "construing the statute in a manner that conforms to reason and public policy." *Great Basin Water Network v. Taylor*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010).

[Headnote 5]

NRS 41A.071 requires that a medical malpractice action must be filed with "*an affidavit, supporting the allegations contained in the action*." (Emphasis added.) NRS Chapter 41A does not, however, define the level of detail required to adequately "support[ ]" a plaintiff's allegations. Looking to other sources, the word "support" has varying definitions. *Black's Law Dictionary* defines support as "[b]asis or foundation." *Black's Law Dictionary* 1577-78 (9th ed. 2009). Additionally, support has been defined as "to provide with substantiation," "corroborate," or "to . . . serve as a foundation." *Merriam-Webster's Collegiate Dictionary* 1256 (11th ed. 2007). Given these definitions, and that the statute does not define what level of support is required, we conclude that the term "support" in NRS 41A.071 is ambiguous because it may reasonably be interpreted as merely providing some substantiation or foundation for the underlying facts within the complaint, or it may also be interpreted to require that the affidavit corroborate every fact within the complaint, including individual defendant identities. In light of this ambiguity, we will evaluate the statute's legislative history and attempt to construe it in a manner that conforms to reason and public policy. *See Great Basin*, 126 Nev. at 196, 234 P.3d at 918.

NRS 41A.071 was enacted in 2002 as part of a special legislative session that was called to address a medical malpractice insurance crisis in Nevada. *See Borger v. Eighth Judicial Dist. Court*, 120 Nev. 1021, 1023, 102 P.3d 600, 602 (2004). At the time, doctors claimed that medical malpractice "insurers were quoting premium increases of 300 to 500 percent." Hearing on S.B. 2 Before the Senate Comm. of the Whole, 18th Special Sess. (Nev., July 29, 2002) (statement of Governor Guinn).

[Headnote 6]

The Legislature addressed the medical malpractice insurance crisis, in part, by capping noneconomic damages, requiring settlement conferences, and supplanting the existing malpractice screening panels with the expert affidavit requirement under NRS 41A.071. *Borger*, 120 Nev. at 1023-24, 1026, 102 P.3d at 602, 604.

NRS 41A.071's affidavit requirement was implemented "'to lower costs, reduce frivolous lawsuits, and ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion.'"[5] *Washoe Med. Ctr. v. Second Judicial Dist. Court*, 122 Nev. 1298, 1304, 148 P.3d 790, 794 (2006) (quoting *Szydel v. Markman*, 121 Nev. 453, 459, 117 P.3d 200, 204 (2005)). The Governor of Nevada stated that the legislation "balance[d] the needs of injured parties, patients who seek the best medical care available and the doctors who must purchase and carry insurance to protect themselves and their patients." Hearing on S.B. 2 Before the Senate Comm. of the Whole, 18th Special Sess. (Nev., July 29, 2002) (statement of Governor Guinn).

As noted above, the legislative history of NRS 41A.071 demonstrates that it was enacted to deter baseless medical malpractice litigation, fast track medical malpractice cases, and encourage doctors to practice in Nevada while also respecting the injured plaintiff's right to litigate his or her case and receive full compensation for his or her injuries. The legislative history does not reveal, however, the precise level of specificity that an expert affidavit must include in order to "support" the allegations in a medical malpractice claim under NRS 41A.071. In light of this uncertainty, we are left to construe the statute in a manner that conforms to reason and public policy and thus continues to balance the interests of both the doctors and the injured patients. *See Great Basin*, 126 Nev. at 196, 234 P.3d at 918.

[Headnote 7]

Here, the Zohars argue that when the affidavit and complaint are read together, it is clear that Dr. Bentley is referring to Zbiegien, Lovera, and the EmCare entities. The Zohars note that Max was treated in the emergency room over the course of several different visits, making it difficult, if not impossible, for an expert such as Dr. Bentley to know, before discovery, the name of every doctor, nurse, or staff member who was responsible for Max's treatment. Thus, the Zohars argue that when Dr. Bentley's affidavit is read together with their complaint, it is clear that all defendants received sufficient notice of the nature and basis of the Zohars' medical malpractice claims against them and that the lawsuit is not frivolous or filed in bad faith. Zbiegien, Lovera, and the EmCare entities argue that Dr. Bentley's affidavit does not support the complaint as required by

[5]Additionally, the affidavit of merit was intended to make up for the perceived inefficiency of malpractice screening panels by shortening the time necessary tolitigate medical malpractice cases, thereby driving down the costs of litigation for all parties. *See* Hearing on A.B. 1 Before the Comm. on Med. Malpractice Issues, 18th Special Sess. (Nev., July 30, 2002) (statement of Assemblywoman Buckley).

NRS 41A.071 because it fails to reference or attribute any negligent acts to them individually by name. Thus, the crux of this issue is whether courts should require a plaintiff's NRS 41A.071 affidavit of merit to independently state every fact required to demonstrate a cause of action for medical malpractice, or whether courts should read the affidavit of merit together with the complaint to "ensure that medical malpractice actions are filed in good faith based upon competent expert medical opinion." *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794 (internal quotation omitted).

[Headnotes 8-10]

We conclude that reason and public policy dictate that courts should read the complaint and the plaintiff's NRS 41A.071 expert affidavit together when determining whether the expert affidavit meets the requirements of NRS 41A.071. *See Great Basin*, 126 Nev. at 196, 234 P.3d at 918; *Washoe Med. Ctr.*, 122 Nev. at 1304, 148 P.3d at 794; *see also* NRCP 10(c). Such a reading ensures that our courts are dismissing only frivolous cases, furthers the purposes of our notice-pleading standard, and comports with Nevada's Rules of Civil Procedure. *See* NRCP 10(c) (exhibits to pleadings are considered part thereof); *Borger*, 120 Nev. at 1028, 102 P.3d at 605. As we have previously acknowledged, the NRS 41A.071 affidavit requirement is a preliminary procedural rule subject to the notice-pleading standard, and thus, it must be "liberally construe[d] . . . in a manner that is consistent with our NRCP 12 jurisprudence." *Borger*, 120 Nev. at 1028, 102 P.3d at 605 (recognizing that "NRS 41A.071 governs the threshold requirements for initial pleadings in medical malpractice cases, not the ultimate trial of such matters"). Given that the purpose of a complaint is to "give fair notice of the nature and basis of a legally sufficient claim and the relief requested," *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993), and the purpose of the expert affidavit is to further enable the trial court to determine whether the medical malpractice claims within the complaint have merit, both policy considerations are served when the sufficiency of the affidavit is determined by reading it in conjunction with the complaint.

Additionally, we are hesitant to adopt such a strict interpretation of NRS 41A.071 as is advocated by respondents because at this preliminary point in the proceedings, the parties have conducted little to no formal discovery. Such a harsh interpretation would undoubtedly deny many litigants the opportunity to recover against negligent parties when the medical records available to the plaintiff do not identify a negligent actor by name—especially in res ipsa loquitur cases in which the parties are simply unable to identify the negligent actor. The majority of other states that require an affidavit of merit or similar type of expert substantiation do not require that the

affidavit or substantiation independently establish a claim of medical malpractice against each defendant. *See, e.g.*, *Gadd v. Wilson & Co.*, 416 S.E.2d 285, 286 (Ga. 1992) (negligence need not be explicitly linked to the defendant); *Kearney v. Berger*, 7 A.3d 593, 604 (Md. 2010) (omitting the name of the defendant "would not cause [the doctor, other defendants], or the courts any difficulty in evaluating whether [the doctor] violated the standard of care"); *Barber v. Catholic Health Initiatives, Inc.*, 951 A.2d 857, 872 (Md. Ct. Spec. App. 2008) (although the certificate did not explicitly identify the defendants, when read together with the other documents filed, "the [c]ertificate unequivocally identified all of the [defendants]"); *Ellefson v. Earnshaw*, 499 N.W.2d 112, 114-15 (N.D. 1993) (concluding that North Dakota's functionally similar statute "provides for a preliminary screening of totally unsupported cases [but] does not require the plaintiff to complete discovery or to establish a prima facie case during that accelerated time frame"; rather, the expert's affidavit is sufficient if it "tends to corroborate and support . . . allegations of . . . negligence"). Even in instances with multiple defendants, courts have not required individual names within the affidavit. *See Galik v. Clara Maass Med. Ctr.*, 771 A.2d 1141, 1152 (N.J. 2001) (referring to a radiologist by his job title and the timing of treatment was sufficient to identify the defendant radiologist).[6]

