ROBERT LOGAN AND JAMIE LOGAN, HUSBAND AND WIFE, APPELLANTS, *v.* CALVIN J. ABE, AN INDIVIDUAL; RON MARTINSON, AN INDIVIDUAL; AND ABE PACIFIC HEIGHTS PROPERTIES, LLC, A FOREIGN LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 63980

June 4, 2015 350 P.3d 1139

Appeal from a post-judgment award of attorney fees and costs in a personal injury action. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Plaintiffs, one of whom had been shot by hotel employee, brought personal injury action against hotel owner, hotel operator, and hotel general manager. Following a jury trial, the district court awarded defendants $71,907.50 in attorney fees and $24,812.60 in costs, including $7,290 for the fees of an expert witness who did not testify. Plaintiffs appealed. The supreme court, SAITTA, J., held that: (1) defendants had standing to pursue claim for attorney fees and costs; (2) in an apparent matter of first impression, defendants were eligible to recover attorney fees and costs incurred after offer of judgment was made when personal injury plaintiffs failed to improve on defendants' offer of judgment, even though defendants' liability insurer paid the fees and costs; (3) substantial evidence existed to support award of attorney fees in the amount of $71,907.50; and (4) the district court did not abuse its discretion in awarding hotel owner, hotel operator, and hotel general manager expert witness fees in excess of $1,500.

Affirmed.

Wm. Patterson Cashill, Ltd., and *Wm. Patterson Cashill*, Reno; *Bradley, Drendel & Jeanney* and *William C. Jeanney*, Reno, for Appellants.

LeVangie Law Group and *Jeffery C. Long, Jason A. Rose*, and *Michael J. LeVangie*, Carson City, for Respondents.

1. COSTS.
   For purposes of a cost and reasonable attorney fee award, a party incurs an expense at the time the expense is paid or the party becomes legally obligated to pay it, and the party need not actually pay the expense to have incurred it.
2. COSTS.
   Hotel owner, hotel operator, and hotel general manager, who were defendants in personal injury action brought by plaintiffs, one of whom had been shot by hotel employee, had standing to pursue claim for attorney fees and costs because they made their claims on their own behalf and not on behalf of another entity.

3. Appeal and Error.
   Standing is a question of law reviewed de novo.
4. Action.
   A party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court.
5. Costs.
   Hotel owner, hotel operator, and hotel general manager were eligible to recover attorney fees and costs incurred after offer of judgment was made when personal injury plaintiffs failed to improve on defendants' offer of judgment, even though defendants' liability insurer paid the fees and costs, when defendants would otherwise be legally obligated to pay the expenses regardless of the insurer's payment. NRS 17.115; NRCP 68.
6. Appeal and Error.
   When a party's eligibility for a fee award is a matter of statutory interpretation or the interpretation of court rules, the district court's decision is reviewed de novo.
7. Statutes.
   The supreme court interprets clear and unambiguous statutes based on their plain meaning.
8. Statutes.
   In the absence of an ambiguity, the supreme court does not resort to other sources, such as legislative history, in ascertaining a statute's meaning.
9. Courts.
   Because the rules of statutory interpretation apply to the Rules of Civil Procedure, the supreme court interprets rules of civil procedure by their plain meaning.
10. Costs.
    Substantial evidence existed to support the district court's award of attorney fees in the amount of $71,907.50 to defendants under the factors set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), in personal injury action by plaintiffs, one of whom was shot by hotel employee, against hotel owner, hotel operator, and hotel general manager; the district court stated in its order that it analyzed the fees pursuant to *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and *Brunzell*, and that the individual elements of those cases supported a discretionary award of attorney fees and costs.
11. Appeal and Error.
    The supreme court reviews an award of attorney fees for an abuse of discretion and will affirm an award that is supported by substantial evidence.
12. Costs.
    In determining the amount of fees to award, the district court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the factors set out in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969).
13. Costs.
    While it is preferable for a district court to expressly analyze each factor set forth in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 455 P.2d 31 (1969), relating to an award of attorney fees, express findings on each factor are not necessary for a district court to properly exercise its discretion.

14. Costs.

The district court did not abuse its discretion in awarding hotel owner, hotel operator, and hotel general manager expert witness fees in excess of $1,500, even though the defendants did not depose the witness or call him at trial on personal injury claim brought by plaintiffs, one of whom had been shot by hotel employee, because the plaintiffs decided on the eve of trial not to call their expert, and the circumstances surrounding the lack of defendants' expert's testimony was of the plaintiffs' creation. NRS 17.115(4)(d)(1), 18.005(5).

15. Appeal and Error.

An award of costs is reviewed for an abuse of discretion.

Before Saitta, Gibbons and Pickering, JJ.

OPINION

By the Court, Saitta, J.:

A party who makes an unimproved-upon offer of judgment—an offer that is more favorable to the opposing party than the judgment ultimately rendered by the district court—is entitled to recover costs and reasonable attorney fees incurred after making the offer of judgment. NRS 17.115(4); NRCP 68(f)(2). At issue here is (1) whether a party can recover these expenses if they were paid by a third party on the party's behalf, (2) whether the district court abused its discretion in the present case by awarding attorney fees, and (3) whether the district court abused its discretion in the present case by awarding costs in excess of $1,500 for the fees of an expert witness that did not testify and was not deposed.

[Headnote 1]

Because a party incurs an expense at the time the expense is paid or the party "become[s] legally obligated to pay it," *United Services Auto Ass'n v. Schlang*, 111 Nev. 486, 490, 894 P.2d 967, 969 (1995) (internal quotations omitted), the party need not actually pay the expense to have incurred it. Therefore, we hold that a party can incur an expense even if a third party pays the expense on the party's behalf, as long as the party would otherwise be legally obligated to pay the expense. Thus, costs and reasonable attorney fees that a third party paid on behalf of a litigant can be recovered under NRS 17.115(4) and NRCP 68(f)(2). In addition, we conclude that in the present case the district court did not abuse its discretion in awarding expert witness fees in excess of $1,500 for an expert who did not testify at trial and was not deposed.

FACTUAL AND PROCEDURAL HISTORY

Appellants Robert and Jamie Logan sued respondents Calvin J. Abe, Abe Pacific Heights Properties, LLC (Abe Properties), and

Ron Martinson for personal injuries that Robert Logan suffered when he was shot by an employee of a hotel. The Logans alleged that Abe Properties owned the hotel, Abe operated the hotel, and Martinson was the hotel's general manager.

Before trial, Abe, Abe Properties, and Martinson made an offer of judgment to the Logans in which they offered to pay $55,000 to settle the Logans' claims. The record does not show that the Logans accepted this offer, and the case proceeded to a jury trial.

After the jury returned a verdict in their favor, Abe, Abe Properties, and Martinson made a motion for attorney fees and costs, which had been paid by their insurer. The Logans opposed the motion. Reasoning that Abe, Abe Properties, and Martinson were entitled to attorney fees and costs under NRS 17.115 and NRCP 68 because the Logans failed to improve upon their offer of judgment, the district court awarded $71,907.50 in attorney fees and $24,812.60 in costs, including $7,290 for the fees of an expert witness who did not testify. The Logans now appeal the award of attorney fees and costs.

DISCUSSION

Abe, Abe Properties, and Martinson have standing to seek attorney fees

[Headnote 2]

As a preliminary matter, the Logans argue that Abe, Abe Properties, and Martinson lack standing because they did not actually pay the attorney fees and costs.

[Headnotes 3, 4]

"Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011). Under Nevada law, "a party generally has standing to assert only its own rights and cannot raise the claims of a third party not before the court." *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 731, 291 P.3d 128, 133 (2012). Here, Abe, Abe Properties, and Martinson made claims for attorney fees and costs on their own behalf and not on behalf of another entity. Therefore, they have standing to pursue their claim for attorney fees and costs. *See id*.

The district court correctly found that Abe, Abe Properties, and Martinson are eligible to recover attorney fees and costs

[Headnote 5]

The Logans argue that NRS 17.115 and NRCP 68 only allow recovery of attorney fees and costs that a party actually pays or has a legal duty to pay. Thus, they contend that Abe, Abe Properties, and Martinson are not eligible to recover attorney fees and costs in this case because their insurer paid these expenses.

[Headnote 6]

"[W]hen a party's eligibility for a fee award is a matter of statutory interpretation" or the interpretation of court rules, we review the district court's decision de novo. *In re Estate & Living Trust of Miller*, 125 Nev. 550, 553, 216 P.3d 239, 241 (2009); *see Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012) (reviewing "legal conclusions regarding court rules" de novo).

[Headnotes 7-9]

We interpret clear and unambiguous statutes based on their plain meaning. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). "In the absence of an ambiguity, we do not resort to other sources, such as legislative history, in ascertaining that statute's meaning." *Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013). Because "the rules of statutory interpretation apply to Nevada's Rules of Civil Procedure," *Webb v. Clark County School District*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009), we interpret unambiguous statutes, including rules of civil procedure, by their plain meaning. *See Cromer*, 126 Nev. at 109, 225 P.3d at 790.

NRS 17.115 and NRCP 68 allow a party who made an unimproved-upon offer of judgment to recover certain attorney fees and costs

In relevant part, NRS 17.115(4) states:

> Except as otherwise provided in this section, if a party who rejects an offer of judgment fails to obtain a more favorable judgment, the court:
>
> . . .
>
> (c) *Shall order the party to pay the taxable costs incurred by the party who made the offer*; and
>
> (d) May order the party to pay to the party who made the offer any or all of the following:
>
> (1) A reasonable sum *to cover any costs incurred by the party who made the offer for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case.*
>
> . . . .
>
> (3) *Reasonable attorney's fees incurred by the party who made the offer for the period from the date of service of the offer to the date of entry of the judgment*. If the attorney of the party who made the offer is collecting a contingent fee, the amount of any attorney's fees awarded to the party pursuant to this subparagraph must be deducted from that contingent fee.

(Emphases added.) In relevant part, NRCP 68(f)(2) provides that if an offeree fails to improve upon a rejected offer of judgment, "*the*

offeree shall pay the offeror's post-offer costs, applicable interest on the judgment from the time of the offer to the time of entry of the judgment *and reasonable attorney's fees, if any be allowed, actually incurred by the offeror from the time of the offer*. . . ." (Emphases added.) Thus, both the statute and the rule authorize a party who makes an offer of judgment that is not improved upon to recover the reasonable attorney fees and costs incurred after the offer of judgment was made. NRS 17.115(4)(c)-(d); NRCP 68(f)(2).

An expense is incurred if a party has an obligation to pay it without regard to whether the party actually pays the expense

"An expense can only be 'incurred' when one has paid it or become legally obligated to pay it." *United Servs. Auto Ass'n v. Schlang*, 111 Nev. 486, 490, 894 P.2d 967, 969 (1995) (internal quotations omitted). While we have not directly addressed the issue of whether a party incurs an expense that is ultimately satisfied by another party, other jurisdictions have persuasively held that an expense can be incurred even if it is ultimately satisfied by someone other than the party. A North Carolina appellate court has held that a party incurs an expense if it would have been liable to pay the expense regardless of whether a third party had paid it. *Hoffman v. Oakley*, 647 S.E.2d 117, 124 (N.C. Ct. App. 2007) (interpreting "incur" in the context of an insurer's payment of an insured's litigation expenses). Similarly, a Colorado appellate court has held that expenses are incurred when paid on a party's behalf by its insurer because "[t]he arrangement between [a] defendant and [its] liability insurer for the disbursement and repayment of those costs is of no consequence." *Mullins v. Kessler*, 83 P.3d 1203, 1204 (Colo. App. 2003); c*f. Manor Healthcare Corp. v. Lomelo*, 929 F.2d 633, 639 (11th Cir. 1991) (holding that a prevailing party may recover litigation costs without regard to whether a third party advanced the funds for the costs); *Aspen v. Bayless*, 564 So. 2d 1081, 1083 (Fla. 1990) (same). We therefore extend *Schlang* and hold that a party can incur an expense that was paid on its behalf if the party would have been liable for the expense regardless of the third party's payment.

NRS 17.115 and NRCP 68 allow a party to recover costs and reasonable attorney fees that a third party paid on its behalf

NRS 17.115 and NRCP 68 each authorize a party to recover the reasonable attorney fees and costs that it incurs after it makes an offer of judgment that is not improved upon. NRS 17.115(4)(c)-(d); NRCP 68(f)(2). Because the statutes are limited to the costs incurred rather than the party who pays them, we therefore hold that NRS 17.115 and NRCP 68 allow a party to recover qualifying attorney fees and costs that were paid on its behalf by a third party. Thus, Abe, Abe Properties, and Martinson were eligible to recover the

post-offer costs and reasonable attorney fees that their insurer paid on their behalf.

