CONCLUSION

The district court erred in failing to strike Juror 9 for cause as Juror 9's statements in their totality evinced bias against Sanders' case. This error resulted in an unfair empaneled jury, requiring reversal. The district court's process in allowing Juror 9 to be present while Sanders' challenged Juror 9 for cause likewise constitutes plain error under these facts. Further, the district court erred by admitting into evidence exhibit 62 over Sanders' objection as this document was not properly authenticated. Finally, the district court erred when it allowed a retained defense expert to testify to an undisclosed opinion by utilizing exhibit 62. Accordingly, we reverse and remand for a new trial.

GIBBONS, C.J., and TAO, J., concur.

DUSTIN JAMES BARRAL, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 64135

July 23, 2015 353 P.3d 1197

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of sexual assault with a minor under 14 years of age. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

The supreme court, CHERRY, J., held that, as a matter of first impression, the district court committed structural error when it failed to administer oath to jury venire before voir dire.

Reversed and remanded.

[Rehearing denied September 25, 2015]

[En banc reconsideration denied December 2, 2015]

Las Vegas Defense Group, LLC, and *Michael L. Becker* and *Michael V. Castillo*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Michelle Y. Jobe*, Deputy District Attorney, Clark County, for Respondent.

1. CRIMINAL LAW; JURY.
The district court committed structural error requiring reversal when it failed to administer oath to jury venire before voir dire. NRS 16.030(5).

2. Criminal Law.
   Whether the district court's actions constituted structural error is a question of law that the supreme court reviews de novo.
3. Criminal Law.
   Structural errors mandate routine reversal because they are intrinsically harmful.
4. Constitutional Law.
   A defendant in a criminal case is denied due process whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process. U.S. Const. amend. 14.
5. Criminal Law.
   A district court commits structural error, which is reversible per se, when it fails to administer the oath to potential jurors. NRS 16.030(5).

Before Parraguirre, Douglas and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

In this opinion, we address whether a district court commits structural error when it fails to administer an oath to the jury panel, pursuant to NRS 16.030(5), prior to commencing voir dire. We hold that it does.

FACTS AND PROCEDURAL HISTORY

Dustin Barral was charged with sexually assaulting a child. His case proceeded to a jury trial. At the beginning of voir dire, both the prosecution and defense explained to the potential jurors the importance of answering their questions honestly. After questioning the first potential juror, the following bench conference took place:

> MR. BECKER [for Barral]: My recollection may not be correct, but I think it's possible that the panel was not sworn in.
>
> THE COURT: They aren't.
>
> MR. BECKER: Okay.
>
> THE COURT: I don't swear them in until the end.
>
> MR. BECKER: Okay. In other words, admonish [the jury] that they are to give truthful answers to all the questions—
>
> MS. FLECK [for the State]: Yeah[.]
>
> MR. CASTILLO [for Barral]: That's fine.
>
> . . . .
>
> THE COURT: —I won't swear them in.
>
> MR. BECKER: Okay.

THE COURT: Because the ones who are sworn in; that's the panel.

MR. BECKER: Right.

. . . .

MS. FLECK: But do we have to give them the oath that they have to tell the truth[?]

THE COURT: No.

MS. FLECK: Or no?

THE COURT: No.

MS. FLECK: Okay.

THE COURT: No.

MS. FLECK: Okay.

The court then proceeded with voir dire. The district court clerk swore in the petit jury at the beginning of the second day of trial. After both parties rested and presented closing arguments, the jury deliberated for approximately three hours and returned guilty verdicts on both charges. Following a post-trial motion for acquittal that the court denied, Barral appealed.

DISCUSSION

[Headnote 1]

Barral claims that the district court committed structural error requiring reversal when it failed to comply with NRS 16.030(5)[1] and administer the oath to the jury venire before voir dire. He argues that the court's error compromised his right to trial by an impartial jury because potential jurors may not have felt obligated to respond truthfully during voir dire, as the court did not place them under oath. The State contends that the potential jurors understood that they were required to answer truthfully because the court and counsel for both sides repeatedly stressed to the venire the importance

[1]NRS 16.030(5) dictates:

> Before persons whose names have been drawn are examined as to their qualifications to serve as jurors, the judge or the judge's clerk *shall* administer an oath or affirmation to them in substantially the following form:
>
> > Do you, and each of you, (solemnly swear, or affirm under the pains and penalties of perjury) that you will well and truly answer all questions put to you touching upon your qualifications to serve as jurors in the case now pending before this court (so help you God)?