As a result, we conclude that the district court should have read Dr. Bentley's affidavit together with the Zohars' complaint to determine whether the affidavit satisfied the requirements of NRS 41A.071. Under such a reading, we conclude that the Zohars' complaint is not frivolous or filed in bad faith, and Zbiegien, Lovera, and the EmCare entities were on sufficient notice of the nature and basis of the Zohars' medical malpractice claims against them. That is not to say that every affidavit of merit that fails to identify specific de-

[6]Even the few states that require the affidavit of merit to state an independent claim of medical malpractice against each and every defendant offer opportunities to cure deficiencies. *See Scoresby v. Santillan*, 346 S.W.3d 546, 557 (Tex. 2011); *Hinchman v. Gillette*, 618 S.E.2d 387, 394-95 (W. Va. 2005). In Texas, every expert report, even if substantively deficient, is eligible for the statutory extension to cure any deficiencies so long as it was timely served, includes a qualified expert's opinion that the claim has merit, and implicates the defendant's conduct. Tex. Civ. Prac. & Rem. Code Ann. § 74.351 (West 2013); *Scoresby*, 346 S.W.3d at 557. In West Virginia, a defendant cannot challenge the legal sufficiency of a certificate of merit unless the plaintiff has "been given written and specific notice of, and an opportunity to address and correct, the alleged defects and insufficiencies." *Hinchman*, 618 S.E.2d at 394-95. Thus, even the states with the most exacting requirements ensure that medical malpractice plaintiffs are given an opportunity to amend or cure their claims so that only baseless and frivolous claims are excluded. Given that NRS 41A.071—unlike the statute in Texas—*requires* dismissal for noncompliance with the affidavit-of-merit requirement, *Washoe Med. Ctr.*, 122 Nev. at 1305, 148 P.3d at 795, we conclude that such a harsh interpretation would unreasonably deny injured plaintiffs the opportunity to seek redress against negligent parties.

fendants will satisfy NRS 41A.071. Rather, the district court in each instance should evaluate the factual allegations contained in both the affidavit and the medical malpractice complaint to determine whether the affidavit adequately supports or corroborates the plaintiff's allegations. Here, the complaint stated that upon Max's initial arrival at Summerlin Hospital, Zbiegien and Lovera treated and dressed Max's finger, and that Zbiegien and a Doe nurse examined and treated Max's finger on the Zohars' second trip to Summerlin Hospital. When these allegations are read together with Dr. Bentley's chronological description of Max's treatment and his opinion that "the medical staff in the emergency department of Summerlin Hospital Medical Center breached the standard of care in their treatment of Max Zohar through the inappropriately tight application of a wound dressing and/or bandage," it is clear that Zbiegien, Lovera, and the EmCare entities received sufficient notice of the nature and basis of the medical malpractice claims against them, and that the district court had sufficient information to determine whether the action should be allowed to proceed.[7]

CONCLUSION

We conclude that courts should read a medical malpractice complaint and the plaintiff's NRS 41A.071 expert affidavit together when determining whether the affidavit satisfies the requirements of NRS 41A.071. Thus, an expert affidavit of merit that fails to specifically name allegedly negligent defendants may still comply with NRS 41A.071 as to the unnamed parties if it is clear that the defendants and the court received sufficient notice of the nature and basis of the medical malpractice claims. As a result, we conclude that the district court erred in finding that Dr. Bentley's expert affidavit was inadequate to support the Zohars' allegations of medical malpractice against respondents. We therefore reverse the district court's order of dismissal and remand this case for further proceedings consistent with this opinion.

Pickering, Hardesty, Parraguirre, Douglas, Cherry, and Saitta, JJ., concur.

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[7]In light of this disposition, we need not address the parties' remaining arguments.

SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Appellant, *v.* U.S. BANK, N.A., a National Banking Association as Trustee for the Certificate Holders of the Banc of America Mortgage Pass Through Certificates, Series 2008-A, Respondent.

No. 63078

September 18, 2014 334 P.3d 408

Appeal from a district court order dismissing a complaint and denying injunctive relief. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Following common interest community association's trustee's sale of property on which association dues were delinquent, purchaser filed action to quiet title and enjoin sale of property by deed of trust beneficiary. The district court denied purchaser's motion for preliminary injunction and dismissed its complaint. Purchaser appealed. The supreme court, Pickering, J., held that: (1) association had true superpriority lien over property, (2) association was not required to judicially foreclose on its lien, (3) nonjudicial foreclosure sale did not violate beneficiary's due process rights, and (4) association's mortgage savings clause did not subordinate association's lien to deed of trust.

Reversed and remanded.

[Rehearing denied October 16, 2014]

Gibbons, C.J., with whom Parraguirre and Cherry, JJ., agreed, dissented in part.

Howard Kim & Associates and *Jacqueline A. Gilbert, Howard C. Kim*, and *Diana S. Cline*, Henderson, for Appellant.

Akerman LLP and *Ariel E. Stern* and *Natalie L. Winslow*, Las Vegas, for Respondent.

1. Common Interest Communities; Mortgages.
   Common interest community association had true superpriority lien over former homeowner's property for unpaid association dues under homeowners' association (HOA) lien statute, rather than mere payment priority, such that proper foreclosure of lien would extinguish first deed of trust on property; statute did not speak in terms of payment priorities, but rather stated that HOA lien was prior to other liens, and "prior" referred to lien, not payment or proceeds. NRS 116.3116, 116.31162-116.31168.
2. Statutes.
   Official comment written by drafters of a statute and available to a legislature before statute is enacted has considerable weight as aid to statutory construction.
3. Common Interest Communities.
   Common interest community association was not required to judicially foreclose on its superpriority lien over former homeowner's property for

unpaid association dues, but rather association was permitted to foreclose on lien by nonjudicial foreclosure sale; statute governing foreclosure of liens stated that association, as planned community, was permitted to foreclose its lien by sale, and statute provided for notices required of nonjudicial foreclosure sales and concerned mechanics and requirements of nonjudicial sales of association liens. NRS 116.075, 116.3116, 116.31162-116.31168.

4. Common Interest Communities; Constitutional Law.
   Common interest community association's foreclosure of its superpriority lien on former homeowner's property for unpaid association dues by nonjudicial foreclosure sale did not violate due process rights of lender that held first deed of trust on property, which was extinguished by foreclosure sale, despite contention that lender was not given adequate notice of sale; association's foreclosure sale complied with all statutory requirements. U.S. Const. amend. 14; NRS 107.090, 116.31162-116.31168.
5. Appeal and Error.
   On appeal from motion to dismiss for failure to state a claim upon which relief can be granted, court must take all factual allegations in complaint as true and not delve into matters asserted defensively that are not apparent from face of the complaint. NRCP 12(b)(5).
6. Common Interest Communities; Mortgages.
   Mortgage savings clause in common interest community association's covenants, conditions, and restrictions did not subordinate association's superpriority lien over former homeowner's property, based on homeowner's nonpayment of association dues, to first deed of trust; statutory scheme governing common interest ownership prohibited variation of provisions by agreement and waiver of rights conferred by statute, except as expressly provided, and statutes providing for liens against owners of common interest properties did not expressly provide for waiver of association's right to priority position for superpriority lien. NRS 116.1104, 116.3116.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

NRS 116.3116 gives a homeowners' association (HOA) a superpriority lien on an individual homeowner's property for up to nine months of unpaid HOA dues. With limited exceptions, this lien is "prior to all other liens and encumbrances" on the homeowner's property, even a first deed of trust recorded before the dues became delinquent. NRS 116.3116(2). We must decide whether this is a true priority lien such that its foreclosure extinguishes a first deed of trust on the property and, if so, whether it can be foreclosed nonjudicially. We answer both questions in the affirmative and therefore reverse.

I.

This dispute involves a residence located in a common-interest community known as Southern Highlands. The property was subject to Covenants, Conditions, and Restrictions (CC&Rs) recorded in 2000. In 2007 it was further encumbered by a note and deed of trust in favor of, via assignment, respondent U.S. Bank, N.A. By

2010, the former homeowners, who are not parties to this case, had fallen delinquent on their Southern Highlands Community Association (SHHOA) dues and also defaulted on their obligations to U.S. Bank. Separately, SHHOA and U.S. Bank each initiated nonjudicial foreclosure proceedings.