The district court did not abuse its discretion by awarding attorney fees to Abe, Abe Properties, and Martinson

[Headnote 10]

The Logans argue that Abe, Abe Properties, and Martinson are not entitled to recover attorney fees because they failed to demonstrate that the award satisfied the factors set out in *Brunzell v. Golden Gate National Bank*, 85 Nev. 345, 349, 455 P.2d 31, 33 (1969).[1]

[Headnote 11]

We review an award of attorney fees for an abuse of discretion, *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1027-28 (2006), and will affirm an award that is supported by substantial evidence. *See Uniroyal Goodrich Tire Co. v. Mercer*, 111 Nev. 318, 324, 890 P.2d 785, 789 (1995), *superseded by statute on other grounds as discussed in RTTC Commc'ns, LLC v. Saratoga Flier, Inc.*, 121 Nev. 34, 41-42 & n.20, 110 P.3d 24, 29 & n.20 (2005).

[Headnotes 12, 13]

"In determining the amount of fees to award, the [district] court is not limited to one specific approach; its analysis may begin with any method rationally designed to calculate a reasonable amount, so long as the requested amount is reviewed in light of the" *Brunzell* factors. *Haley v. Eighth Judicial Dist. Court*, 128 Nev. 171, 178, 273 P.3d 855, 860 (2012) (internal quotations omitted). While it is preferable for a district court to expressly analyze each factor relating to an award of attorney fees, express findings on each factor are not necessary for a district court to properly exercise its discretion. *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 383, 283 P.3d 250, 258 (2012). Instead, the district court need only demonstrate that it considered the required factors, and the award must be supported by substantial evidence. *See Uniroyal Goodrich Tire*, 111 Nev. at 324, 890 P.2d at 789.

Here, the district court stated in its order that it "analyzed the fees pursuant to *Beattie v. Thomas*, 99 Nev. 579, 668 P.2d 268 (1983), and *Brunzell*" and that "[t]he individual elements of these cases support the discretionary award of fees and costs." Since the district court demonstrated that it considered the *Brunzell* factors, its award of attorney fees will be upheld if it is supported by substantial

[1]The Logans also contend that Abe, Abe Properties, and Martinson submitted a deficient attorney's declaration with their motion for attorney fees. This argument is without merit because the attorney's declaration complied with NRCP 54(d)(2)(B) and NRS 53.045.

evidence. *See Uniroyal Goodrich Tire*, 111 Nev. at 324, 890 P.2d at 789.

In the instant case, the district court issued an order awarding $71,907.50 in attorney fees and commenting favorably on the quality of the work performed by Abe, Abe Properties, and Martinson's attorneys. Although the district court's order states that it considered the attorneys' invoices, they are not included in the appellate record. Because these invoices were omitted from the appellate record, we must presume that they support the district court's award of attorney fees under the *Brunzell* factors. *See Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007). We therefore conclude that the district court did not abuse its discretion in awarding attorney fees.

The district court did not abuse its discretion in awarding costs to Abe, Abe Properties, and Martinson

[Headnote 14]

The Logans argue that the district court abused its discretion by violating NRS 18.005(5) in awarding more than $1,500 in costs to Abe, Abe Properties, and Martinson for the fees of one of their experts. As part of this argument, they contend that the district court's award of expert witness expenses was unwarranted because the expert witness was not deposed and did not testify.[2] On appeal, the Logans do not dispute the reasonableness or necessity of the fees charged by Abe, Abe Properties, and Martinson's expert witness.

[Headnote 15]

We review an award of costs for an abuse of discretion. *Vill. Builders 96, L.P. v. U.S. Labs., Inc.*, 121 Nev. 261, 276, 112 P.3d 1082, 1092 (2005).

NRS 18.005(5) allows the recovery of "[r]easonable fees of not more than five expert witnesses in an amount of not more than $1,500 for each witness, *unless the court allows a larger fee* after determining that the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." (Emphasis added.) *See also Gilman v. State Bd. of Veterinary Med. Exam'rs*, 120 Nev. 263, 272-73, 89 P.3d 1000, 1006-07 (2004) (observing that a district court has discretion to award more than $1,500 for an expert's witness fees), *disapproved of on other grounds by Nassiri v. Chiropractic Physicians' Bd.*, 130 Nev. 245, 251, 327 P.3d 487,

[2]The Logans also argue that Abe, Abe Properties, and Martinson's inconsistent cost calculations voided the award of costs. However, this argument is without merit because it does not demonstrate that the district court's award of costs was an abuse of discretion. *See Schwartz v. Estate of Greenspun*, 110 Nev. 1042, 1051, 881 P.2d 638, 644 (1994) ("We will not reverse an order or judgment unless error is affirmatively shown.").

491 (2014). Thus, NRS 18.005(5) allows the district court to award more than $1,500 for an expert's witness fees if the larger fee was necessary. Furthermore, NRS 17.115(4)(d)(1) authorizes the district court to award "[a] reasonable sum to cover any costs incurred by the party who made the offer [of judgment] *for each expert witness whose services were reasonably necessary to prepare for and conduct the trial of the case*." (Emphasis added.)

While NRS 18.005 does not require an expert witness to testify in order to recover fees less than $1,500, *see* NRS 18.005(5), the award of the expert's fees in this case was not an abuse of discretion. *See Vill. Builders 96, L.P.*, 121 Nev. at 276, 112 P.3d at 1092. The district court found that Abe, Abe Properties, and Martinson did not call their expert witness, who was retained to rebut the Logans' expert witness, because "[the Logans] chose on the eve of trial (or during trial) to not call" their expert. Thus, the "circumstances surrounding the expert's testimony," or in this case, the lack thereof, were of the Logans' creation and "were of such necessity as to require the larger fee." NRS 18.005(5). In addition, the district court's finding regarding the absence of Abe, Abe Properties, and Martinson's expert's testimony shows that the award of this expert's fees was also supported by NRS 17.115(4)(d)(1). Therefore, the district court did not abuse its discretion in awarding costs for expert witness fees in excess of $1,500 to Abe, Abe Properties, and Martinson.

CONCLUSION

A party is entitled to recover certain costs and reasonable attorney fees that it incurs after making an unimproved-upon offer of judgment pursuant to NRS 17.115 and NRCP 68. Because a party incurs an expense when it becomes legally obligated to pay the cost, it may recover qualifying expenses pursuant to NRS 17.115 and NRCP 68 that are paid by a third party on the party's behalf. Here, the district court did not abuse its discretion in awarding attorney fees or costs to Abe, Abe Properties, and Martinson. Therefore, we affirm the district court's award of attorney fees and costs.

GIBBONS and PICKERING, JJ., concur.

PHILLIP DOUGLAS SHARPE, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64287

June 4, 2015 350 P.3d 388

Appeal from a judgment of conviction, pursuant to a guilty plea, of trafficking in a controlled substance. Third Judicial District Court, Lyon County; Leon Aberasturi, Judge.

The supreme court, GIBBONS, J., held that: (1) "wire communication," as defined in state wiretapping statute, included cellular telephone calls and text messages; and (2) state wiretap statute was broad enough to protect all forms of cellular telephone calls and text messages as utilizing wire, cable, or other like connections and, thus, was as protective as federal wiretap statute, such that it was not preempted by federal wiretap statute, and the district court had authority to issue warrant permitting state law enforcement officers to intercept cellular telephone calls and text messages, even though state statute had not been updated in over 40 years.

Affirmed.

[Rehearing denied July 31, 2015]

[En banc reconsideration denied September 3, 2015]

Quade Law, Ltd., and *Paul E. Quade*, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Robert Auer*, District Attorney, and *Jeremy R. Reichenberg* and *Moreen Scully*, Deputy District Attorneys, Lyon County, for Respondent.

Gordon Silver and *Dominic P. Gentile*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Steven B. Wolfson, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Amicus Curiae Nevada District Attorneys Association.

1. CRIMINAL LAW.
   Questions of statutory interpretation are reviewed de novo.
2. STATUTES.
   When a statute is plain and unambiguous, the supreme court will give that language its ordinary meaning and not go beyond it.
3. STATUTES.
   The supreme court only turns to a statute's legislative history when the statute is ambiguous.
4. STATUTES.
   A statute is ambiguous when the statutory language lends itself to two or more reasonable interpretations.

5. STATUTES.
   The plainness or ambiguity of statutory language is determined not only by reference to the language itself, but as well by the specific context in which that language is used, and the broader context of the statute as a whole.
6. TELECOMMUNICATIONS.
   "Wire communication," defined in state wiretapping statute as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception," included cellular telephone calls and text messages. NRS 179.455, 179.460, 200.650.
7. STATES; TELECOMMUNICATIONS.
   State wiretap statute was broad enough to protect all forms of cellular telephone calls and text messages as utilizing wire, cable, or other like connections and, thus, state wiretap statute was as protective as federal wiretap statute, such that it was not preempted by federal wiretap statute, and the district court had authority to issue warrant permitting state law enforcement officers to intercept cellular telephone calls and text messages, even though state statute had not been updated in over 40 years. NRS 179.455, 179.460, 200.650.

Before SAITTA, GIBBONS and PICKERING, JJ.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we address whether Nevada wiretap law permits the interception of cellular telephone calls and text messages, even though it has not been updated since 1973. We conclude that Nevada wiretap law, assuming its other statutory requirements are satisfied, allows for the interception of cellular telephone calls and text messages.

FACTS AND PROCEDURAL HISTORY

In 2010, officers began investigating appellant Phillip Sharpe after receiving information that he distributed methamphetamines. Approximately four months into their investigation, officers obtained a warrant authorizing a wiretap to intercept communications on two different cellular telephone numbers attributed to Sharpe. The wiretap resulted in the interception of both telephone calls and text messages. After collecting sufficient intelligence, officers obtained a search and seizure warrant for Sharpe's residence and vehicles.

Four days after obtaining the search and seizure warrant, due to intelligence gathered from physical surveillance and the wiretap, officers anticipated that Sharpe intended to purchase a large quantity of methamphetamines. After observing the presumed drug deal,

officers pulled Sharpe over and arrested him. During the arrest, officers confiscated approximately 3.25 pounds of methamphetamines from Sharpe's vehicle. Almost simultaneously, officers executed the search and seizure warrant at Sharpe's residence and confiscated small amounts of various drugs and drug paraphernalia.

Sharpe was charged with four drug-trafficking-related felonies. After pleading not guilty on all four counts, Sharpe filed a motion to compel further discovery, two motions to suppress evidence obtained from the wiretap, a motion to suppress evidence obtained from the search of his vehicle, and a motion for a *Franks*[1] hearing. The district court denied all five motions.

Subsequently, Sharpe pleaded guilty to trafficking in a controlled substance, level III, based upon the 3.25 pounds of methamphetamines confiscated from his vehicle. Sharpe, however, reserved his right to appeal the denial of the aforementioned five motions. On October 18, 2013, the district court sentenced Sharpe to life imprisonment with the possibility of parole after serving 10 years, $235 in fees, and a $50,000 fine.

DISCUSSION

Although Sharpe raises a multitude of issues on appeal, we take this opportunity to discuss a specific issue originating from his second motion to suppress the wiretap. In that motion, Sharpe argued that the fruits of the wiretap should be suppressed because Nevada law does not allow for the interception of cellular communications. The district court disagreed. After oral arguments on appeal, we ordered amicus briefs on the following narrow issue: "whether Nevada wiretap law allows for the interception of cellular telephone calls and SMS text messages. [And] [m]ore specifically, whether NRS 179.460(1)'s mention of 'wire or oral communications' includes cellular telephone calls and SMS text messages, considering that similar federal statutes were updated to include 'electronic communications,' while NRS 179.460(1) was not."

[Headnote 1]

This issue presents questions of statutory interpretation, which we review de novo. *See State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

In response to the United States Supreme Court's decisions in *Berger v. New York*, 388 U.S. 41 (1967), and *Katz v. United States*, 389 U.S. 347 (1967), "Congress undertook to draft comprehensive legislation both authorizing the use of evidence obtained by electronic surveillance on specified conditions, and prohibiting its use

[1]*Franks v. Delaware*, 438 U.S. 154 (1978).

otherwise." *Bartnicki v. Vopper*, 532 U.S. 514, 523 (2001) (internal quotations omitted). This legislative effort resulted in the enactment of Title III of the Omnibus Crime Control and Safe Streets Act of 1968. *Id.* at 523. Title III allowed for the interception of both wire communications and oral communications as long as certain requirements were met. *Id.* ("One of the stated purposes of [Title III] was to protect effectively the privacy of wire and oral communications." (internal quotations omitted)). Pertinent to the issue on appeal, Title III defined " 'wire communication' [as] . . . 'any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable, or like connection between the point of origin and the point of reception.' " *Commonwealth v. Moody*, 993 N.E.2d 715, 718 (Mass. 2013) (emphasis omitted) (quoting Omnibus Crime Control and Safe Streets Act of 1968, Pub. L. No. 90-351, § 802, 82 Stat. 197, 212 (1968) (codified as amended at 18 U.S.C. § 2510 (2014))).

"In enacting Title III [Congress] intended to occupy [and thus preempt] the field of wiretapping and electronic surveillance, except as that statute specifically permits concurrent State regulation." *Id.* at 718 (alterations in original) (internal quotations omitted). The 1968 Senate Report on Title III states that: "[t]he proposed provision envisions that States would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation." S. Rep. No. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2112, 2187. Accordingly, states were allowed to adopt their own wiretap laws, as long as they were at least as restrictive as federal legislation. *See State v. Serrato*, 176 P.3d 356, 360 (Okla. Crim. App. 2007) ("Under the current regime established by Congress in Title III, a state wiretapping law can never be less restrictive than federal law.").