(Emphasis added.) Although this statute is articulated in the civil practice section of the Nevada Revised Statutes, it applies to criminal proceedings through NRS 175.021(1).

of answering their questions honestly. The State also argues that the court's error did not undermine the framework of the trial.

[Headnote 2]

Whether the district court's actions in this case constituted structural error is a question of law that we review de novo. *See Neder v. United States*, 527 U.S. 1, 7 (1999) ("[W]e have recognized a limited class of fundamental constitutional errors that defy analysis by harmless error standards. Errors of this type are so intrinsically harmful as to require automatic reversal (*i.e.*, affect substantial rights) without regard to their effect on the outcome." (internal citations and quotation marks omitted)); *see also* NRCP 61 ("No error . . . in anything done or omitted by the court . . . is ground for granting a new trial or for setting aside a verdict . . . , unless refusal to take such action appears to the court inconsistent with substantial justice.").

NRS 16.030(5)

NRS 16.030(5) does not give the district courts discretion: "the judge or the judge's clerk *shall* administer an oath or affirmation." *Id.* (emphasis added); *see also* NRS 0.025(1)(d) (stating that " '[s]hall' imposes a duty to act"). Thus, we conclude that the district court violated NRS 16.030(5) in the instant case when, according to its apparent general preference, it failed to administer the oath to the venire. Neither party disputes that the district court erred by violating NRS 16.030(5). However, a district court's error will not always entitle a convicted defendant to a new trial. The type of relief, if any, to which a criminal defendant is entitled following a trial court's violation of NRS 16.030(5) is an issue of first impression for this court.

Structural error

[Headnote 3]

Structural errors compromise "the framework of a trial." *Brass v. State*, 128 Nev. 748, 752, 291 P.3d 145, 148 (2012). Such errors mandate routine reversal because they are " 'intrinsically harmful.' " *Id.* (quoting *Cortinas v. State*, 124 Nev. 1013, 1024, 195 P.3d 315, 322 (2008)). The United States Supreme Court has repeatedly held that trial court errors which violate a defendant's Sixth Amendment right to an impartial jury are structural errors that create the probability of prejudice and preclude the need for showing actual prejudice to warrant relief. *See Peters v. Kiff*, 407 U.S. 493, 502 (1972) (stating that "even if there is no showing of actual bias in the tribunal, this Court has held that due process is denied by circumstances that create the likelihood or the appearance of bias," and citing, as examples, *Mayberry v. Pennsylvania*, 400 U.S. 455, 465-66 (1971)

(concluding that the same judge who was subject to a trial lawyer's insults that were "apt to strike at the most vulnerable and human qualities of a judge's temperament" was precluded from deciding the criminal contempt charges against the lawyer in order for "justice [to] satisfy the appearance of justice") (internal citations and quotations omitted from parenthetical)); *Estes v. Texas*, 381 U.S. 532, 545 (1965) (reversing a criminal conviction without a showing of the actual prejudice caused by the television broadcast of the trial proceedings because "[t]he conscious or unconscious effect that [broadcasting the trial] may have on [the proceedings] cannot be evaluated, but experience indicates that it is not only possible but highly probable"); *Turner v. Louisiana*, 379 U.S. 466, 467-73 (1965) (reversing a criminal conviction without a showing of prejudice because two of the sheriff's deputies (who were "key witnesses" at trial and testified regarding disputed facts) were responsible for the sequestered jury over the course of the trial and were continuously in the jurors' company, including transporting the jurors to restaurants for each meal, transporting the jurors to and from their lodgings, conversing with the jurors, and handling errands for the jurors); *In re Murchison*, 349 U.S. 133, 133-34, 136 (1955) (holding that a judge who acted as a "one-man grand jury" could not try the case of two witnesses the judge charged with contempt because "[a] fair trial in a fair tribunal is a basic requirement of due process [and] requires [not only] an absence of actual bias [but the prevention of] even the probability of unfairness"); and *Tumey v. Ohio*, 273 U.S. 510, 531, 535 (1927) (reversing a defendant's criminal conviction by a judge who was "paid for his service only when he convicts the defendant" because "[n]o matter what the evidence was against [the defendant], he had the right to have an impartial judge"). In *Peters*, the Court reasoned that due process demands not only the absence of bias but the appearance of bias as well:

> These principles [that fairness requires not only the absence of actual bias but also preventing even a possibility of bias] compel the conclusion that a State cannot, consistent with due process, subject a defendant to . . . trial by a jury that has been selected in an arbitrary and discriminatory manner, in violation of the Constitution and laws of the United States. Illegal and unconstitutional jury selection procedures cast doubt on the integrity of the whole judicial process. They create the appearance of bias in the decision of individual cases, and they increase the risk of actual bias as well.