Appellant SFR Investments Pool 1, LLC (SFR) purchased the property at the SHHOA's trustee's sale, which took place on September 5, 2012. SFR received and recorded a trustee's deed reciting compliance with all applicable notice requirements. In the meantime, the trustee's sale on U.S. Bank's deed of trust had been postponed to December 19, 2012. Days before then, SFR filed an action to quiet title and enjoin the sale. SFR alleged that the SHHOA trustee's deed extinguished U.S. Bank's deed of trust and vested clear title in SFR, leaving U.S. Bank nothing to foreclose.

The district court temporarily enjoined the U.S. Bank trustee's sale pending briefing and argument on SFR's motion for a preliminary injunction. Ultimately, the district court denied SFR's motion for a preliminary injunction and granted U.S. Bank's countermotion to dismiss. It held that an HOA must proceed judicially to validly foreclose its superpriority lien. Since SHHOA foreclosed nonjudicially, the district court reasoned, U.S. Bank's first deed of trust survived the SHHOA trustee's sale and was senior to the trustee's deed SFR received.

SFR appealed. The district court stayed U.S. Bank's trustee's sale pending decision of this appeal.

II.

A.

The HOA lien statute, NRS 116.3116, is a creature of the Uniform Common Interest Ownership Act of 1982, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991, 1991 Nev. Stat., ch. 245, §§ 1-128, at 535-79, and codified as NRS Chapter 116. *See* NRS 116.001. One purpose of adopting a Uniform Act like the UCIOA is "to make uniform the law with respect to [its] subject [matter] among states enacting it." NRS 116.1109(2). Thus, in addition to the usual tools of statutory construction, we have available the comments of the National Conference of Commissioners on Uniform State Laws, national commentary, and other states' cases to explicate NRS Chapter 116. 2A Norman J. Singer & Shambie Singer, *Sutherland Statutory Construction* § 48:11, at 603-08 (7th ed. 2014); *see Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 717, 290 P.3d 265, 268 (2012).

NRS 116.3116(1) gives an HOA a lien on its homeowners' residences—the UCIOA calls them "units," *see* NRS 116.093—"for any construction penalty that is imposed against the unit's owner . . . ,

any assessment levied against that unit or any fines imposed against the unit's owner from the time the construction penalty, assessment or fine becomes due." NRS 116.3116(2) elevates the priority of the HOA lien over other liens. It states that the HOA's lien is "prior to all other liens and encumbrances on a unit" except for:

> (a) Liens and encumbrances recorded before the recordation of the declaration [creating the common-interest community] . . . ;
>
> (b) *A first security interest on the unit recorded before the date on which the assessment sought to be enforced became delinquent* . . . ; and
>
> (c) Liens for real estate taxes and other governmental assessments or charges against the unit or cooperative.

NRS 116.3116(2) (emphasis added). If subsection 2 ended there, a first deed of trust would have complete priority over an HOA lien. But it goes on to carve out a partial exception to subparagraph (2)(b)'s exception for first security interests:

> *The* [*HOA*] *lien is also prior to all security interests described in paragraph (b)* to the extent of any [maintenance and nuisance-abatement] charges incurred by the association on a unit pursuant to NRS 116.310312 and *to the extent of the assessments for common expenses* [*i.e.*, *HOA dues*] based on the periodic budget adopted by the association pursuant to NRS 116.3115 which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien, unless federal regulations adopted by the Federal Home Loan Mortgage Corporation or the Federal National Mortgage Association require a shorter period of priority for the lien. . . . *This subsection does not affect* the priority of mechanics' or materialmen's liens, or *the priority of liens for other assessments made by the association*.

NRS 116.3116(2) (emphases added).[1]

As to first deeds of trust, NRS 116.3116(2) thus splits an HOA lien into two pieces, a superpriority piece and a subpriority piece. The superpriority piece, consisting of the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges, is "prior to" a first deed of trust. The subpriority piece, consisting of all other HOA fees or assessments, is subordinate to a first deed of trust.

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[1]UCIOA § 3-116 differs from NRS 116.3116(1) in that it limits the superpriority to six rather than nine months of unpaid dues, does not make provision for Federal Home Loan Mortgage Corporation and Federal National Mortgage Association regulations, and does not include maintenance and nuisance-abatement charges in the superpriority lien.

NRS 116.3116 largely tracks section 3-116(a)-(i) of the 1982 UCIOA.[2] But it does not use the language in subsections (j) and (k) of UCIOA § 3-116, which offer alternative HOA lien foreclosure provisions for adaptation to local law. *See* 1982 UCIOA § 3-116(j)(1) ("In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]]."); *id.* § 3-116(k) (offering an optional fast-track foreclosure method for cooperatives, which often carry substantial debt service obligations). Instead, the Nevada Legislature handcrafted a series of provisions to govern HOA lien foreclosures, NRS 116.31162 through NRS 116.31168, and refashioned 1982 UCIOA §§ 3-116(j)(2) and (3), concerning cooperatives, as NRS 116.3116(10).

To initiate foreclosure under NRS 116.31162 through NRS 116.31168, a Nevada HOA must notify the owner of the delinquent assessments. NRS 116.31162(1)(a). If the owner does not pay within 30 days, the HOA may record a notice of default and election to sell. NRS 116.31162(1)(b). Where the UCIOA states general third-party notice requirements, *see* 1982 UCIOA § 3-116(j)(4) ("In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected."), NRS 116.31168 imposes specific timing and notice requirements.

"The provisions of NRS 107.090," governing notice to junior lienholders and others in deed-of-trust foreclosure sales, "apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed." NRS 116.31168(1). The HOA must provide the homeowner notice of default and election to sell; it also must notify "[e]ach person who has requested notice pursuant to NRS 107.090 or 116.31168" and "[a]ny holder of a recorded security interest encumbering the unit's owner's interest who has notified the association, 30 days before the recordation of the notice of default, of the existence of the security interest." NRS 116.31163(1), (2). The homeowner must be given at least 90 days to pay off the lien. NRS 116.31162. If the lien is not paid off, then the HOA may proceed to foreclosure sale. *Id.* Before doing so, the HOA must give notice of the sale to the owner and to the holder of a recorded security interest if the security interest holder "has notified the association, before the mailing of the notice of sale of the existence of the security interest." NRS 116.311635(1)(b)(2); *see* NRS 107.090(3)(b), (4) (re-

[2]NRS 116.3116(3) was added in 2013, 2013 Nev. Stat., ch. 552, § 7, at 3788, and is unique. NRS 116.3116(11) was added in 2011, 2011 Nev. Stat., ch. 389, § 49, at 2450 (renumbered from subsection 10 to 11 by 2013 Nev. Stat., ch. 552, § 7 at 3789), and replicates subparagraph (*l*) of the 1994 version and subparagraph (m) of the 2008 version of the UCIOA. *See* UCIOA § 3-116(m) (2008), 7 U.L.A., part IB 377 (2009); UCIOA § 3-116(*l*) (1994), 7 U.L.A., part IB 571-72 (2009). *See* note 1 above for additional variations.

quiring notice of default and notice of sale to "[e]ach other person with an interest whose interest or claimed interest is subordinate to the deed of trust").

NRS 116.31164 addresses the procedure for sale upon foreclosure of an HOA lien and specifies the distribution order for the proceeds of sale. A trustee's deed reciting compliance with the notice provisions of NRS 116.31162 through NRS 116.31168 "is conclusive" as to the recitals "against the unit's former owner, his or her heirs and assigns, and all other persons." NRS 116.31166(2). And, "[t]he sale of a unit pursuant to NRS 116.31162, 116.31163 and 116.31164 vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3).

B.

U.S. Bank maintains that NRS 116.3116(2) merely creates a payment priority as between the HOA and the beneficiary of the first deed of trust. If so, then the dues and maintenance and nuisance-abatement piece of the HOA lien does not acquire superpriority status until the beneficiary of the first deed of trust forecloses, at which point, to obtain clear, insurable title, the foreclosure-sale buyer would have to pay off that piece of the HOA lien. But if the superpriority piece is a true priority lien, then it is senior to the first deed of trust. As such, it can be foreclosed and its foreclosure will extinguish the first deed of trust. *See, e.g.*, Restatement (Third) of Prop.: Mortgages § 7.1 (1997) ("A valid foreclosure of a mortgage terminates all interests in the foreclosed real estate that are junior to the mortgage being foreclosed and whose holders are properly joined or notified under applicable law.").