In 1968, Nevada law was already more restrictive than federal law. Eleven years earlier, the Nevada Legislature had enacted what is now NRS 200.650. At the time, NRS 200.650 prohibited a person from "surreptitiously listening to, monitoring or recording, or attempting to listen to, monitor or record," i.e., eavesdrop, a private conversation via a device, unless authorized to do so by one of the persons engaged in the private conversation. *See* A.B. 47, 48th Leg. (Nev. 1957).

In 1973, the Nevada Legislature introduced Senate Bill 262. *See* S.B. 262, 57th Leg. (Nev. 1973). Once passed, Senate Bill 262 provided for Nevada's wiretap statutes and introduced the two statutes at issue in this appeal, what are today NRS 179.455 and NRS 179.460. *See* 1973 Nev. Stat., ch. 791, §§ 10, 11, at 1743. At the same time, the Legislature amended NRS 200.650 to state that a

person could eavesdrop if the person met the requirements of the wiretap statutes. *See id.*, § 26, at 1749.

Subject to other qualifications, Senate Bill 262 allowed "a supreme court justice or . . . a district judge in the county where the interception is to take place" to issue "an order authorizing the interception of wire or oral communications." *Id.*, § 11, at 1743; *see also* NRS 179.460. A "wire communication," like its federal equivalent at the time, was defined as "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception." 1973 Nev. Stat., ch. 791, § 10, at 1743; *see also* NRS 179.455.

The relevant portions of these Nevada statutes have remained the same since 1973. But federal wiretap law kept developing. In 1986, Congress amended Title III with the Electronic Communications Privacy Act of 1986 (ECPA). *See generally* Pub. L. No. 99-508, 100 Stat. 1848 (1986) (codified as amended in scattered sections of 18 U.S.C.). As part of this Act, Congress created "a new category of protected communication called 'electronic communication,'" to go along with wire and oral communications. *Moody*, 993 N.E.2d at 719. Congress also amended the definition of "wire communication." *Id.* at 720. Due to the creation of the "electronic communication" category and the amendment of the definition of "wire communication," today, cellular telephone calls and text messages are commonly viewed as electronic communications. *See Bartnicki*, 532 U.S. at 524; *McKamey v. Roach*, 55 F.3d 1236, 1240 (6th Cir. 1995).

Additionally, "the ECPA established a two-year grace period for States, essentially delaying Federal preemption with respect to the amendments and allowing States time to amend their wiretap statutes to the extent necessary to meet or exceed the level of protection provided to electronic communications under Title III." *Moody*, 993 N.E.2d at 720. Nevada did not update its wiretap statutes. On appeal, Sharpe argues that Nevada's failure to update its wiretap law to reflect federal wiretap law means that Nevada wiretap law does not give the proper statutory authorization for officers to intercept cellular telephone calls and text messages. Amicus Nevada Attorneys for Criminal Justice asserts that Nevada's failure to update must be construed as the Legislature choosing to achieve a result different from federal wiretap law, i.e., no authorization for the interception of cellular telephone calls or text messages.

[Headnotes 2-5]

"When a statute is plain and unambiguous, this court will give that language its ordinary meaning and not go beyond it." *State v.*

Allen, 119 Nev. 166, 170, 69 P.3d 232, 235 (2003). We only turn to a statute's legislative history when the statute is ambiguous. *Lucero*, 127 Nev. at 95, 249 P.3d at 1228. A statute is ambiguous "when the statutory language lends itself to two or more reasonable interpretations." *Id.* (internal quotations omitted). Further, " '[t]he plainness or ambiguity of statutory language is determined [not only] by reference to the language itself, [but as well by] the specific context in which that language is used, and the broader context of the statute as a whole.' " *Yates v. United States*, 574 U.S. ___, ___, 135 S. Ct. 1074, 1081-82 (2015) (alterations in original) (quoting *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997)).

NRS 200.650 allows for the interception of a private communication if authorized by NRS 179.410 to 179.515. NRS 179.460, subject to other qualifications, permits the interception of "wire communications." A "wire communication"—still defined as it was in 1973—is "any communication made in whole or in part through the use of facilities for the transmission of communications by the aid of wire, cable or other like connection between the point of origin and the point of reception." NRS 179.455.

[Headnote 6]

We conclude that NRS 179.455's definition of "wire communication" includes cellular telephone calls and text messages by its plain terms. The broad scope of "any communication" is obvious. We conclude that "any" indicates that both cellular telephone calls and text messages fall within the definition of "wire communication." Next, for cellular telephone calls and text messages to be included under the plain terms of the definition of "wire communication," they must be "made in whole or in part . . . by the aid of wire, cable or other like connection between the point of origin and the point of reception." NRS 179.455.

When faced with a similar question, many courts have found that cellular telephone calls and text messages are made in part "by the aid of wire . . . between the point of origin and the point of reception." NRS 179.455; *see In re Application of United States for an Order Authorizing Roving Interception of Oral Communications*, 349 F.3d 1132, 1138 n.12 (9th Cir. 2003) ("Despite the apparent wireless nature of cellular phones, communications using cellular phones are considered wire communications under the statute, because cellular telephones use wire and cable connections when connecting calls."); *Moody*, 993 N.E.2d at 722-24 (concluding that Massachusetts' wiretap law, which possesses the same 1968 definition of "wire communication" as Nevada, allows for the interception of cellular telephone calls and text messages because each communication "travels in part by wire or cable or other like con-

nection"); *Serrato*, 176 P.3d at 359 ("The evidence presented in the District Court established that 'wireless' cellular phone communications are actually processed by the initiation of a wireless communication from a handset (cell phone) to a cellular tower, from which the communication is then transmitted *by wire* through a switching station to another transmitting tower . . . ." (emphasis added)); *see also* S. Rep. No. 99-541, at 9 (1986), *reprinted in* 1986 U.S.C.C.A.N. 3555, 3563 (noting that cellular telephone services "use[ ] both radio transmission and wire to make 'portable' telephone service available"). We agree with the conclusion of our sister courts: cellular telephone calls and text messages rely in part upon the aid of wire for the purposes of transmission.

Accordingly, we conclude that cellular telephone calls and text messages are "wire communication[s]" under NRS 179.455's plain terms, because cellular telephone calls and text messages qualify as "any communication" and are "made in whole or in part . . . by the aid of wire, cable or other like connection between the point of origin and the point of reception."

[Headnote 7]

Sharpe also asserts on appeal that because Nevada did not update its wiretap law in accordance with federal wiretap law, Nevada wiretap law is less restrictive and is thus preempted. Sharpe, however, fails to point out how Nevada wiretap law is less restrictive, i.e., what Nevada wiretap law allowed to occur here that federal wiretap law would have prohibited. Due to our holding, current Nevada wiretap law, like federal wiretap law, allows for the interception of cellular telephone calls and text messages. Although the statutes read differently, their allowances in this regard are equally restrictive. Thus, we conclude that Nevada wiretap law is not preempted. *See* S. Rep. No. 90-1097, at 98 (1968), *reprinted in* 1968 U.S.C.C.A.N. 2111, 2187 (stating that Title III envisioned that states "would be free to adopt more restrictive legislation, or no legislation at all, but not less restrictive legislation").

Consequently, we conclude that the district court did not err in finding that Nevada wiretap law permitted the interception of Sharpe's cellular telephone calls and text messages.[2] For the reasons set forth above, we affirm Sharpe's judgment of conviction.

SAITTA and PICKERING, JJ., concur.

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[2]Further, we conclude that the district court did not err in its handling of the other issues raised by Sharpe on appeal.

PAMELA FULBROOK, Individually and as Special Administrator of the ESTATE OF ADASHA EDISON; MICHAEL BENNINGTON and ELIZABETH BENNINGTON, Husband and Wife; and MICHELLE BENNINGTON, Appellants, *v.* ALLSTATE INSURANCE COMPANY, Respondent.

No. 61567

PAMELA FULBROOK, Individually and as Special Administrator of the ESTATE OF ADASHA EDISON; MICHAEL BENNINGTON and ELIZABETH BENNINGTON, Husband and Wife; and MICHELLE BENNINGTON, Appellants, *v.* ALLSTATE INSURANCE COMPANY, Respondent.

No. 62199

June 4, 2015 350 P.3d 88

Motion to recall remittitur.

Following entry of final judgment and post-judgment order in insurance matter by the district court and affirmance by the supreme court, administrator of estate of passenger killed in motor vehicle accident, driver of vehicle, and owners of vehicle filed motion to recall remittitur. The supreme court, Saitta, J., held that counsel's failure to receive e-mail notification of affirmance due to technical difficulties did not warrant recall of remittitur.

Motion denied.

Christensen Law Offices, LLC, and *Thomas Christensen*, Las Vegas, for Appellants.

Prince & Keating, LLP, and *Dennis M. Prince* and *Ian C. Estrada*, Las Vegas, for Respondent.

Appeal and Error.

Counsel's purported failure to receive e-mail notification of order of affirmance entered by the supreme court, following final judgment and post-judgment order in insurance matter, due to virus on counsel's servers and switching to new case management system did not warrant recall of remittitur, where official notice of the order of affirmance was sent to counsel's electronic filing account, an e-mail was sent to two separate e-mail addresses at counsel's law firm, and, although counsel asserted that he did not receive either of the e-mails sent, he did not indicate that he was unable to access his electronic filing account to check his notifications during this time and, indeed, had successfully accessed account during this time in unrelated case.

Before Parraguirre, Saitta and Pickering, JJ.

OPINION

By the Court, SAITTA, J.:

These are consolidated appeals from a final judgment and a post-judgment order in an insurance matter. This court affirmed the judgments of the district court in an order entered on January 30, 2015. Pursuant to NRAP 40(a)(1), the time for filing a petition for rehearing expired on February 17, 2015. No petition for rehearing was filed, and the remittitur issued on February 24, 2015, as provided in NRAP 41(a)(1).

On February 27, 2015, appellants' counsel filed a motion to recall the remittitur. Appellants' counsel states that he did not become aware of the order of affirmance until February 26, 2015, "due to technical difficulties experienced by . . . counsel due to a virus on its servers as well as switching to a new case management system." Specifically, appellants' counsel avers that he has been experiencing difficulties with case files as well as e-mails, and the e-mail notification "slipped through." Further, counsel states that his firm has switched to a new case management system, and "all of the client files were not properly loaded into the case management system by its technicians."

Knowing that there were technical difficulties, appellants' counsel states that his office checked the status of the case on the Nevada Supreme Court website on January 26, 2015, and no order had been issued. The site was not checked again until February 26, 2015, when counsel discovered that the order of affirmance had been entered. By that point, the time for filing a petition for rehearing had passed.

The Nevada Electronic Filing and Conversion Rules (NEFCR) provide for electronic service of documents. NEFCR 9. The rule requires that "[w]hen a document is electronically filed, the court . . . must provide notice to all registered users on the case that a document has been filed and is available on the electronic service system document repository." NEFCR 9(b). "This notice shall be considered as valid and effective service of the document on the registered users and shall have the same legal effect as service of a paper document." *Id.* Further, "[t]he notice must be sent by e-mail to the addresses furnished by the registered users under Rule 13(c)." *Id.*

The required notice to which the rule refers is the notification within the electronic filing system. When a registered user logs into his account, he can see all the notifications in his cases. In addition to the official notice within the system, an e-mail is sent to all the

e-mail addresses of the attorneys on the case who are registered users and to any additional e-mail addresses those attorneys may list in their profiles. The e-mail notifications are a courtesy, and the official notification of a document filed in this court is the notification within the electronic filing system.

In the instant case, this court's electronic record reflects that an official notice of the order of affirmance was sent to appellants' counsel's electronic filing account. Additionally, an e-mail was sent to two separate e-mail addresses at appellants' counsel's law firm. Although appellants' counsel asserts that he did not receive either of the e-mails sent, he does not indicate that he was unable to access his electronic filing account to check his notifications during this time. Indeed, he successfully accessed the account to electronically file an opening brief and multiple volumes of appendices in an unrelated case[1] on February 3, 2015, a mere four days after the order of affirmance in this case was entered. If counsel had checked the notifications in his account at that time, he would have been aware of the dispositional order. We remind counsel that it is his duty to log in to the electronic filing system and check notifications for his cases as often as is necessary to properly monitor his pending cases.

Counsel informs this court that he checked the court's website on January 26, 2015, and again on February 26, 2015. By referring to the court's "website," it is not clear whether he is referring to the electronic filing system or the public access portal of the court's case management system. Either way, he would have learned of the disposition in time to file a petition for rehearing had he checked more frequently than every 30 days.

This court has long recognized "the rule that a remittitur will be recalled when, but only when, inadvertence, mistake of fact, or an incomplete knowledge of the circumstances of the case on the part of the court or its officers, whether induced by fraud or otherwise, has resulted in an unjust decision." *Wood v. State*, 60 Nev. 139, 141, 104 P.2d 187, 188 (1940). In this case, the remittitur was regularly issued, and appellants have not demonstrated a basis on which the remittitur should be recalled. The motion is therefore denied.

PARRAGUIRRE, J., concurs.

PICKERING, J., concurring:

I concur in the result but would do so by order denying the motion to recall the remittitur as legally insufficient.

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[1]*Stanlake v. Serafani*, Docket No. 65920.

BRANDON DOUGLAS NUTTON, AN INDIVIDUAL, APPELLANT, *v.* SUNSET STATION, INC., A NEVADA CORPORATION DBA SUNSET STATION HOTEL & CASINO, RESPONDENT.

No. 62878

June 11, 2015 357 P.3d 966

Appeal from a district court summary judgment entered in a personal injury action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Plaintiff filed complaint for personal injury against hotel alleging that it had breached its duty of care by improperly placing excessive lane wax in approach area of bowling lane, which caused his slip and fall. Three weeks after expiration of deadline to amend pleadings, he filed motion seeking to amend his complaint. The district court concluded plaintiff's motion was untimely, and further, that even if leave were granted, the proposed amendment would be futile. Subsequently, hotel moved for summary judgment, which the court granted. Plaintiff appealed. The court of appeals, TAO, J., held that: (1) even though the district court had failed to determine if good cause existed to modify scheduling order before reviewing merits of plaintiff's belated motion to amend pleadings, it nonetheless properly denied his motion; and (2) the district court's error, in incorrectly applying futility exception to rule governing amended pleadings, was harmless.

Affirmed.

Kravitz, Schnitzer & Johnson, Chtd., and *Martin J. Kravitz* and *Kristopher T. Zeppenfeld*, Las Vegas, for Appellant.

Pyatt Silvestri and *Robert P. Molina* and *Jay T. Hopkins*, Las Vegas, for Respondent.

1. PLEADING.
   When a motion seeking leave to amend a pleading is filed after the expiration of the deadline for filing such motions, the district court must first determine whether "good cause" existed for missing the deadline, before the court can consider the merits of the motion under standards of rule governing amended pleadings. NRCP 15(a), 16(b).
2. PLEADING.
   Motions for leave to amend pleadings should be granted unless a strong reason exists not to do so, such as prejudice to the opponent or lack of good faith by the moving party. NRCP 15(a).
3. PLEADING.
   Where a scheduling order has been entered, the lenient standard under rule providing that leave to amend pleadings "shall be freely given" must be balanced against the requirement that the district court's scheduling order "shall not be modified except upon a showing of good cause." NRCP 15(a), 16(b).

4. Pretrial Procedure.
   Disregard of the district court's scheduling order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and the cavalier. NRCP 16(b).
5. Pretrial Procedure.
   Inquiry into good cause necessary to justify amendment to scheduling order primarily considers diligence of party seeking amendment, rather than focusing on the bad faith of the party seeking to interpose an amendment to the pleadings and the prejudice to the opposing party. NRCP 15(a), 16(b).
6. Pleading; Pretrial Procedure.
   Even when good cause has been shown to modify court's scheduling order to allow for amended pleadings, the district court must still independently determine whether the amendment should be permitted under rule governing amended pleadings. NRCP 15(a), 16(b).
7. Pleading; Pretrial Procedure.
   Even though the district court had failed to determine if good cause existed to modify scheduling order before reviewing merits of personal injury plaintiff's belated motion to amend pleadings, it nonetheless properly denied his motion, when plaintiff's motion sought to fundamentally change the factual premise of his negligence claim after the deadline for amending pleadings had elapsed, with only a short time remaining to conduct discovery, and under the scheduling order then in place, insufficient time remained in discovery for hotel he was suing to explore the new allegations and for both parties to prepare for trial, which was then only a few months away. NRCP 15(a), 16(b).
8. Pleading.
   Leave to amend pleadings, even if timely sought, need not be granted if the proposed amendment would be futile. NRCP 15(a).
9. Pleading.
   A proposed amendment to pleadings may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one that would not survive a motion to dismiss for failure to state a claim, or a last-second amendment alleging meritless claims in an attempt to save a case from summary judgment. NRCP 15(a).
10. Pleading.
    The liberality embodied in rule governing amended pleadings requires the district courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had. NRCP 15(a).
11. Appeal and Error.
    The district court's error in incorrectly applying futility exception to rule governing amended pleadings by determining that personal injury plaintiff's belated motion to amend his pleadings was likely futile, looking beyond the face of the proposed amendment and considering whether the amendment was likely to prove victorious before allowing it to be made was harmless, when plaintiff had failed to demonstrate "good cause" for missing scheduling order deadline permitting the district court to even consider merits of his belated motion seeking leave. NRCP 15(a).
12. Judgment.
    Mere fact that a party seeks to proffer apparently inconsistent testimony or assert apparently inconsistent positions at some point during the course of litigation does not, by itself, justify the granting of summary judgment against that party; the general rule is that a party cannot defeat sum-

mary judgment by contradicting itself in response to an already-pending summary judgment motion. NRCP 56.

Before GIBBONS, C.J., TAO and SILVER, JJ.

OPINION

By the Court, TAO, J.:

In this appeal, we explore the relationship between Rule 15(a) and Rule 16(b) of the Nevada Rules of Civil Procedure (NRCP), both of which govern the procedures for seeking leave to amend pleadings in a civil action. Under NRCP 15(a), a party should be granted leave to amend a pleading "when justice so requires" and the proposed amendment is not futile. However, when a party seeks to amend a pleading after the deadline previously set for seeking such amendment has expired, NRCP 16(b) requires a showing of "good cause" for missing the deadline. We further explore whether a proposed amendment under NRCP 15(a) can be considered to be futile because it is unsupported by, or contradicts, facts previously uncovered during discovery.

[Headnote 1]

We conclude that when a motion seeking leave to amend a pleading is filed after the expiration of the deadline for filing such motions, the district court must first determine whether "good cause" exists for missing the deadline under NRCP 16(b) before the court can consider the merits of the motion under the standards of NRCP 15(a). Under the circumstances of this case, the district court failed to independently analyze whether the proposed amendment was timely under the standards of NRCP 16(b) before considering whether it was warranted under the standards of NRCP 15(a). The district court also did not correctly apply the futility exception to NRCP 15(a), but nonetheless reached the correct conclusion under the facts of this case, and we therefore affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Brandon Nutton slipped and fell while bowling with some friends at a bowling center operated by respondent, Sunset Station Hotel & Casino, shattering his right patella. At the time, Nutton was wearing his street shoes rather than bowling shoes rented from Sunset Station.

Nutton filed a complaint for personal injury against Sunset Station alleging that he slipped on "a heavy concentration of lane wax" or "lane oil" improperly applied to the approach area of the bowling lane so thickly his clothes were "inundated" after the fall. The complaint presented a single claim for negligence alleging that Sunset

Station breached its duty of care by improperly placing excessive lane wax or oil in the approach area.

Over the ensuing months of discovery, Nutton repeated in interrogatory responses, as well as his own deposition, that he fell on excessive wax or oil so thick it permeated his clothes. He claimed "[t]he oil was thick and clear" and "based on my experiences, I can say with certainty that it was lane oil that I slipped on." During his deposition, Nutton was asked whether he had worn bowling shoes or street shoes when the fall occurred. He responded he had rented bowling shoes from Sunset Station on the day of the fall, but did not put them on because no employee of Sunset Station explained the need to do so. Nutton denied his street shoes played any role in the fall, testifying, "I don't find that bowling shoes would have been a factor in my slipping and because I don't see how that's pertinent. . . . I feel as though I would have fallen in the same fashion whether I was wearing my own shoes or the shoes they provide."

The parties located no other witness who saw or felt excessive wax or oil on the floor. To the contrary, Sunset Station produced an expert report concluding that a study of the bowling alley's surveillance video revealed no evidence of a foreign substance on the floor and showed other people bowling in the same approach area just before Nutton with no difficulty. Moreover, Nutton retained his own expert witness who agreed "Nutton did not slip and fall from oil residue on the approach." These opinions were contained in an expert report prepared before the expiration of the deadline to amend pleadings.

Subsequently, Nutton filed a motion with the district court seeking leave to amend his complaint pursuant to NRCP 15(a). Conceding that his own expert had agreed excessive lane oil did not cause his fall, Nutton sought to amend his theory of liability to instead plead that the fall was caused by his street shoes and Sunset Station had negligently failed to ensure he wore bowling shoes while he bowled. The proposed amended complaint asserted that Sunset Station's own policies required bowlers to wear bowling shoes at all times while bowling, but employees and agents of Sunset Station breached their duty by failing to enforce the policy and permitting Nutton to bowl without them. Nutton also sought to assert that Sunset Station possessed superior knowledge regarding the risks of bowling in street shoes, yet failed to warn him of any danger.

Nutton's motion was filed approximately three weeks after the expiration of the deadline to amend pleadings previously imposed by the district court. At the time, the final discovery cutoff date was just over two months away, and trial was set to begin three months after the close of discovery. Nutton's motion to amend was also filed after the expiration of the statute of limitations period for asserting a negligence claim.

Sunset Station filed an opposition to Nutton's motion. The opposition noted that Nutton had previously denied his shoes played any role in the fall. Sunset Station also provided some photographs of signs posted around the bowling center warning of the danger of failing to wear bowling shoes while bowling. Based upon these photographs and Nutton's prior testimony, Sunset Station argued that Nutton's proposed amendment was meritless and had no chance of prevailing at trial or even surviving a future motion for summary judgment. In reply, Nutton noted Sunset Station had failed to provide any evidence regarding when the signs had been posted, and thus argued the photographs were irrelevant because no evidence had been presented demonstrating they were in place at the time of the fall.

The district court denied Nutton's motion. During oral argument, the district court expressed concern that the proposed amended complaint set forth a "totally different theory of [the] case" than had been alleged in the original complaint, and the motion had been filed "too close to trial." The district court also suggested the amendments would probably not survive a future summary judgment motion, were one to be filed by Sunset Station. The district court's written order concluded that Nutton's motion was untimely and, furthermore, even if leave were granted, the proposed amendment "would be futile given the results of the discovery already conducted."[1]

Shortly after the district court denied Nutton leave to amend, Sunset Station filed a motion seeking summary judgment in its favor on the theory of negligence pleaded in the original complaint. Nutton's opposition conceded that "no genuine issue of fact exists as to [Nutton's] original theory of negligence liability set forth in his original Complaint." The district court granted summary judgment in favor of Sunset Station and awarded attorney fees and costs. This appeal followed.

ANALYSIS

Nutton contends the district court erred by refusing to grant leave to amend the complaint even though discovery was still open and the allegations of the proposed amended complaint had been substantially explored during discovery. Nutton also argues that, although summary judgment was properly granted as to the theory of liability set forth in his original complaint, summary judgment would not have been appropriate had he been given leave to amend. Finally, Nutton challenges the award of attorney fees and costs, ar-

[1]During the hearing, the district court also expressed "concern" that Nutton's amendment was proposed after the expiration of the limitations period applicable to the amended cause of action and might not "relate back" to the filing of his original complaint. However, the district court did not make any finding on this issue in its written order, and therefore it is not part of this appeal.

guing that it was predicated upon the improper granting of summary judgment resulting from the district court's erroneous decision to deny him leave to amend his complaint.

Although Nutton separately challenges all three decisions issued by the district court, all three arise from a single overarching issue, namely, the allegedly erroneous denial of his motion seeking leave to amend his complaint. If the district court's denial of leave was error, then it follows that its orders granting summary judgment and awarding attorney fees and costs were also improper. Therefore, we begin with the district court's resolution of Nutton's motion seeking leave to amend.

The district court denied Nutton's motion on two grounds. First, it found that the request was untimely. Second, it concluded the proposed amendment would have been futile even if it had been brought earlier in the case. We consider each of these grounds *seriatim*.

The relationship between Rule 15(a) and Rule 16(b)

[Headnote 2]

NRCP 15(a) recites that when a party seeks leave to amend a pleading after the initial responsive pleadings have been served, "leave shall be freely given when justice so requires." The Nevada Supreme Court has held that "in the absence of any apparent or declared reason—such as undue delay, bad faith or dilatory motive on the part of the movant—the leave sought should be freely given." *Stephens v. S. Nev. Music Co*., 89 Nev. 104, 105-06, 507 P.2d 138, 139 (1973). Thus, NRCP 15(a) contemplates the liberal amendment of pleadings, which in colloquial terms means that most such motions ought to be granted unless a strong reason exists not to do so, such as prejudice to the opponent or lack of good faith by the moving party. *Stephens*, 89 Nev. at 105, 507 P.2d at 139.

The liberality reflected in NRCP 15(a) recognizes that discovery is a fluid process through which unexpected and surprising evidence is uncovered with regularity (particularly when important evidence was solely in the possession of one party when the case was initiated), and parties should have some ability to tailor their pleadings and reframe the case around what they might have learned after the initial pleadings were filed. Such flexibility aids not only the parties but also the court and the judicial process by helping to ensure that the pleadings remain focused on issues that are truly in dispute and the court's time is not unduly wasted on allegations that may have been originally made in good faith but eventually fail to pan out despite initial investigation.