Nevada's state and federal district courts are divided on whether NRS 116.3116 establishes a true priority lien. *Compare 7912 Limbwood Court Trust v. Wells Fargo Bank, N.A.*, 979 F. Supp. 2d 1142, 1149 (D. Nev. 2013) ("[A] foreclosure sale on the HOA super priority lien extinguishes all junior interests, including the first deed of trust."), *Cape Jasmine Court Trust v. Cent. Mortg. Co.*, No. 2:13-CV-1125-APG-CWH, 2014 WL 1305015, at *4 (D. Nev. Mar. 31, 2014) (same), *and First 100, LLC v. Burns*, No. A677693 (8th Jud. Dist. Ct. May 31, 2013) (order denying motion to dismiss) (same), *with Bayview Loan Servicing, LLC v. Alessi & Koenig, LLC*, 962 F. Supp. 2d 1222, 1225 (D. Nev. 2013) ("The super-priority amount is senior to an earlier-recorded first mortgage in the sense that it must be satisfied before a first mortgage upon its own foreclosure, but it is *in parity with* an earlier-recorded first mortgage with respect to extinguishment, i.e., the foreclosure of neither extinguishes the other.") (emphasis in original); *Weeping Hollow Ave. Trust v. Spencer*, No. 2:13-CV-00544-JCM-VCF, 2013 WL 2296313, at *6 (D. Nev. May 24, 2013) (same), *and Diakonos Holdings, LLC*

v. Countrywide Home Loans, Inc., No. 2:12-CV-00949-KJD-RJJ, 2013 WL 531092, at *3 (D. Nev. Feb. 11, 2013) (similar).

[Headnote 1]

Textually, NRS 116.3116 supports the *Limbwood*, *Cape Jasmine*, and *First 100* view that it establishes a true priority lien. NRS 116.3116(2) does not speak in terms of *payment* priorities. It states that the HOA "lien . . . is *prior to*" other liens and encumbrances "except . . . [a] first security interest," then adds that, "The lien is *also prior to* [first] security interests" to the extent of nine months of unpaid HOA dues and maintenance and nuisance-abatement charges. *Ibid.* (emphases added). "Prior" refers to the lien, not payment or proceeds, and is used the same way in both sentences, a point the phrase "*also* prior to" drives home. And "priority lien" and "prior lien" mean the same thing, according to *Black's Law Dictionary* 1008 (9th ed. 2009): "A lien that is superior to one or more other liens on the same property, usu. because it was perfected first."

The official comments to UCIOA § 3-116 confirm its text. Payment priority proponents insist that the statute cannot mean what it says because the result—a split lien, a piece of which has priority over a first deed of trust—is unprecedented. *Cf. Bayview Loan Servicing*, 962 F. Supp. 2d at 1226 (observing that, "the real estate community in Nevada clearly understands the statutes to work the way the Court finds," that is to say, as establishing only a payment priority). But the official comments to UCIOA § 3-116 forthrightly acknowledge that the split-lien approach represents a "significant departure from existing practice." 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2. It is a specially devised mechanism designed to "strike[ ] an equitable balance between the need to enforce collection of unpaid assessments and the obvious necessity for protecting the priority of the security interests of lenders." *Id.* The comments continue: "As a practical matter, secured lenders will most likely pay the 6 [in Nevada, nine, *see supra* note 1] months' assessments demanded by the association *rather than having the association foreclose on the unit*." *Id.* (emphasis added). If the superpriority piece of the HOA lien just established a payment priority, the reference to a first security holder paying off the superpriority piece of the lien to stave off foreclosure would make no sense.[3]

[Headnote 2]

"An official comment written by the drafters of a statute and available to a legislature before the statute is enacted has considerable weight as an aid to statutory construction." *Acierno v. Worthy Bros.*

[3]The lion's share of most HOA liens will be the unpaid dues, which have superpriority status. This does not make NRS 116.3116(2)(b) superfluous as U.S. Bank suggests, citing *Bayview Loan Servicing*, 962 F. Supp. 2d at 1227. It simply reflects the policy choices underlying the statute as structured.

Pipeline Corp., 656 A.2d 1085, 1090 (Del. 1995). The comments to the 1982 UCIOA were available to the 1991 Legislature when it enacted NRS Chapter 116. Even though the comments emphasize that the split-lien approach is "[a] significant departure from existing practice," 1982 UCIOA § 3-116 cmt. 1, the Legislature enacted NRS 116.3116(2) with UCIOA § 3-116's superpriority provision intact. From this it follows that, however unconventional, the superpriority piece of the HOA lien carries true priority over a first deed of trust.

The Uniform Law Commission (ULC) has established a Joint Editorial Board for Uniform Real Property Acts (JEB), made up of members from the ULC; the ABA Section of Real Property, Probate and Trust Law; and the American College of Real Estate Lawyers, which "is responsible for monitoring all uniform real property acts," of which the UCIOA is one, http://www.uniformlawcommission.com/Committee.aspx?title=Joint Editorial Board for Uniform Real Property Acts. The JEB's 2013 report entitled, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, also supports that § 3-116(b) establishes a true priority lien.[4] Addressing the recent foreclosure crisis and the incentives the crisis created for first security holders to strategically delay foreclosure, this report canvasses the case law construing the UCIOA's superpriority lien. It endorses the decision in *Summerhill Village Homeowners Ass'n v. Roughley*, 289 P.3d 645, 647-48 (Wash. Ct. App. 2012), which, addressing a statute using the same superpriority language as NRS 116.3116(2), holds that an HOA's judicial foreclosure of the superpriority piece of its lien extinguished the first deed of trust. JEB, *The Six-Month "Limited Priority Lien*," at 8-9. The report then criticizes by name two of the three Nevada federal district court cases cited above as being on the payment-priority side of the NRS 116.3116(2) split—*Weeping Hollow* and *Diakonos*—saying they "misread and misinterpret the Uniform Laws limited priority lien

[4]The dissent dismisses the work of the ULC JEB as "post-hoc commentary" that is "not persuasive" with respect to the judicial v. nonjudicial foreclosure issue addressed in Section II.C, *infra*. These observations mistake our reliance on the 2013 ULC JEB report for guidance as a legislative-intent analysis, which it is not—the "intent" of the 1991 Legislature that adopted the 1982 UCIOA could hardly be affected by comments 20+ years in the future. Courts often rely on post-enactment ULC Editorial Board commentary as persuasive, though not mandatory, precedent; doing so here is consistent with the mandate that we interpret the UCIOA, like other Uniform Acts, "to make uniform the law with respect to the subject of [the act] among states enacting it." NRS 116.1109(2); *e.g.*, *Chase Plaza Condo. Ass'n v. JPMorgan Chase Bank, N.A.*, 98 A.3d 166, 175 n.5 (D.C. 2014) (relying on the ULC JEB report cited in the text as persuasive authority); *Export-Import Bank of United States v. Asia Pulp & Paper Co.*, 609 F.3d 111, 119-20 & 119 n.8 (2d Cir. 2010) (consulting post-enactment commentary by the ULC's Permanent Editorial Board for the Uniform Commercial Code (UCC) in interpreting a particular UCC provision).

provision, which . . . constitutes a true lien priority, [such that] the association's proper enforcement of its lien . . . extinguish[es] the otherwise senior mortgage lien." *Id.* at 10 n.9.

The comments liken the HOA lien to "other inchoate liens such as real estate taxes and mechanics liens." 1994 & 2008 UCIOA § 3-116 cmt. 1. An HOA's "sources of revenues are usually limited to common assessments." JEB, *The Six-Month "Limited Priority Lien*," at 4. This makes an HOA's ability to foreclose on the unpaid dues portion of its lien essential for common-interest communities. *Id.* at 1-2. Otherwise, when a homeowner walks away from the property and the first deed of trust holder delays foreclosure, the HOA has to "either increase the assessment burden on the remaining unit/parcel owners or reduce the services the association provides (e.g., by deferring maintenance on common amenities)." *Id.* at 5-6. To avoid having the community subsidize first security holders who delay foreclosure, whether strategically or for some other reason, UCIOA § 3-116 creates a true superpriority lien:

> A foreclosure sale of the association's lien (whether judicial or nonjudicial) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens, transferring those liens to the sale proceeds. Nothing in the Uniform Laws establishes (or was intended to establish) a contrary result.

Id. at 9 (footnotes omitted); *accord* Memorandum from the JEB to the Comm'rs for the Unif. Law Comm'n 3 (June 11, 2014) (noting that, "[a]s originally drafted, § 3-116(c) was intended to create a true lien priority, and thus the association's foreclosure properly should be viewed as extinguishing the lien of the otherwise first mortgagee (to the same extent that foreclosure of a real estate tax lien would extinguish that same mortgage)," citing *7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1149).

U.S. Bank's final objection is that it makes little sense and is unfair to allow a relatively nominal lien—nine months of HOA dues—to extinguish a first deed of trust securing hundreds of thousands of dollars of debt. But as a junior lienholder, U.S. Bank could have paid off the SHHOA lien to avert loss of its security; it also could have established an escrow for SHHOA assessments to avoid having to use its own funds to pay delinquent dues. 1982 UCIOA § 3-116 cmt. 1; 1994 & 2008 UCIOA § 3-116 cmt. 2. The inequity U.S. Bank decries is thus of its own making and not a reason to give NRS 116.3116(2) a singular reading at odds with its text and the interpretation given it by the authors and editors of the UCIOA. *See* NRS 116.1109 (obligating this court to interpret its version of the UCIOA so as to "make uniform the law . . . among states enacting it").

C.

[Headnote 3]

Since NRS 116.3116(2) establishes a true superpriority lien, the next question we must decide is whether the lien may be foreclosed nonjudicially or requires judicial foreclosure. NRS Chapter 116 answers this question directly: An HOA may foreclose its lien by nonjudicial foreclosure sale. Thus, NRS 116.3116(1) defines what an HOA lien covers, while NRS 116.31162(1) states that "in a planned community"—a "planned community" is any type of "common-interest community that is not a condominium or a cooperative," NRS 116.075—"the association may foreclose its lien by sale." To "foreclose [a] lien by sale" under NRS 116.31162(1) encompasses an HOA's conducting a nonjudicial foreclosure sale. This is evident from the remainder of NRS 116.31162, which speaks to the statutory notices of delinquency, default and election to sell required of a nonjudicial foreclosure sale, and the sections that follow, NRS 116.31163 through NRS 116.31168, all of which concern the mechanics and requirements of nonjudicial foreclosure sales of HOA liens. The only limits Chapter 116 places on HOA lien foreclosure sales appear in NRS 116.31162(5) and (6), which restrict foreclosure of HOA liens for certain fines and penalties and liens on homes in Nevada's foreclosure mediation program (FMP). *See also State v. Javier C.*, 128 Nev. 536, 541, 289 P.3d 1194, 1197 (2012) ("Nevada follows the maxim 'expressio unius est exclusio alterius,' the expression of one thing is the exclusion of another."). Given this statutory text, we cannot agree with our dissenting colleagues that NRS Chapter 116 requires judicial foreclosure of the superpriority piece of an HOA lien but authorizes nonjudicial foreclosure of everything else.

Together, NRS 116.3116(1) and NRS 116.31162 provide for the nonjudicial foreclosure of the whole of an HOA's lien, not just the subpriority piece of it. U.S. Bank and our dissenting colleagues do not come to terms with NRS 116.31162. Instead, they focus on a single phrase in NRS 116.3116(2) which defines the superpriority piece of the lien as comprising "assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding *institution of an action to enforce the lien*." (Emphasis added.) Not acknowledging that NRS 116.3116(2) only discusses lien priority, not foreclosure methods, they maintain that the phrase "institution of an action to enforce the lien" suggests a civil action, a lawsuit brought in a court of law. But the phrase is not so narrow that it excludes nonjudicial foreclosure proceedings. *Black's Law Dictionary* 869 (9th ed. 2009) defines "institution" as "[t]he commencement of something, *such as* a civil or criminal action." (Emphasis added.) As *Black's* recognizes, "foreclosure" proceedings are "instituted" and include both

"judicial foreclosure" and "nonjudicial foreclosure" methods. *Id.* at 719 (defining "foreclosure," "judicial foreclosure," and "nonjudicial" or "power-of-sale foreclosure"). And in the context of foreclosures, "action" appears to be commonly used in connection with nonjudicial as well as judicial foreclosures. *See In re Bonner Mall P'ship*, 2 F.3d 899, 902 (9th Cir. 1993) (referring to a bank "commenc[ing] a nonjudical foreclosure action"); *Santiago v. BAC Home Loans Servicing, L.P.*, 20 F. Supp. 3d 585, 589 (W.D. Tex. 2014) (holding an assignee to be "an appropriate party to initiate a nonjudicial foreclosure action against the Property"); *In re Beach*, 447 B.R. 313, 316 (D. Idaho 2011) ("[T]he Bank initiated a nonjudicial foreclosure action . . . ."); *Bowmer v. Dettelbach*, 672 N.E.2d 1081, 1086 (Ohio Ct. App. 1996) (discussing a "nonjudicial foreclosure action . . . instituted" in California); *Klem v. Wash. Mut. Bank*, 295 P.3d 1179, 1189 (Wash. 2013) (addressing the powers of the trustee in "a nonjudicial foreclosure action").

The argument that NRS 116.3116(2)'s use of the word "action" means "that an HOA must foreclose judicially to invoke the superpriority" lien provision was considered and rejected in *Nationstar Mortgage, LLC v. Rob and Robbie, LLC*, No. 2:13-cv-01241-RCJ-PAL, 2014 WL 3661398, at *4 (D. Nev. July 23, 2014). The court gave "two independent reasons" for its holding. "First, 'action' does not include only civil actions. The Legislature could easily have said 'civil action' or 'judicial action,' but it used the broader term 'action.'" *Id.* In the lien foreclosure context, "where the statutes . . . provide for either judicial or non judicial foreclosure, 'action' is most reasonably read to include either." *Id.*[5] Second, NRS 116.3116(2) does not "use the word 'action' in a way that makes the super-priority status depend[e]nt upon whether an 'action' has been instituted. Rather, the word 'action' is used (in the subjunctive mode, not the indicative mode) as a way to measure the portion of an HOA lien that has super-priority status." *Id.*

UCIOA § 3-116(b) uses the phrase "institution of an action to enforce the lien" in describing the superpriority lien, exactly as NRS 116.3116(2) does. Section 3-116(j) of the 1982 and 1994 UCIOA (and with minor alteration, section 3-116(k) of the 2008 UCIOA) prompt the adopting state to choose and insert its authorized foreclosure method, be it judicial or nonjudicial:

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[5]We recognize that NRS 116.3116 uses "action" to signify civil action in NRS 116.3116(8) (a "judgment or decree in any action brought under this section must include costs and reasonable attorney's fees") and NRS 116.3116(11) (authorizing appointment of a receiver "[i]n an action by an association to collect assessments or to foreclose a lien"). But we accept that "action" includes civil court actions. The point is that "institution of an action to enforce the lien" is not restricted to judicial actions but, rather, includes nonjudicial foreclosure actions as well.

> (j) The association's lien may be foreclosed as provided in this subsection:
>
> (1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];
>
> (2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or
>
> (3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien must be foreclosed in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code.]
>
> [(4) In the case of foreclosure under [insert reference to state power of sale statute], the association shall give reasonable notice of its action to all lien holders of the unit whose interest would be affected.]

1982 UCIOA § 3-116(j). If the UCIOA meant "institution of an action to enforce the lien" in § 3-116(b) to signify that all superpriority HOA lien foreclosures must proceed judicially, § 3-116(j)'s repeated references to the foreclosure of "the association's lien" by judicial or nonjudicial foreclosure, depending on the enacting state's local laws, is inexplicable. And, indeed, the Joint Editorial Board for Uniform Real Property Acts has confirmed that, in the context of an HOA's superpriority lien specifically, "[a] foreclosure sale of the association's lien (*whether judicial or nonjudicial*) is governed by the principles generally applicable to lien foreclosure sales, i.e., a foreclosure sale of a lien entitled to priority extinguishes that lien and any subordinate liens." JEB, *The Six-Month "Limited Priority Lien,"* at 9 (emphasis added) (footnote omitted).