On its face, NRCP 15(a) makes no reference to whether leave has been requested before or after the close of discovery, or before or after any other deadline imposed by the trial court. Read in isolation, the text of NRCP 15(a) appears to suggest that the liberal standards

for granting leave remain the same regardless of when the motion has been filed. But NRCP 15(a) cannot be read in a vacuum; the rules of civil procedure must be read together. *See generally Rosen v. Dick*, 639 F.2d 82, 94 (2d. Cir. 1980).[2] *See also* NRCP 1 (providing that rules of procedure are to be construed and administered to secure the just, speedy, and inexpensive determination of every action).

One rule that frequently overlaps with NRCP 15(a) is NRCP 16(b). NRCP 16(b) requires, among other things, the district court to set deadlines in each case for various events, including deadlines for conducting various types of discovery and for filing various kinds of motions. One deadline specifically contemplated by NRCP 16(b) is one by which motions seeking to amend the pleadings must be filed with the court. Moreover, NRCP 16(b) recites that the deadlines imposed by the court under this rule "shall not be modified" except "upon a showing of good cause."

Thus, when a party seeks leave to amend a pleading pursuant to NRCP 15(a) after a deadline set under NRCP 16(b) for filing such a motion has already elapsed, such motions implicate NRCP 16(b) in addition to NRCP 15(a) because they effectively seek a waiver or extension of that deadline so that the merits of the motion may be considered. If this were not so, and a motion seeking leave would be considered only under the standards of NRCP 15(a) no matter when it was filed, then the deadlines required to be imposed under NRCP 16(b) would become meaningless and could be blithely ignored.

[Headnotes 3, 4]

Functionally, NRCP 16(b) serves as something of a counterweight to NRCP 15(a). In contrast to the fluidity reflected in NRCP 15(a), the purpose of NRCP 16(b) is "to offer a measure of certainty in pretrial proceedings, ensuring that at some point both the parties and the pleadings will be fixed." *Parker v. Columbia Pictures Indus.*, 204 F.3d 326, 339-40 (2d Cir. 2000) (internal quotation marks omitted). Thus, "[w]here a scheduling order has been entered, the lenient standard under Rule 15(a), which provides leave to amend 'shall be freely given,' must be balanced against the requirement under Rule 16(b) that the Court's scheduling order 'shall not be modified except upon a showing of good cause.'" *Grochowski v. Phoenix Constr.*, 318 F.3d 80, 86 (2d Cir. 2003) (quoting prior version of FRCP 15(a) and 16(b)). "Disregard of the [scheduling] order would undermine the court's ability to control its docket, disrupt the agreed-upon course of the litigation, and reward the indolent and

[2]Where the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules. *See Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d 872, 876 (2002).

the cavalier." *Johnson v. Mammoth Recreations, Inc.*, 975 F.2d 604, 610 (9th Cir. 1992). NRCP 16 was drafted precisely to prevent this from occurring, and "its standards may not be short-circuited by an appeal to those of Rule 15." *Id.*

The Nevada Supreme Court has never defined what constitutes "good cause" under NRCP 16(b), but NRCP 16(b) is based in relevant part upon Rule 16(b) of the Federal Rules of Civil Procedure. Multiple federal courts of appeal have held that, although Rule 15(a) governs the amendments of pleadings in general, Rule 16(b) "governs amendment of pleadings after a scheduling order deadline has expired." *S&W Enters., LLC v. South Trust Bank of Ala., NA*, 315 F.3d 533, 536 (5th Cir. 2003); *see In re Milk Prods. Antitrust Litig.*, 195 F.3d 430, 437 (8th Cir. 1999) ("When the district court has filed a Rule 16 pretrial scheduling order, it may properly require that good cause be shown for leave to file an amended pleading that is substantially out of time under that order."); *Riofro Anda v. Ralston Purina Co*., 959 F.2d 1149, 1154-55 (1st Cir. 1992) ("The district court did not abuse its discretion by adhering to its scheduling order and refusing to allow plaintiffs to amend their complaint. Under the facts here, the allowance of an amendment would have nullified the purpose of rule 16"); *Johnson*, 975 F.2d at 608-09 (some "courts have considered a motion to amend the complaint [after the amendment deadline] as a motion to amend the scheduling order and the court's denial of that motion a denial of a motion to amend the scheduling order"); *Dedge v. Kendrick*, 849 F.2d 1398 (11th Cir. 1988) (holding that a motion filed after scheduling order deadline is untimely and, where appropriate, may be denied solely on that ground); *R.L. Clark Drilling Contractors, Inc. v. Schramm, Inc.*, 835 F.2d 1306, 1308 (10th Cir. 1987) (construing a party's assertion of matter after scheduling order deadline as a request to modify the deadline).

[Headnote 5]

The distinction between NRCP 15(a) and NRCP 16(b) is not merely a cosmetic one, because the definition of "good cause" under Rule 16(b) is narrower than the considerably more lenient considerations governing amendment under Rule 15(a). "A court's evaluation of good cause [under Rule 16(b)] is not coextensive with an inquiry into the propriety of the amendment under Rule 15." *Johnson*, 975 F.2d at 609 (internal quotation marks omitted). "Unlike Rule 15(a)'s liberal amendment policy which focuses on the bad faith of the party seeking to interpose an amendment and the prejudice to the opposing party, Rule 16(b)'s 'good cause' standard primarily considers the diligence of the party seeking the amendment." *Id*.

In determining whether "good cause" exists under Rule 16(b), the basic inquiry for the trial court is whether the filing deadline cannot reasonably be met despite the diligence of the party seeking

the amendment. *See* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1522.2 (2010), and cases cited therein. Courts have identified four factors that may aid in assessing whether a party exercised diligence in attempting, but failing, to meet the deadline: (1) the explanation for the untimely conduct, (2) the importance of the requested untimely action, (3) the potential prejudice in allowing the untimely conduct, and (4) the availability of a continuance to cure such prejudice. *S&W Enters.*, 315 F.3d at 536. However, the four factors are nonexclusive and need not be considered in every case because, ultimately, if the moving party was not diligent in at least attempting to comply with the deadline, "the inquiry should end." *Johnson*, 975 F.2d at 609. Thus, of the four factors, the first (the movant's explanation for missing the deadline) is by far the most important and may in many cases be decisive by itself. *Id.* ("Although the existence or degree of prejudice to the party opposing the modification might supply additional reasons to deny a motion, the focus of the inquiry is upon the moving party's reasons for seeking modification."). Lack of diligence has been found when a party was aware of the information behind its amendment before the deadline, yet failed to seek amendment before it expired. *See Perfect Pearl Co. v. Majestic Pearl & Stone, Inc.*, 889 F. Supp. 2d 453, 457 (S.D.N.Y 2012) ("A party fails to show good cause when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline." (internal quotation marks omitted)). In addition, "carelessness is not compatible with a finding of diligence and offers no reason for a grant of relief." *Johnson*, 975 F.2d at 609.

[Headnote 6]

Even where good cause has been shown under NRCP 16(b), the district court must still independently determine whether the amendment should be permitted under NRCP 15(a). *See Grochowski*, 318 F.3d at 86. Thus, when a party seeks leave to amend a pleading after the expiration of the deadline for doing so, it must first demonstrate "good cause" under NRCP 16(b) for extending the deadline to allow the merits of the motion to be considered by the district court before the merits of the motion may then be considered under NRCP 15(a). *See S&W Enters.*, 315 F.3d at 536 ("Only upon the movant's demonstration of good cause to modify the scheduling order will the more liberal standard of Rule 15(a) apply to the district court's decision to grant or deny leave.").

[Headnote 7]

In this case, the district court did not make findings in conformance with NRCP 16(b) but rather only applied the standards associated with NRCP 15(a). Notwithstanding this omission, the record demonstrates the district court's conclusion would have been correct

even under the standards of NRCP 16(b). Nutton's motion sought to fundamentally change the factual premise of his negligence claim after the deadline for amending pleadings had elapsed, with only a short time remaining to conduct discovery. The district court concluded that, under the scheduling order then in place, insufficient time remained in discovery for Sunset Station to explore the new allegations and for both parties to prepare for trial, which was then only a few months away.

Nutton argues that the district court's conclusion was erroneous because both parties explored the effect Nutton's street shoes may have played in his fall during discovery already conducted in the case. For example, Nutton was asked questions about his shoes by opposing counsel during his deposition, and witnesses for Sunset Station testified during depositions that Sunset Station's policies required bowlers to wear bowling shoes while bowling. From this, Nutton argues that permitting him to file his amended pleadings would actually have required very little additional discovery because much discovery had already been completed. But this argument is something of a double-edged sword because, if we accept Nutton's characterization to be true and agree that both Nutton and Sunset Station had already thoroughly investigated the role his street shoes played in the fall, then the question arises why Nutton waited until after the expiration of the NRCP 16(b) deadline to try to add the claim to the case. The district court reasonably concluded that Nutton acted dilatorily in failing to seek to file the amendment months earlier, especially when he apparently realized much earlier that his street shoes may have played a role in causing the fall. *See Perfect Pearl*, 889 F. Supp. 2d at 457 (good cause not shown "when the proposed amendment rests on information that the party knew, or should have known, in advance of the deadline" (internal quotation marks omitted)).

Nutton also contends that allowing his proposed amendment would not have resulted in any prejudice to Sunset Station because the new claim merely proffered a "refined theory of liability" not dissimilar to his original negligence claim.[3] The district court concluded that the proposed amendment set forth a "totally different theory of [the] case" than had been originally pleaded and observed

[3]Nutton argues that, under NRCP 15(b), he could have amended his pleadings even during trial itself to conform to the evidence, and therefore Sunset Station cannot be prejudiced by an amendment before trial, even if after the technical deadline. As an initial observation, such amendments are permitted when a matter has been tried by "consent," NRCP 15(b), and it is not clear that Sunset Station would have "consented" to litigate Nutton's new claim at trial. Moreover, because this motion was resolved before trial, that question is not before us in this appeal. In any event, whether Sunset Station might have consented to litigate a new claim in a future trial has nothing to do with whether Nutton's motion complied with NRCP 16(b) at the time it was filed.

the original complaint alleged "not one thing" about street shoes. This observation was factually correct.

Under these circumstances, the record demonstrates that Nutton did not act diligently in filing his motion when he did. In particular, Nutton proffered no explanation as to why he could not have filed his motion before the deadline for doing so, especially since he asserted that both parties had already conducted discovery relating to his proposed new claim. Rather than filing the motion before the deadline, he inexplicably let the deadline elapse by three weeks. Thus, Nutton's motion would have been properly denied under NRCP 16(b).

The futility exception to NRCP 15(a)

The district court also determined that Nutton's motion was likely futile "given the results of the discovery already conducted."

[Headnotes 8, 9]

Under NRCP 15(a), leave to amend, even if timely sought, need not be granted if the proposed amendment would be "futile." *Allum v. Valley Bank of Nev*., 109 Nev. 280, 287, 849 P.2d 297, 302 (1993); *see also Halcrow Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 394, 398, 302 P.3d 1148, 1152 (2013). A proposed amendment may be deemed futile if the plaintiff seeks to amend the complaint in order to plead an impermissible claim, such as one which would not survive a motion to dismiss under NRCP 12(b)(5) or a "last-second amendment[ ] alleging meritless claims in an attempt to save a case from summary judgment." *Soebbing v. Carpet Barn, Inc.*, 109 Nev. 78, 84, 847 P.2d 731, 736 (1993).

Few Nevada cases explain precisely how the futility exception is to be properly applied. In theory, the exception is intended to mean that an amendment should not be allowed if it inevitably will be considered to be a waste of time and resources on which the movant has no realistic chance of prevailing at trial. But in practical application, a question exists regarding to what extent a district court may consider the ultimate merits of a proposed amendment at a time when all it has before it might be only the pleading itself, perhaps coupled with a few strands of discovery conducted under the auspices of the prior, unamended, pleading. In many such instances, improper or careless application of the futility exception to NRCP 15(a) could create an irreconcilable conflict between the loose pleading standards of NRCP 8, which governs what must be pleaded, and the more demanding evidentiary standards of NRCP 56, which governs whether what has been pleaded is entitled to proceed to trial.

The Nevada Supreme Court originally adopted the "futility" exception to NRCP 15(a) in *Allum*, 109 Nev. at 287, 849 P.2d at 302. There, the court affirmed a district court's denial of leave to

amend when the Racketeer Influenced and Corrupt Organization Act (RICO) claim plaintiff sought to add failed to adequately plead the occurrence of a "predicate act" required by the RICO statute. In reaching its decision, the Nevada Supreme Court expressly adopted the "futility" exception from the United States Court of Appeals for the Ninth Circuit's decision in *Reddy v. Litton Industries, Inc*., in which the Ninth Circuit affirmed a district court's denial of leave to amend when the allegations of the complaint itself made clear that the movant's claims were not cognizable. 912 F.2d at 291, 296 (9th Cir. 1990) ("His complaint makes clear that his injury was caused by his alleged wrongful termination. . . . It would not be possible for [plaintiff] to amend his complaint to allege a completely new injury that would confer standing to sue without contradicting any of the allegations of his original complaint."). Similarly, in *Halcrow*, 129 Nev. at 398-400, 302 P.3d at 1152-54, the Nevada Supreme Court affirmed the district court's denial of leave to add additional claims that were barred on their face by the "economic loss" doctrine, concluding that, under that doctrine, the movant "cannot assert claims of negligent misrepresentation against Halcrow."

In these three cases, the question of futility was resolved only with reference to the proposed amendment itself, because the court concluded that the amendments were facially futile without having to look outside the four corners of the pleadings. However, in the instant case, Sunset Station asked the district court to find Nutton's proposed amendments to be futile based on evidence lying almost entirely outside of the pleadings. The legal question before us inquires to what extent NRCP 15(a) permits a district court to look beyond the face of the proposed amendment and consider whether the amendment is likely to prove victorious before allowing it to be made.

In Nevada, pleadings are governed by NRCP 8, which requires only general factual allegations, not itemized descriptions of evidence. *See* NRCP 8 (complainant need only provide "a short and plain statement of the claim showing that the pleader is entitled to relief"); *see also Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 846, 858 P.2d 1258, 1260 (1993) ("The test for determining whether the allegations of a complaint are sufficient to assert a claim for relief is whether [they] give fair notice of the nature and basis of a legally sufficient claim and the relief requested."). Thus, a pleading need only broadly recite the "ultimate facts" necessary to set forth the elements of a cognizable claim that a party believes can be proven at trial. A pleading is not required to identify the particular "evidentiary facts" that will be employed to prove those allegations. *See* Jack Friedenthal, Mary Kane & Arthur Miller, *Civil Procedure* § 5.5 (4th ed. 2005) (discussing distinction between "ultimate facts" upon which a party bears the burden of proof, such as whether a breach

of duty occurred, and the "evidentiary facts" such as particular testimony or exhibits that may be used to meet that burden of proof).

Furthermore, Nevada is a "notice pleading" state, which means that the ultimate facts alleged within the pleadings need not be recited with particularity (except when required by NRCP 9, which is not at issue in this appeal), much less supported by citations to evidence and testimony within the pleading. *See Hall v. SSF, Inc*., 112 Nev. 1384, 1391, 930 P.2d 94, 98 (1996) ("[A] complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has adequate notice of the nature of the claim and the relief sought.") (internal quotation marks omitted); *Pittman v. Lower Court Counseling*, 110 Nev. 359, 365, 871 P.2d 953, 957 (1994) ("Nevada is a notice pleading jurisdiction and we liberally construe pleadings to place matters into issue which are fairly noticed to the adverse party."), *overruled on other grounds by Nunez v. City of N. Las Vegas*, 116 Nev. 535, 1 P.3d 959 (2000). Thus, a plaintiff is entitled under NRCP 8 to set forth only general allegations in its complaint and yet be able to rely in trial upon specific evidentiary facts never mentioned anywhere in its pleadings.

In contrast, the question of whether a claim would survive summary judgment under NRCP 56 is one that typically depends on evidence lying almost entirely outside the scope of the pleadings. A successful summary judgment motion requires the moving party to demonstrate both the absence of genuinely contested material facts as well as a prima facie entitlement to judgment as a matter of law based upon undisputed evidence that would be admissible at trial (or upon a lack of evidence if the nonmoving party bears the burden of persuasion at trial). Only after both showings have been made does the burden shift to the opposing party to prove the existence of genuinely disputed material facts. NRCP 56(e) (when a motion for summary judgment relies upon affidavits, the affidavits must set forth "such facts as would be admissible in evidence"); *see Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (moving party must make initial showing of both an absence of genuinely disputed material facts as well as entitlement to judgment as a matter of law before burden shifts to opposing party); *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 302, 662 P.2d 610, 621 (1983) (evidence in support of or in opposition to summary judgment must be evidence that would be admissible at trial). Summary judgment cannot be granted unless and until all of these requirements are satisfied.

[Headnote 10]

Consequently, a disparity exists between the general, and relatively lax, requirements of NRCP 8 and the highly specific evidentiary and procedural requirements of NRCP 56. In this case, Sunset Station argued that Nutton's amendment should be deemed futile not

because it failed to facially plead a cognizable claim under NRCP 12, but because it supposedly had no chance of succeeding on its merits under NRCP 56. When a district court is asked to apply the standards of NRCP 56 to determine the validity of a pleading that is only required to comply with NRCP 8 and 12, the court is asked to compare the general allegations of a pleading against specific evidence already uncovered during discovery (or that might possibly be uncovered later in discovery). This exercise must be done with great care and with considerable deference to the pleadings so that the court does not deny amendments that might have considerable merit.[4] The liberality embodied in NRCP 15(a) requires courts to err on the side of caution and permit amendments that appear arguable or even borderline, because denial of a proposed pleading amendment amounts to denial of the opportunity to explore any potential merit it might have had.[5] *See generally Foman v. Davis*, 371 U.S. 178, 182 (1962) ("If the underlying facts or circumstances relied upon by a party may be the proper subject of relief, he ought to be afforded an opportunity to test his claim on the merits."); *DCD Programs, Ltd. v. Leighton*, 833 F.2d 183, 186 (9th Cir. 1987) ("rule 15's policy of favoring amendments to pleadings should be applied with extreme liberality" [and] "amendment is to be liberally granted where from the underlying facts or circumstances, the plaintiff may be able to state a claim" (internal quotation marks omitted)).

[Headnote 11]

In the case at bar, the district court determined that Nutton's proposed amendment was not self-evidently futile on its face, but

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[4]NRCP 12(b) permits a court to look at evidence outside of the pleadings in some instances to determine whether a proper claim has been stated, but only if the parties are "given reasonable opportunity to present all material made pertinent to such a motion by Rule 56." Thus, when considering matters outside of the pleadings, the district court must apply the standards of NRCP 56 rather than NRCP 12(b).

[5]Motions seeking leave to amend a pleading ordinarily must be filed before the close of discovery; indeed, filing such a motion after discovery has already closed has been held to be one reason to deny such a motion. *See McNall v. Credit Bureau of Josephine Cnty.*, 689 F. Supp. 2d 1265, 1269 (D. Or. 2010) ("The timing of a motion to amend after completion of discovery . . . weighs heavily against allowing amendment."). Sunset Station's argument thus creates a potential paradox. Under Sunset Station's argument, a party should not be permitted leave to amend a pleading unless it is prepared to defeat a motion for summary judgment challenging the amendment, but the party might not possess the evidence needed to do that until discovery has closed. Furthermore, a party might possess limited means to conduct discovery relating to claims that have not already been pleaded while discovery was open. In short, Sunset Station's approach could effectively permit a proposed pleading amendment to be denied because the movant had not uncovered evidence supporting the amendment before any such discovery had actually been conducted and at a time when any such discovery might not even have been permitted.

rather that the amendment was unlikely to ultimately prevail at trial "given the results of the discovery already conducted." Thus, the district court implicitly compared the facts pleaded in the proposed amendment against the discovery already conducted in the case and concluded that Nutton could not prevail either at trial or in response to a future motion for summary judgment. However, no motion for summary judgment had yet been filed, and thus Sunset Station had not yet met its initial burden of demonstrating a facial entitlement to judgment under NRCP 56. Furthermore, because no summary judgment motion had yet been filed and discovery was still open, this is not a case in which the only obvious motive for Nutton's motion was to serve as a transparent, last-ditch effort to avoid summary judgment that otherwise might have been imminently granted.

Moreover, the briefing and exhibits before the district court in connection with Nutton's NRCP 15(a) motion contained at least one factual dispute that would have precluded the court from granting summary judgment based upon the evidence then before it. Specifically, Sunset Station's futility argument relied in part upon photographs of warning signs advising bowlers to wear bowling shoes. However, as Nutton correctly noted in his reply briefing, Sunset Station failed to provide admissible evidence proving that those signs were in place on the date of the fall. Thus, Sunset Station would not have been entitled to summary judgment based on the materials presented to the district court in connection with Nutton's motion. The district court fell into the trap of surmising that Nutton's proposed amendment would eventually prove to be futile under the standards of NRCP 56 before a sufficient legal basis existed to warrant this conclusion.[6]

Sunset Station's futility argument noted that Nutton's new cause of action depended upon facts apparently contradicted by his prior

[6]The district court's reaction was understandable in view of Nutton's deposition testimony which facially contradicted the factual premise of his proposed amendment. Nevertheless, had Sunset Station actually filed a motion for summary judgment against the amended claim, Nutton conceivably could have defended against it by seeking sanctuary under NRCP 56(f). NRCP 56(f) ("Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."); *see Francis v. Wynn Las Vegas*, 127 Nev. 657, 262 P.3d 705 (2011) (court may deny summary judgment if additional discovery necessary to fully respond). But here, it is not clear whether such a mechanism would have been available to Nutton in replying to an opposition to a motion originally filed under NRCP 15(a). The only opportunity for Nutton to have requested relief under NRCP 56(f) would have been in his reply brief, and it is not clear that the district court would have permitted Sunset Station to file a sur-reply so that Nutton's request could be fully considered.

deposition testimony. Specifically, Nutton had testified during his deposition that he did not believe his street shoes played a role in his fall, yet his proposed new claim asserted exactly that. Sunset Station thus contended that the amendment could not survive summary judgment because Nutton should not be allowed to change his story so late in the game. But the inconsistency cited by Sunset Station related to a matter of opinion regarding the ultimate cause of Nutton's fall, and not an observation of fact at all; merely because Nutton expressed a personal opinion (as an untrained layperson) that his shoes played no role in his fall does not necessarily mean his opinion was scientifically accurate. Nutton's personal opinion regarding the cause of the fall might have been admissible under the rules of evidence, *see* NRS 50.265 & 50.295, but it was not necessarily conclusive upon the jury, and denial of the amendment meant that Nutton was deprived of the opportunity to explain to a jury that his personal opinion may have been legitimately mistaken or simply a layperson's impression of events that did not match the physics of the fall.

[Headnote 12]

The mere fact that a party seeks to proffer apparently inconsistent testimony or assert apparently inconsistent positions at some point during the course of litigation does not, by itself, justify the granting of summary judgment against that party. The general rule is that a party cannot defeat summary judgment by contradicting itself in response to an already-pending NRCP 56 motion. *See Aldabe v. Adams*, 81 Nev. 280, 284-85, 402 P.2d 34, 36-37 (1965) (refusing to credit sworn statement made in opposition to summary judgment that was in direct conflict with an earlier statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998); *see also Cleveland v. Policy Mgmt. Sys. Corp.*, 526 U.S. 795, 806-07 (1999). But here, no summary judgment motion was pending at the time Nutton filed his motion. When a contradiction is not necessarily driven by a desperate attempt to avoid a pending summary judgment motion that appears meritorious on its face, a party's inconsistent testimony actually creates a question of credibility for the jury to resolve, unless the district court affirmatively concludes that the conflicting testimony either creates judicial estoppel or represents a legal "sham" designed solely to avoid summary judgment, and was not the result of an honest discrepancy, a mistake, or newly discovered evidence.[7]

[7]Even where a summary judgment motion has already been filed and a party seeks to defeat it by presenting last-minute inconsistent testimony, under federal jurisprudence, the general rule is that an apparent contradiction between an affidavit submitted in opposition to a summary judgment motion and the same witness's prior deposition testimony presents a question of credibility for the jury, unless the court affirmatively concludes that the later affidavit constitutes a

See Breliant v. Preferred Equities Corp., 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) (stating that when a change in testimony "represent[s] a legitimate abandonment of a clearly unsupportable theory of the case, rather than an attempt . . . to 'have it both ways,'" judicial estoppel does not bar a change in party's testimony); *see also Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004) (explaining that "judicial estoppel is an extraordinary remedy that should be cautiously applied only when a party's inconsistent position arises from intentional wrongdoing or an attempt to obtain an unfair advantage" and "does not preclude changes in position not intended to sabotage the judicial process" (internal quotation marks omitted)). The district court's futility analysis in this case noted the apparent contradiction, but the court did not make the affirmative findings allowing it to discount the change in Nutton's testimony and conclude there would have been nothing for the jury to resolve. Consequently, the apparent contradiction in this case represented a question of credibility for the jury to resolve, and summary judgment would not necessarily have been inevitable.

Accordingly, in this case, the district court's futility analysis was flawed. Nonetheless, Nutton failed to demonstrate "good cause" permitting the district court to even consider the merits of his belated motion seeking leave, and therefore this error was harmless under the circumstances.[8]

"sham." *See Radobenko v. Automated Equip. Corp.*, 520 F.2d 540, 544 (9th Cir. 1975) (citing *Perma Research & Dev. Co. v. Singer Co.*, 410 F.2d 572, 578 (2d Cir. 1969)). In *Kennett-Murray Corp. v. Bone*, 622 F.2d 887, 894 (5th Cir. 1980), the Fifth Circuit stated:

> The gravamen of the *Perma Research-Radobenko* line of cases is the reviewing court's determination that the issue raised by the contradictory affidavit constituted a sham. Certainly, every discrepancy contained in an affidavit does not justify a district court's refusal to give credence to such evidence. In light of the jury's role in resolving questions of credibility, a district court should not reject the content of an affidavit even if it is at odds with statements made in an earlier deposition.