Nevada did not enact subsection (j) of § 3-116. Instead, it enacted a series of separate, consecutively numbered statutes, NRS 116.31162 through NRS 116.31168, each addressing a specific aspect of the nonjudicial foreclosure process NRS 116.31162 authorizes for HOA liens. These statutes use "enforce" throughout with reference to an HOA's nonjudicial foreclosure of its lien. *See* NRS 116.31162(1)(b)(2) (the notice of delinquent assessment must identify "the person authorized by the association to enforce the lien by sale"); NRS 116.31162(1)(c); NRS 116.31164(2) (discussing costs, fees, and expenses incident to an HOA's nonjudicial "enforcement of its lien"). Nothing in these statutes suggests that, by adopting them in lieu of the more abbreviated § 3-116(j), Nevada was *sub silentio*

rejecting the UCIOA's use of "institution of an action to enforce the lien" as applying to either judicial or nonjudicial foreclosures—much less distinguishing, though without saying so, between the subpriority piece of an HOA's lien, to which the nonjudicial foreclosure procedures detailed in NRS 116.31162 through NRS 116.31168 would apply, and the superpriority piece of an HOA's lien, which would require a judicial foreclosure proceeding not actually mentioned in Chapter 116. If anything, Nevada's elaborate nonjudicial foreclosure provisions signal the Legislature's embrace of nonjudicial foreclosure of HOA liens, not the opposite.

Recall that, unlike § 3-116(b), which currently limits the superpriority piece of an HOA's lien to six months of unpaid dues, Nevada's superpriority lien covers nine months of dues as well as maintenance and nuisance-abatement charges "incurred . . . pursuant to NRS 116.310312." NRS 116.3116(2); *see supra* note 1. Addressing maintenance and nuisance-abatement charges, NRS 116.310312(4) expressly cross-references Chapter 116's nonjudicial foreclosure provisions, stating that "[t]he lien may be foreclosed under NRS 116.31162 to 116.31168, inclusive." The maintenance and nuisance-abatement statute borrows the phrase "institution of an action to enforce the lien" from NRS 116.3116 in explaining that even if federal law requires a shorter period of priority, "the period of priority of the lien must not be less than the 6 months immediately preceding the institution of an action to enforce the lien." NRS 116.310312(6). This phrasing is underinclusive and beyond confusing unless read to encompass judicial and nonjudicial foreclosures alike, both in NRS 116.310312(6) and in its statute of origin, NRS 116.3116(2).

The Nevada Real Estate Division of the Department of Business and Industry (NRED) is charged with administering Chapter 116. NRS 116.615; *see State, Dep't of Bus. & Indus. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 368, 294 P.3d 1223, 1227-28 (2012). NRS 116.623(1)(a) tasks NRED with issuing "advisory opinions as to the applicability or interpretation of . . . [a]ny provision of this chapter." On December 12, 2012, NRED issued Advisory Opinion No. 13-01. The opinion addresses, among other questions, whether NRS 116.3116(2) requires a civil action by an HOA to foreclose the superpriority piece of its lien. NRED opines that it does not: "The association is not required to institute a civil action in court to trigger the 9 month look back provided in NRS 116.3116(2)." 13-01 Op. Dep't of Bus. & Indus., Real Estate Div. 18 (2012). Elaborating, the NRED opinion states, "NRS 116 does not require an association to take any particular action to enforce its lien, but [only] that it institutes 'an action,'" which includes the HOA taking action under NRS 116.31162 to initiate the nonjudicial foreclosure process. *Id.* at 17-18. NRED's interpretation is persuasive, as it comports with

both the statutory text and the JEB's interpretation of the UCIOA. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 157, 127 P.3d 1088, 1106 (2006).

U.S. Bank and the dissent argue that judicial foreclosure should be required as a matter of policy because of the safeguards it offers—notice and an opportunity to be heard, court supervision of the sale, judicial review of the amount of the lien comprising the superpriority piece, and a one-year redemption period. *See* NRS 40.430-.463; NRS 21.190-.210. But this argument assumes that requiring the superpriority piece of an HOA lien to be judicially foreclosed will actually afford such protections without need of further amendment to Chapter 116, and this is far from clear. To allow nonjudicial foreclosure of the subpriority piece, which is where the dissent would draw the judicial v. nonjudicial foreclosure line, produces the same difficulties for the homeowners and junior lienholders that are cited as policy reasons for requiring judicial foreclosure of the superpriority piece of the lien; the only difference is the benefit that would inure to first security holders under the dissent's interpretation of Chapter 116. Surely, if the Legislature intended such an unusual distinction, it would have said so explicitly, but it did not.

We recognize that "there has been considerable publicity across the country regarding alleged abuse in the foreclosure process when unit owners fail to pay sums due" their HOA, prompting amendments to the UCIOA that "propose[ ] new and considerable restrictions on the foreclosure process as it applies to common interest communities." *Prefatory Note to the 2008 Amendments to the UCIOA*, 7 U.L.A., part IB, at 225 (2009). But the choice of foreclosure method for HOA liens is the Legislature's, and the Nevada Legislature has written NRS Chapter 116 to allow nonjudicial foreclosure of HOA liens, subject to the special notice requirements and protections handcrafted by the Legislature in NRS 116.31162 through NRS 116.31168. Countervailing policy arguments exist in favor of allowing nonjudicial foreclosure, including that judicial foreclosure takes longer to accomplish, thereby delaying the common-interest community's receipt of needed HOA funds. The consequences of such delays can be "devastating to the community and the remaining residents," who must either make up the dues deficiencies, arguably unjustly enriching the delaying lender, or abandon amenities and maintenance, thereby impairing the value of their homes. JEB, *The Six-Month "Limited Priority Lien,"* at 4-5. If revisions to the foreclosure methods provided for in NRS Chapter 116 are appropriate, they are for the Legislature to craft, not this court.

D.

U.S. Bank makes two additional arguments that merit brief discussion. First, the lender contends that the nonjudicial foreclosure

in this case violated its due process rights. Second, it invokes the mortgage savings clause in the Southern Highlands CC&Rs, arguing that this clause subordinates SHHOA's lien to the first deed of trust. Neither argument holds up to analysis.

1.

[Headnotes 4, 5]

SFR is appealing the dismissal of its complaint for failure to state a claim upon which relief can be granted. NRCP 12(b)(5). The complaint alleges that "the HOA foreclosure sale complied with all requirements of law, including but not limited to, recording and mailing of copies of Notice of Delinquent Assessment and Notice of Default, and the recording, posting and publication of the Notice of Sale." It further alleges that, "prior to the HOA foreclosure sale, no individual or entity paid the super-priority portion of the HOA Lien representing 9 months of assessments for common expenses." In view of the fact that the "requirements of law" include compliance with NRS 116.31162 through NRS 116.31168 and, by incorporation, NRS 107.090, *see* NRS 116.31168(1), we conclude that U.S. Bank's due process challenge to the lack of adequate notice fails, at least at this early stage in the proceeding.[6]

The contours of U.S. Bank's due process argument are protean. To the extent U.S. Bank argues that a statutory scheme that gives an HOA a superpriority lien that can be foreclosed nonjudicially, thereby extinguishing an earlier filed deed of trust, offends due process, the argument is a nonstarter. As discussed in *7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1152:

> Chapter 116 was enacted in 1991, and thus [the lender] was on notice that by operation of the statute, the [earlier recorded] CC&Rs might entitle the HOA to a super priority lien at some future date which would take priority over a [later recorded] first deed of trust . . . . Consequently, the conclusion that foreclosure on an HOA super priority lien extinguishes all junior liens, including a first deed of trust recorded prior to a notice of delinquent assessments, does not violate [the lender's] due process rights.

Accord Nationstar Mortg., 2014 WL 3661398, at *3 (rejecting a due process challenge to nonjudicial foreclosure of a superpriority lien).

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[6]On a motion to dismiss, a court must take all factual allegations in the complaint as true and not delve into matters asserted defensively that are not apparent from the face of the complaint. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Consistent with this standard, we note but do not resolve U.S. Bank's suggestion that we could affirm by deeming SFR's purchase "void as commercially unreasonable."