See also Miller v. A.H. Robins Co., 766 F.2d 1102, 1104 (7th Cir. 1985) ("An inconsistent affidavit may preclude summary judgment . . . if the affiant was confused at the deposition and the affidavit explains those aspects of the deposition testimony or if the affiant lacked access to material facts and the affidavit sets forth the newly-discovered evidence."); *Camfield Tires, Inc. v. Michelin Tire Corp.*, 719 F.2d 1361, 1365 (8th Cir. 1983) (inconsistent affidavit may be accepted if it was not a sham but rather was an attempt to explain certain aspects of the confused deposition testimony and therefore was not really inconsistent). Thus, before excluding an apparently inconsistent affidavit, "the district court must make a factual determination that the contradiction was actually a 'sham' [and not] the result of an honest discrepancy, a mistake, or the result of newly discovered evidence." *Kennedy v. Allied Mut. Ins.*, 952 F.2d 262, 267 (9th Cir. 1991).

[8]Nutton also appeals the district court's order granting summary judgment and its order granting attorney fees and costs, but the only error ascribed to the district court was that the court did not allow him to amend his complaint

CONCLUSION

While the district court failed to determine whether "good cause" existed under NRCP 16(b) before reviewing the merits of Nutton's motion under NRCP 15(a), the error was harmless under the circumstances because the record demonstrates the motion would properly have been denied under the standards of NRCP 16(b). The district court did not err in granting summary judgment in favor of Sunset Station and awarding attorney fees and costs. We therefore affirm.

GIBBONS, C.J., and SILVER, J., concur.

PROVINCIAL GOVERNMENT OF MARINDUQUE, APPELLANT, *v.* PLACER DOME, INC.; AND BARRICK GOLD CORPORATION, RESPONDENTS.

No. 57956

June 11, 2015 350 P.3d 392

Appeal from a district court order granting a motion to dismiss for forum non conveniens. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Philippine province brought action against Canadian mining company arising from several incidents that caused significant environmental degradation and health hazards to its people. Company moved to dismiss for forum non conveniens. The district court granted the motion. Province appealed. The supreme court, PARRAGUIRRE, J., held that the district court: (1) properly gave less deference to the province's choice of a Nevada forum, (2) did not abuse its discretion by finding that public interest factors favored dismissal, (3) properly exercised its discretion in private interest factor analysis in dismissing, and (4) imposed appropriate conditions to ensure adequacy of the alternative fora without requiring company to proceed in any particular forum.

Affirmed.

Snell & Wilmer L.L.P. and *Patrick G. Byrne*, Las Vegas; *Snell & Wilmer L.L.P.* and *Neil Peck* and *Jessica E. Yates*, Denver, Colorado; *Diamond McCarthy, L.L.P.*, and *James D. McCarthy,*

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prior to summary judgment being granted. Because we conclude herein that the district court did not err in denying Nutton's motion for leave to amend his complaint, we necessarily must conclude that the district court also did not err in granting summary judgment in favor of Sunset Station on Nutton's original claim that Nutton expressly conceded was not valid.

Walter J. Scott, David Ammons, and *Reda Hicks*, Dallas, Texas, for Appellant.

Morris Law Group and *Steve L. Morris* and *Rex D. Garner*, Las Vegas; *Arnold & Porter LLP* and *Edward Han*, Washington, D.C.; *Arent Fox LLP* and *Martin F. Cunniff*, Washington, D.C., for Respondents.

1. Appeal and Error.
   The supreme court reviews a district court's order dismissing an action for forum non conveniens for an abuse of discretion.
2. Courts.
   When deciding a motion to dismiss for forum non conveniens, a district court must first determine the level of deference owed to the plaintiff's forum choice; next, a district court must determine whether an adequate alternative forum exists; and finally, if an adequate alternative forum does exist, the district court must then weigh public and private interest factors to determine whether dismissal is warranted.
3. Courts.
   Dismissal for forum non conveniens is appropriate only in exceptional circumstances when the factors weigh strongly in favor of another forum.
4. Courts.
   A plaintiff's choice of forum is generally entitled to great deference, but a foreign plaintiff's choice of a United States forum is entitled to less deference.
5. Courts.
   While the law recognizes the validity of a foreign plaintiff's selection of a United States forum in order to obtain jurisdiction over a defendant, a foreign plaintiff's choice will be entitled to substantial deference only when the case has bona fide connections to and convenience favors the chosen forum.
6. Courts.
   The district court properly gave less deference to Philippine province's choice of a Nevada forum to obtain personal jurisdiction over Canadian mining company by piercing its corporate veil, when company's subsidiary's business activities were the only connection that the litigation had with the state, which was not the type of bona fide connection that would have justified giving the province's forum choice substantial deference.
7. Courts.
   The district court did not abuse its discretion by finding that public interest factors favored dismissal for forum non conveniens of complaint filed by Philippine province against Canadian mining company involving incidents that caused significant environmental degradation and health hazards to people living in the province, where there would be minimal local interest in the litigation, Canadian law likely governed some issues, events giving rise to the litigation, which lacked any real connection to the state, spanned several decades, and extensive expert testimony would have been necessary to prove the province's claims and damages, and the weight of the factors favoring dismissal was compounded by fact that the parties continued to dispute whether personal jurisdiction was proper in Nevada.
8. Courts.
   Relevant public interest factors considered by the district court in ruling on motion to dismiss based on forum non conveniens include: (1) the

local interest in the case, (2) the district court's familiarity with applicable law, (3) the burdens on local courts and jurors, (4) court congestion, and (5) the costs of resolving a dispute unrelated to the plaintiff's chosen forum.

9. COURTS.

Where personal jurisdiction is difficult to determine, and forum non conveniens considerations weigh heavily in favor of dismissal, a district court may properly dismiss a complaint for forum non conveniens without first deciding whether it has personal jurisdiction over the defendant.

10. COURTS.

Where a genuine dispute as to personal jurisdiction exists, a district court may properly consider this dispute in the forum non conveniens analysis.

11. COURTS.

The district court properly exercised its discretion in its analysis of private interest factors in dismissing for forum non conveniens Philippine province's suit against Canadian mining company involving incidents that caused significant environmental degradation and health hazards to people living in the province, when no parties or witnesses resided in Nevada, but some witnesses resided in Canada, and a judgment could be more readily enforced against the company in Canada because the company was incorporated under the laws of Ontario and headquartered there.

12. COURTS.

Relevant private interest factors considered by the district court in ruling on motion to dismiss based on forum non conveniens may include the location of a defendant corporation, access to proof, the availability of compulsory process for unwilling witnesses, the cost of obtaining testimony from willing witnesses, and the enforceability of a judgment.

13. COURTS.

The district court was not required to deny motion to dismiss for forum non conveniens simply because it had found that litigating the matter, involving Philippine province's complaint against Canadian mining company involving incidents causing significant environmental degradation and health hazards to its people, in Nevada would not harass, oppress, or vex mining company.

14. COURTS.

A district court has discretion to impose conditions on a forum non conveniens dismissal to ensure that the case may be heard in an alternative forum.

15. COURTS.

The district court properly conditioned forum non conveniens dismissal, of Philippine province's environmental action against Canadian mining company, on the company's waiver of personal jurisdiction, statute of limitations, and forum non conveniens arguments in Ontario and British Columbia, and on stipulation that monetary and injunctive relief were available in either Canadian forum, where the conditions merely ensured that the company would be amenable to suit in the alternative fora and that the province would have some remedy.

16. COURTS.

An alternative forum is adequate, for purposes of forum non conveniens analysis, if the defendant is amenable to process in the other jurisdiction, and the alternative forum provides the plaintiff with some remedy for his or her wrong.

17. COURTS.

An alternative forum is inadequate, for purposes of forum non conveniens analysis, if a statute of limitations bars the bringing of the case in that forum.

18. COURTS.

The district courts are not required to impose conditions on forum non conveniens dismissals, but it is an abuse of discretion to fail to do so when there is a justifiable reason to doubt that a party will cooperate with the foreign forum.

Before the Court EN BANC.[1]

OPINION

By the Court, PARRAGUIRRE, J.:

In this appeal, we are asked to determine whether the district court abused its discretion by dismissing a complaint for forum non conveniens when the events giving rise to the complaint occurred in the Republic of the Philippines and the alternative fora are in Canada. Because this matter has no bona fide connection to this state, we conclude that the district court properly exercised its discretion by granting the motion to dismiss for forum non conveniens. We further conclude that the district court imposed appropriate conditions to ensure the adequacy of the alternative fora without requiring appellant to proceed in any particular forum. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant, the Provincial Government of Marinduque (the Province), is a political subdivision of the Republic of the Philippines. Respondent Placer Dome, Inc. (PDI), was incorporated under the laws of British Columbia, Canada. Beginning in the 1950s, a predecessor of PDI formed Marcopper Mining Corporation to undertake mining activities in the Province. This predecessor, and later PDI, held a substantial minority of the shares of Marcopper. According to the Province, PDI and its predecessor controlled all aspects of Marcopper's operations. During the course of Marcopper's operations, several incidents occurred that caused significant environmental degradation and health hazards to the people living in the Province, who are known as Marinduqueños.

These incidents and the harms resulting therefrom were investigated by several organizations, including United States Geological Survey (U.S.G.S.) teams. U.S.G.S. documents regarding the disasters are located in Colorado and Virginia, and U.S.G.S. team members reside throughout the United States. Several participants in medical missions to the Province also reside across the United States. Many witnesses whose testimony would be material to the Province's claims live in the Philippines. Many individuals named in the Province's operative complaint as being involved with Mar-

[1]THE HONORABLE KRISTINA PICKERING, Justice, voluntarily recused herself from participation in the decision of this matter.

copper or PDI live in Canada, but some live in the United States. Few, if any, material witnesses reside in Nevada.

At the time the Province filed its complaint in the district court, PDI subsidiaries owned mining operations in Nevada. Shortly thereafter, PDI and another business entity amalgamated under the laws of Ontario, Canada, to form respondent Barrick Gold Corporation. Barrick's subsidiaries have continued substantial mining operations in Nevada. Barrick and PDI contend that only their subsidiaries conduct business in Nevada and personal jurisdiction is therefore lacking. The Province responds that the corporate veils may be pierced to establish personal jurisdiction in Nevada over both Barrick and PDI.

Barrick and PDI moved to dismiss for forum non conveniens, arguing that either British Columbia, where PDI was incorporated, or Ontario, where Barrick was formed, would provide a better forum for this litigation. The Province opposed this motion and alternatively asked the district court to condition dismissal on Barrick's and PDI's consent to jurisdiction in the Philippines. Because the Province is a foreign plaintiff, the district court gave the Province's choice of a Nevada forum "little deference." The district court found that the Philippines would be the best forum for this litigation and stated that the Province could file a complaint there, but the court refused to condition dismissal on Barrick's and PDI's consent to jurisdiction in the Philippines. The district court further found that either British Columbia or Ontario provided an adequate alternative forum. After analyzing several public and private interest factors, the district court found that dismissal for forum non conveniens was warranted. The district court conditioned dismissal on Barrick's and PDI's (1) waiver of personal jurisdiction, statute of limitations, and forum non conveniens arguments in British Columbia and Ontario; and (2) stipulation that both monetary and injunctive relief would be available in British Columbia and Ontario. Because Barrick and PDI agreed to these conditions, the district court dismissed the action without prejudice. The Province now appeals.

DISCUSSION

[Headnote 1]

We review a district court's order dismissing an action for forum non conveniens for an abuse of discretion. *Payne v. Eighth Judicial Dist. Court*, 97 Nev. 228, 229, 626 P.2d 1278, 1279 (1981), *overruled on other grounds by Pan v. Eighth Judicial Dist. Court*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004).

[Headnotes 2, 3]

When deciding a motion to dismiss for forum non conveniens, a court must first determine the level of deference owed to the plaintiff's forum choice. *Pollux Holding Ltd. v. Chase Manhattan Bank*,

329 F.3d 64, 70 (2d Cir. 2003). Next, a district court must determine "whether an adequate alternative forum exists." *Lueck v. Sundstrand Corp.*, 236 F.3d 1137, 1142 (9th Cir. 2001) (citing *Piper Aircraft Co. v. Reyno*, 454 U.S. 235, 254 n.22 (1981)). If an adequate alternative forum does exist, the court must then weigh public and private interest factors to determine whether dismissal is warranted. *Id.* Dismissal for forum non conveniens is appropriate "only in exceptional circumstances when the factors weigh strongly in favor of another forum." *Eaton v. Second Judicial Dist. Court*, 96 Nev. 773, 774-75, 616 P.2d 400, 401 (1980), *overruled on other grounds by Pan*, 120 Nev. at 228, 88 P.3d at 844.

The Province's choice of a Nevada forum was entitled to less deference

[Headnotes 4, 5]

Generally, a plaintiff's choice of forum is entitled to great deference, but a foreign plaintiff's choice of a United States forum is entitled to less deference. *Pollux Holding*, 329 F.3d at 71. While the law recognizes the validity of a foreign plaintiff's selection of a United States forum in order to obtain jurisdiction over a defendant, a foreign plaintiff's choice will be entitled to substantial deference only where the case has bona fide connections to and convenience favors the chosen forum. *Id.* at 74.