U.S. Bank further complains about the content of the notice it received. It argues that due process requires specific notice indicating the amount of the superpriority piece of the lien and explaining how the beneficiary of the first deed of trust can prevent the superpriority foreclosure sale. But it appears from the record that specific lien amounts were stated in the notices, ranging from $1,149.24 when the notice of delinquency was recorded to $4,542.06 when the notice of sale was sent. The notices went to the homeowner and other junior lienholders, not just U.S. Bank, so it was appropriate to state the total amount of the lien. As U.S. Bank argues elsewhere, dues will typically comprise most, perhaps even all, of the HOA lien. *See supra* note 3. And from what little the record contains, nothing appears to have stopped U.S. Bank from determining the precise superpriority amount in advance of the sale or paying the entire amount and requesting a refund of the balance. *Cf. In re Medaglia*, 52 F.3d 451, 455 (2d Cir. 1995) ("[I]t is well established that due process is not offended by requiring a person with actual, timely knowledge of an event that may affect a right to exercise due diligence and take necessary steps to preserve that right."). On this record, at the pleadings stage, we credit the allegations of the complaint that SFR provided all statutorily required notices as true and sufficient to withstand a motion to dismiss. *See 7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1152-53.

2.

[Headnote 6]

U.S. Bank last argues that, even if NRS 116.3116(2) allows nonjudicial foreclosure of a superpriority lien, the mortgage savings clause in the Southern Highlands CC&Rs subordinated SHHOA's superpriority lien to the first deed of trust. The mortgage savings clause states that "no lien created under this Article 9 [governing nonpayment of assessments], nor the enforcement of any provision of this Declaration shall defeat or render invalid the rights of the beneficiary under any Recorded first deed of trust encumbering a Unit, made in good faith and for value." It also states that "[t]he lien of the assessments, including interest and costs, shall be subordinate to the lien of any first Mortgage upon the Unit."

NRS 116.1104 defeats this argument. It states that Chapter 116's "provisions may not be varied by agreement, and rights conferred by it may not be waived . . . [e]xcept as *expressly* provided in" Chapter 116. (Emphasis added.) "Nothing in [NRS] 116.3116 expressly provides for a waiver of the HOA's right to a priority position for the HOA's super priority lien." *See 7912 Limbwood Court Trust*, 979 F. Supp. 2d at 1153. The mortgage savings clause thus does not af-

fect NRS 116.3116(2)'s application in this case.[7] *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 407, 215 P.3d 27, 34 (2009) (holding that a CC&Rs clause that created a statutorily prohibited voting class was void and unenforceable).

III.

NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust. Because Chapter 116 permits nonjudicial foreclosure of HOA liens, and because SFR's complaint alleges that proper notices were sent and received, we reverse the district court's order of dismissal. In view of this holding, we vacate the order denying preliminary injunctive relief and remand for further proceedings consistent with this opinion.

HARDESTY, DOUGLAS, and SAITTA, JJ., concur.

GIBBONS, C.J., with whom PARRAGUIRRE and CHERRY, JJ., agree, concurring in part and dissenting in part:

While I concur with the majority that NRS 116.3116(2) establishes a true superpriority for an HOA's lien, the enforcement of the superpriority portion of the lien requires institution of an action. I would conclude that this statutory language mandates that a civil judicial foreclosure complaint be filed in order to extinguish a first deed of trust.

The Legislature's use of the term "action" indicates that a superpriority lienholder must file a judicial foreclosure complaint

The phrase "institution of an action" may not inherently mean the filing of a judicial action. *See Black's Law Dictionary* 800 (6th ed. 1990) (defining "institution" as "[t]he commencement or inauguration of anything, as the commencement of an action"); *id.* at 28 (defining "action" as "[c]onduct; behavior; something done; the condition of acting; an act or series of acts"). But when used in "its usual legal sense," "action" means "a lawsuit brought in a court." *Id.*; *see also BP Am. Prod. Co. v. Burton*, 549 U.S. 84, 91 (2006) ("The key terms in this provision—'action' and 'complaint'—are ordinarily used in connection with judicial, not administrative, proceedings.").

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[7]*Coral Lakes Community Ass'n v. Busey Bank, N.A.*, 30 So. 3d 579 (Fla. Dist. Ct. App. 2010), on which U.S. Bank relies, does not suggest a different result. The CC&Rs that contained the subordination clause in *Coral Lakes* were in place before the statute that limited the ability to subrogate association liens took effect. *Id.* at 581-84 & 582 n.3. The court refused to enforce the statute because disturbing the prior, contractual relationship "would implicate constitutional concerns about impairment of vested contractual rights." *Id.* at 584. Here, however, the Southern Highlands CC&Rs were recorded after the Legislature adopted and enacted Chapter 116, so no similar concerns about impairment of any party's vested contractual rights arise.

In my view, NRS 116.3116 is using "action" in its usual legal sense. Other subsections in NRS 116.3116 reference concepts specific to judicial proceedings in relation to the word "action." NRS 116.3116(8) states that a "judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." NRS 116.3116(11) states:

> In an action by an association to collect assessments or to foreclose a lien created under this section, the court may appoint a receiver to collect all rents or other income from the unit alleged to be due and owing to a unit's owner before commencement or during pendency of the action . . . . The court may order the receiver to pay any sums held by the receiver to the association during pendency of the action to the extent of the association's common expense assessments . . . .

The way NRS 116.3116 uses action to indicate a court action demonstrates that "institution of an action" means the filing of a judicial proceeding. *See Savage v. Pierson*, 123 Nev. 86, 94 & n.32, 157 P.3d 697, 702 & n.32 (2007) ("[I]f a word is used in different parts of a statute, it will be given the same meaning unless it appears from the whole statute that the Legislature intended to use the word differently.").

To be sure, Chapter 116 does not consistently use "action" to mean a judicial action. *See, e.g.*, NRS 116.2119 (the association's declaration may require that the lenders who hold security interests in the units "approve specified actions of the units' owners or the association as a condition to the effectiveness of those actions" but it may not require approval for certain specified nonjudicial "actions"); NRS 116.785(1) (giving the Commission for Common-Interest Communities and Condominium Hotels, if it finds a violation of NRS Chapter 116, the authority to "take any or all of the following actions," and providing various nonjudicial actions). But when Chapter 116 uses a phrase akin to "institution of an action," it signals the filing of an action in court. *See, e.g.*, NRS 116.2124 (any person holding an interest in a common interest community "may *commence an action* in the district court" to terminate the community in the event of a catastrophe (emphasis added)); NRS 116.31088 (discussing rules for when the association is considering "*the commencement of a civil action*" (emphasis added)); NRS 116.320(3) ("In *any action commenced to enforce* the provisions of this section, the prevailing party is entitled to recover reasonable attorney's fees and costs." (emphasis added)); NRS 116.795(1) (the regulatory agency "may *bring an action* in . . . any court of competent jurisdiction" to enjoin further continuing violations of Chapter 116 (emphasis added)). The specific phraseology used in NRS 116.3116(2), "institution of an action," demonstrates that a judicial action, rather than just any enforcement action, was what the Legislature con-

templated as the method for extinguishing a first deed of trust. *See also Benson v. Zoning Bd. of Appeals of Town of Westport*, 873 A.2d 1017, 1021-24 (Conn. App. Ct. 2005) (concluding that although the phrase "institution of an action" as used in the statute at issue was ambiguous, the phrase had "never been held to mean anything other than the filing of a civil action in court" and that the legislature had not made it clear that other proceedings would suffice).

I recognize that Chapter 116 gives the association the option to enforce its lien through nonjudicial foreclosure by following the procedures provided in NRS 116.31162 to 116.31168. The association may even nonjudicially foreclose on its lien for maintenance and abatement charges, charges that may be included in the superpriority portion of the association's lien. *See* NRS 116.310312(4). But, as explained, the lien's superpriority is tied to the "institution of an action to enforce the lien." NRS 116.3116(2); NRS 116.310312(6). Thus, I would conclude that while the association has the option to nonjudicially foreclose on its lien, it must foreclose through judicial action in order to trigger the extinguishing effect of the superpriority portion of its lien.

The NRED advisory opinion should not be given deference because it conflicts with NRS 116.3116(2)'s statutory language

This conclusion is in disagreement with the agency charged with regulating and administering Chapter 116, the Nevada Department of Business and Industry's Real Estate Division (NRED). *See* NRS 116.615; NRS 116.623; *State, Dep't of Bus. & Indus. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 368, 294 P.3d 1223, 1227 (2012). NRED has interpreted "action to enforce the lien" as being met by an association taking action to nonjudicially foreclose on its lien pursuant to NRS 116.31162; thus, according to NRED, an association need not file a civil judicial action to trigger the superpriority portion of the association's lien under NRS 116.3116(2). *See* 13-01 Op. Dep't of Bus. & Indus., Real Estate Div. 17-18 (2012).