[Headnote 6]

First, the Province contends that the district court should not have reduced the level of deference owed to its forum choice because it selected a Nevada forum to obtain personal jurisdiction over PDI. Even with this legitimate reason for choosing a foreign forum, the Province's choice is only entitled to additional deference to the extent that this case has bona fide connections to this state and convenience favors litigating this case in Nevada. *See id.* Because the Province only argues that personal jurisdiction is proper in Nevada through piercing Barrick's and PDI's corporate veils, the link between the Province's forum choice and its stated reason for that choice—establishing personal jurisdiction—is tenuous. *See id.* Moreover, Barrick's and PDI's subsidiaries' business activities are the only connection that this litigation appears to have with this state. This is not the type of bona fide connection that justifies giving a foreign plaintiff's forum choice substantial deference. *See id.* Accordingly, we conclude that the district court properly gave reduced deference to the Province's forum choice. *See Piper Aircraft*, 454 U.S. at 255-56; *Pollux Holding*, 329 F.3d at 74.

Second, the Province argues that the district court applied the wrong level of deference by stating that the Province's forum choice was entitled to "little deference." The district court also quoted *Piper Aircraft*, 454 U.S. at 256, however, to state that "a foreign plain-

tiff's choice [of forum] deserves less deference." Because the district court referred to the appropriate "less deference" standard, we conclude that using the word "little," although unusual in this context, does not indicate an abuse of discretion. *See Payne*, 97 Nev. at 229, 626 P.2d at 1279. We therefore conclude that the district court properly gave less deference to the Province's choice of a Nevada forum.[2] *Piper Aircraft*, 454 U.S. at 255-56.

The district court did not abuse its discretion by finding that the public and private interest factors favored dismissal for forum non conveniens

The Province does not argue on appeal that British Columbia and Ontario are inadequate alternative fora. Therefore, we now turn to the district court's analysis of the public and private interest factors. *See Lueck*, 236 F.3d at 1142.

The district court did not abuse its discretion in its analysis of the public interest factors

[Headnote 7]

The Province argues that the district court abused its discretion by finding that the public interest factors favored dismissal for forum non conveniens. We disagree.

[Headnote 8]

Relevant public interest factors include the local interest in the case, the district court's familiarity with applicable law, the burdens on local courts and jurors, court congestion, and the costs of resolving a dispute unrelated to the plaintiff's chosen forum. *Lueck*, 236 F.3d at 1147 (citing *Piper Aircraft*, 454 U.S. at 259-61).

As to the local interest in this case, the district court concluded that either Canadian forum had more interest in this matter than Nevada. The Province contends that some Marinduqueños living in Nevada may be interested in this litigation, but that does not mean that Nevada, or even Clark County, as a whole has an interest in this lawsuit. Barrick is incorporated and headquartered in Ontario, Barrick and PDI claim that only their subsidiaries have conducted business activities in Nevada, and no events related to this litigation occurred in Nevada. Thus, this case lacks any genuine connection to

[2]The Province further argues that it is not a foreign plaintiff whose forum choice may be given less deference because it is suing as *parens patriae* and some Marinduqueños reside in Nevada. Because the Province fails to further explain its argument or cite any authority in support of it, we decline to address this argument. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that this court need not consider claims that are not cogently argued or supported by relevant authority).

this state, and the district court did not abuse its discretion by finding that there would be only minimal local interest in this litigation. *See id.*; *Payne*, 97 Nev. at 229, 626 P.2d at 1279.

The district court also noted that neither it nor Canadian courts would be familiar with the laws of the Philippines governing the Province's claims, but Canadian law might govern some issues. The Province has not demonstrated that the district court abused its discretion by weighing this factor slightly in favor of dismissal. *Payne*, 97 Nev. at 229, 626 P.2d at 1279.

It cannot be disputed that this complicated case will impose heavy burdens on any court. The events giving rise to this litigation span several decades, and extensive expert testimony will undoubtedly be necessary to prove the Province's claims and damages. Thus, the district court did not abuse its discretion by finding that the burdens and costs of resolving this matter, which lacks any real connection to this state, support dismissal. *See Lueck*, 236 F.3d at 1147. Similarly, the district court did not abuse its discretion by finding that severe court congestion in the Eighth Judicial District favored dismissal. *See id.*

[Headnotes 9, 10]

Moreover, the district court did not abuse its discretion by concluding that the weight of these factors favoring dismissal is compounded by the fact that the parties continue to dispute whether personal jurisdiction is proper in Nevada. Where "personal jurisdiction is difficult to determine, and *forum non conveniens* considerations weigh heavily in favor of dismissal," a court may properly dismiss a complaint for forum non conveniens without first deciding whether it has personal jurisdiction over the defendant. *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 436 (2007). Where a genuine dispute as to personal jurisdiction exists, a district court may properly consider this dispute in the forum non conveniens analysis. *See id.* at 435-36.

As the district court stated, resolving the preliminary issue of personal jurisdiction alone "would likely entail extensive discovery, briefing, and multiple court hearings." It is undisputed that Barrick's and PDI's subsidiaries conducted business in Nevada, but the Province alleges that Barrick and PDI ignored corporate formalities, such that the corporate veils may be pierced to establish personal jurisdiction. *See Viega GmbH v. Eighth Judicial Dist. Court*, 130 Nev. 368, 375-76, 328 P.3d 1152, 1157 (2014) (stating that subsidiaries' contacts with a forum may support personal jurisdiction over a parent if the corporate veil is pierced). Whether a corporate veil should be pierced is a question of fact involving several factors. *LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 904, 8 P.3d 841,

846-47 (2000). Thus, whether personal jurisdiction is proper in Nevada under the alter ego doctrine could only be determined after significant discovery regarding the corporate practices of Barrick, PDI, and their subsidiaries. Accordingly, the existence of this dispute weighs heavily in favor of dismissal for forum non conveniens, and the district court properly considered Barrick's and PDI's personal jurisdiction objections in its analysis. *See Sinochem*, 549 U.S. at 435-36.

The district court did not abuse its discretion by finding that the private interest factors favored dismissal for forum non conveniens

[Headnotes 11, 12]

We also conclude that the district court properly exercised its discretion in its analysis of the private interest factors. Relevant private interest factors may include the location of a defendant corporation, access to proof, the availability of compulsory process for unwilling witnesses, the cost of obtaining testimony from willing witnesses, and the enforceability of a judgment. *Lueck*, 236 F.3d at 1145; *see also Eaton*, 96 Nev. at 774, 616 P.2d at 401.

The district court found that no parties or witnesses reside in Nevada, whereas some witnesses reside in Canada, and compulsory process is available throughout Canada. Although the Province contends that Barrick and PDI failed to demonstrate the materiality of these witnesses' testimony, many of these witnesses were named in the Province's operative complaint, indicating that the Province believed their testimony could be material. Thus, the district court did not abuse its discretion by concluding that these factors favored dismissal. *See Lueck*, 236 F.3d at 1145-46.

We note that the district court's order did not mention U.S.G.S. documents located in Virginia and Colorado, U.S.G.S. witnesses residing throughout the United States, or witnesses residing in the United States who participated in medical missions to Marinduque. The fact remains, however, that none of these documents or witnesses is in Nevada, the Province's chosen forum. Therefore, even though the district court did not mention this evidence, the district court did not abuse its discretion by concluding that the ease of bringing witnesses and evidence to trial favored dismissal for forum non conveniens. *See id.*

[Headnote 13]

Finally, the district court concluded that a judgment could be more readily enforced against Barrick in Canada than in Nevada. Because Barrick is incorporated under the laws of Ontario and headquartered there, we cannot conclude that this finding amounted to an abuse of discretion. *See id.*

Taking all of the public and private interest factors together, we conclude that the district court did not abuse its discretion by dismissing the Province's complaint for forum non conveniens. *See id.*; *Payne*, 97 Nev. at 229, 626 P.2d at 1279.

Finding that litigating in Nevada would not harass, oppress, or vex Barrick and PDI did not require the district court to deny the motion to dismiss for forum non conveniens

Finally, the Province contends that because the district court found that litigating in Nevada would not subject Barrick and PDI "to harassment, oppression, or vexatiousness," the district court could not grant dismissal for forum non conveniens as a matter of law. We disagree.

We have stated that in addition to the factors discussed above, a district "court should *also* consider whether failure to apply the doctrine would subject the defendant to harassment, oppression, vexatiousness or inconvenience." *Eaton*, 96 Nev. at 774, 616 P.2d at 401 (emphasis added). Thus, we have treated the issues of harassment, oppression, and vexatiousness as factors to be considered in the forum non conveniens analysis, not the dispositive talismans that the Province holds them out to be. *See id.* The Province has not suggested any compelling reason to depart from this approach, and we decline to do so. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (stating that this court will not overturn precedent "absent compelling reasons"). Therefore, the district court was not required to deny the motion to dismiss simply because it found that litigating this matter in Nevada would not harass, oppress, or vex Barrick and PDI.

The district court properly exercised its discretion in imposing conditions on dismissal for forum non conveniens

[Headnotes 14, 15]

A district court has discretion to impose conditions on a forum non conveniens dismissal to ensure that the case may be heard in an alternative forum. *See, e.g.*, *In re Union Carbide Corp. Gas Plant Disaster at Bhopal, India in Dec., 1984*, 809 F.2d 195, 203-04 (2d Cir. 1987); *see also Tuazon v. R.J. Reynolds Tobacco Co.*, 433 F.3d 1163, 1178 (9th Cir. 2006).

The Province argues that the district court should have conditioned dismissal on Barrick's and PDI's submission to jurisdiction in the Philippines. The Province relies on *Cortec Corp. v. Erste Bank Ber Oesterreichischen Sparkassen AG*, 535 F. Supp. 2d 403 (S.D.N.Y. 2008). In *Cortec*, the defendant offered Croatia as an alternative forum, and the district court sua sponte considered Austria as an alternative forum. *Id.* at 407, 411. The defendant in *Cortec*

did not object to Austrian jurisdiction, *see id.* at 411, and the district court imposed conditions on dismissal to ensure that the case could be heard in *either* Croatia or Austria, *id.* at 409, 413. Here, Barrick and PDI consent to jurisdiction in either British Columbia or Ontario, but continue to object to Philippine jurisdiction. We note that nothing in the district court's order prevents the Province from filing this action in the courts of the Philippines—the district court simply declined to condition dismissal on Barrick's and PDI's submission to jurisdiction in the Philippines. The Province has not cited and we have not found any authority stating that a district court may condition forum non conveniens dismissal on a defendant's submission to jurisdiction in a single forum that the defendant opposes. Moreover, adopting such a position would encourage plaintiffs to file lawsuits in Nevada that have no connection to this state, in the hope that district courts would condition forum non conveniens dismissals on defendants' submission to jurisdiction in other fora that the defendants opposed. We decline to turn the courts of this state into mere conduits for lawsuits that belong elsewhere.

[Headnotes 16-18]

To the extent that Barrick and PDI oppose the conditions imposed by the district court, we conclude that any such opposition lacks merit. An alternative forum is adequate if "the defendant is amenable to process in the other jurisdiction," *Piper Aircraft*, 454 U.S. at 254 n.22 (internal quotation marks omitted), and the alternative forum "provide[s] the plaintiff with some remedy for his wrong," *Lueck*, 236 F.3d at 1143. A forum is inadequate "if a statute of limitations bars the bringing of the case in that forum." *Bank of Credit & Commerce Int'l Ltd. v. State Bank of Pakistan*, 273 F.3d 241, 246 (2d Cir. 2001). "District courts are not required to impose conditions on *forum non conveniens* dismissals, but it is an abuse of discretion to fail to do so when there is a justifiable reason to doubt that a party will cooperate with the foreign forum." *Carijano v. Occidental Petroleum Corp.*, 643 F.3d 1216, 1234 (9th Cir. 2011) (internal quotation marks omitted).

Here, the district court conditioned dismissal on Barrick's and PDI's (1) waiver of personal jurisdiction, statute of limitations, and forum non conveniens arguments in Ontario and British Columbia; and (2) stipulation that monetary and injunctive relief are available in either Canadian forum. These conditions merely ensured that Barrick and PDI would be amenable to suit in the alternative fora and the Province would have some remedy. Therefore, these conditions guaranteed the availability and adequacy of an alternative forum, *see Piper Aircraft*, 454 U.S. at 254 n.22; *Bank of Credit & Commerce Int'l*, 273 F.3d at 246; *Lueck*, 236 F.3d at 1143, and the district court did not abuse its discretion by imposing these conditions, *see Carijano*, 643 F.3d at 1234.

CONCLUSION

We conclude that the district court properly gave less deference to the Province's choice of a Nevada forum. Applying this less deference standard, the district court did not abuse its discretion by dismissing the Province's complaint for forum non conveniens because, among other reasons, this case lacks any bona fide connection to this state, adequate alternative fora exist, and the burdens of litigating here outweigh any convenience to the Province. Finally, we hold that the district court imposed appropriate conditions on dismissal to ensure the existence of an adequate alternative forum for this litigation. Therefore, we affirm the district court's order dismissing the complaint for forum non conveniens.

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