However, only agency interpretations that are within the statutory language are afforded deference, *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013), and NRED's interpretation is not within NRS 116.3116's language. Although NRS Chapter 116's statutory scheme allows an association to nonjudicially foreclose on its lien, it must judicially foreclose to trigger the superpriority effect of its lien. *See* NRS 116.3116(2).

The Nevada Legislature intentionally departed from the model code to require institution of a judicial action in NRS 116.3116

I also recognize that NRS 116.3116(2)'s proclamation that the association must file a judicial action to trigger the superpriority effect of its lien is at odds with the uniform act upon which the statute was

based. The Joint Editorial Board for Uniform Real Property Acts, which counsels the Uniform Law Commission on uniform real estate laws, has stated that an association may foreclose on superpriority portions of its lien and extinguish the first security "in the manner in which a mortgage is foreclosed"; so, "an association may foreclose its lien by nonjudicial proceedings if the state permits nonjudicial foreclosure." Joint Editorial Board for Uniform Real Property Acts, *The Six-Month "Limited Priority Lien" for Association Fees Under the Uniform Common Interest Ownership Act*, at 9 n.8 (2013).

This interpretation is consistent with the UCIOA section upon which NRS 116.3116 is based. The uniform act allows for an adopting state to insert its authorized foreclosure method, whether it be judicial foreclosure or by power of sale. But once the adopting state chooses a method, it becomes mandatory:

> (1) In a condominium or planned community, the association's lien *must be foreclosed* in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];
>
> (2) In a cooperative whose unit owners' interests in the units are real estate (Section 1-105), the association's lien *must be foreclosed* in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or
>
> (3) In a cooperative whose unit owners' interests in the units are personal property (Section 1-105), the association's lien *must be foreclosed* in like manner as a security interest under [insert reference to Article 9, Uniform Commercial Code].

1982 UCIOA § 3-116(j) (emphases added).

NRS 116.3116 departed from the uniform act in that it permits, but does not mandate, nonjudicial foreclosure. *See* NRS 116.3116(7) ("This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure."). And, NRS 116.3116(2), as well as NRS 116.310312(6), tie the "institution of an action" to the triggering of the lien's superpriority effect. NRS 116.3116's variance from the uniform act renders the Joint Editorial Board's report interpreting the uniform act's intentions not informative on the proper reading of "institution of an action" as used in NRS 116.3116(2). *See Sallee v. Stewart*, 827 N.W.2d 128, 142 (Iowa 2013) (citing 2B Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 52:5, at 370 (rev. 7th ed. 2012), for "noting that ordinarily 'when a legislature models a statute after a uniform act, but does not adopt particular language, courts conclude the omission was "deliberate" or "intentional," and that the legislature rejected a particular policy of the uniform act'").

Furthermore, the report post-dates the Legislature's adoption of the UCIOA. And while preenactment official commentary to uniform acts, including the UCIOA, generally may inform this court's understanding of the Legislature's codification of that uniform act, *see Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 405-06, 215 P.3d 27, 32-33 (2009) (considering the UCIOA's official comments when interpreting Nevada's codification of the uniform act), this post-hoc commentary is not persuasive, especially in the face of statutory language that states otherwise. *Cf. Ybarra v. State*, 97 Nev. 247, 249, 628 P.2d 297, 297-98 (1981) (noting that generally, "a statute adopted from another jurisdiction will be presumed to have been adopted with the construction placed upon it by the courts of that jurisdiction *before* its adoption" (emphasis added)); 2B Norman J. Singer & J.D. Shambie Singer, *Statutes & Statutory Construction* § 52:2 (rev. 7th ed. 2012) ("When the state of origin interprets a statute after the adopting state statute has been enacted, courts do not presume the adopting state also adopted the subsequent construction.").

Policy considerations

In my view, the Legislature's decision to require associations to judicially foreclose their lien to extinguish the first security interest alleviates potential problems that could arise under the majority's holding that nonjudicial foreclosures are enough. As the majority points out, by incorporating certain notice provisions from Chapter 107, Chapter 116 appears to mandate that the association mail the notice of default and notice of sale to the first security holders who have recorded their security interest when the association is foreclosing on its lien. NRS 116.31168(1); NRS 107.090. But what the majority fails to adequately address is that the association is not required to indicate in its notices that superpriority portion of its lien being foreclosed on, let alone what the amount of the superpriority portion is: the association's notice of delinquent assessment and notice of default and election to sell need only state "the assessments and other sums which are due in accordance with subsection 1 of NRS 116.3116." NRS 116.31162(1)(a); NRS 116.31162(1)(b); *see also* NRS 116.311635(3)(a) (notice of sale must provide "the amount necessary to satisfy the lien"). Although the first security holder could prevent the extinguishment of its interest by purchasing the property at the association's foreclosure sale, *see Carrillo v. Valley Bank of Nev.*, 103 Nev. 157, 158, 734 P.2d 724, 725 (1987), *Keever v. Nicholas Beers Co.*, 96 Nev. 509, 515, 611 P.2d 1079, 1083 (1980), in the nonjudicial foreclosure setting, first security interest holders have no means by which to determine whether an association is even foreclosing on superpriority portions of its lien such as to prompt it to purchase the property at the association's

sale. Thus, in my view, the majority fails to give adequate consideration to the due process implications of its holding. *Cf. Kotecki v. Augusztiny*, 87 Nev. 393, 395, 487 P.2d 925, 926 (1971) (" '(W)hen notice is a person's due, process which is a mere gesture is not due process. The means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it.' " (quoting *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950))).

Relatedly, after the first deed of trust loses its security in the property pursuant to the association's foreclosure of its superpriority lien, the former homeowner generally will be liable for the amount still owed on the debt. NRS 40.455. Under the majority's holding, in the nonjudicial foreclosure setting, the owner will be left with no mechanism by which to obtain the property's value as an offset against the amount still owed. For example, even if the foreclosure-sale purchaser took the property for an amount significantly lower than its fair market value, the owner would not have an unjust enrichment action against that purchaser; a sale under the nonjudicial foreclosure scheme for an association's lien "vests in the purchaser the title of the unit's owner without equity or right of redemption." NRS 116.31166(3). This also means that the owner, as well as the first security, will have no right to redeem the property under the majority's holding. NRS 116.31166(3); *see also Bldg. Energetix Corp. v. EHE, LP*, 129 Nev. 78, 85, 294 P.3d 1228, 1233 (2013) (recognizing that there is no right to redeem after a Chapter 107 nonjudicial foreclosure sale because a sale under that chapter " 'vests in the purchaser the title of the grantor and any successors in interest *without equity or right of redemption*' " (quoting NRS 107.080(5))).

But if the association follows the Legislature's directive and forecloses through court action, *see* NRS 116.3116(2), then the rules governing civil proceedings, *see generally* NRS Title 2, Chapters 10-22, and specifically the rules governing actions affecting real property, as well as the Nevada Rules of Civil Procedure, would govern.[1] A specific protection that comes with judicial foreclosure is the one-year right of redemption that is available to both the property owner and the otherwise-extinguished junior lienholders, which includes the first security interest in this context. NRS 21.190; 21.200; 21.210; *see also Bldg. Energetix Corp.*, 129 Nev. at 85, 294 P.3d at 1233. If the owner or junior lienholders pay what the purchaser at the judicial foreclosure sale paid to acquire the property, plus any other statutorily required amounts, they can redeem the property,

[1]NRS 40.430's "one action" rule for recovery of debt or enforcement of rights secured by a mortgage or other lien upon real property would not govern the association's judicial foreclosure action, as liens that arise pursuant to an assessment under Chapter 116 are not considered a "mortgage or other lien." NRS 40.433.

NRS 21.200; 21.210; 21.220, allowing the property's value to be applied to the first security interest's outstanding loan amount. The full adjudication of the rights between the pertinent parties and as to the property, including the association, the owner, and the first security interest, as well as any other pertinent party, combined with the statutory protections afforded with a judicial foreclosure, further demonstrate that judicial foreclosure on an association's lien is necessary to trigger its superpriority effect under NRS 116.3116(2).