407 U.S. at 502-03.

The *Peters* Court considered whether the arbitrary exclusion of African Americans from the grand jury invalidated the indictment and subsequent conviction of a Caucasian crim-

inal defendant. *Id.* at 496-97. Peters claimed that (1) the juries that indicted and convicted him were created through constitutional and statutorily prohibited means, (2) the consequence of this error on a single prosecution is indeterminable, and (3) any indictment or conviction returned by a jury selected in violation of the Constitution or federal law must be reversed. *Id.* at 496-97. The Supreme Court agreed with Peters and concluded that neither the indictment nor the conviction against him was valid due to illegal selection procedures used to seat the grand and petit juries. *Id.* at 501.

The *Peters* Court was specifically concerned with protecting the integrity of the jury selection process through procedural safeguards. *Id.* at 501-03. The Court explained that our system of justice " 'has always endeavored to prevent *even the probability* of unfairness.' " *Id.* at 502 (emphasis added) (quoting *In re Murchison*, 349 U.S. at 136). The Court further clarified that "[i]t is in the nature of the *practices* here challenged that proof of actual harm, or lack of harm, is virtually impossible to adduce," because "there is no way to determine" the composition of the jury or the decision it would have rendered if the jury had been selected pursuant to constitutional mandates. *Peters*, 407 U.S. at 504 (emphasis added).

[Headnotes 4, 5]

Based on the Supreme Court's reasoning, *see id.* at 498-505, we are persuaded that a defendant in a criminal case is denied due process whenever jury selection procedures do not strictly comport with the laws intended to preserve the integrity of the judicial process. An indictment or a conviction resulting from an improperly selected jury must be reversed. A fair tribunal is an elementary prerequisite to due process, so we will not condone any deviation from constitutionally or statutorily prescribed procedures for jury selection. *Cf. id.* at 501. Accordingly, we hold that a district court commits structural error when it fails to administer the oath to potential jurors pursuant to NRS 16.030(5). As we have concluded that failing to swear the potential jurors is a structural error, it is reversible *per se*; a defendant need not prove prejudice to obtain relief.

Therefore, we reverse Barral's convictions for sexual assault of a minor under 14 years of age and remand this matter to the district court for a new trial. Because we reverse Barral's convictions on the grounds that the district court committed structural error in the jury selection process, we need not address the remaining issues in his appeal.

PARRAGUIRRE and DOUGLAS, JJ., concur.

BARRY A. FORD, AN INDIVIDUAL; AND PATRICIA A. FORD, AN INDIVIDUAL, APPELLANTS, *v.* BRANCH BANKING AND TRUST COMPANY, SUCCESSOR-IN-INTEREST TO COLONIAL BANK BY ACQUISITION OF ASSETS FROM THE FDIC AS RECEIVER FOR COLONIAL BANK, A NORTH CAROLINA BANKING CORPORATION ORGANIZED AND IN GOOD STANDING UNDER THE LAWS OF THE STATE OF NORTH CAROLINA, RESPONDENT.

No. 65242

July 23, 2015 353 P.3d 1200

Appeal from a district court order denying a motion for NRCP 60(b) relief in a breach of guaranty action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Assignee of lender brought action against guarantors of commercial loans, alleging breach of guaranty. The district court entered judgment in favor of assignee and subsequently denied guarantors' motion to set aside judgment. Guarantors appealed. The supreme court, PARRAGUIRRE, J., held that change in precedent did not warrant grant of motion for relief from judgment.

Affirmed.

Law Office of Timothy P. Thomas, LLC, and *Timothy P. Thomas*, Las Vegas, for Appellants.

Sylvester & Polednak, Ltd., and *Ryan W. Daniels, Allyson R. Noto*, and *Jeffrey R. Sylvester*, Las Vegas, for Respondent.

1. JUDGMENT.
   Rule of civil procedure that allowed a court to set aside a judgment when a prior judgment upon which it was based had been reversed or otherwise vacated, or it was no longer equitable that an injunction should have prospective application, did not allow a court to set aside a judgment solely based on new or changed precedent; rule's "prior judgment" language referred to prior judgment that instant judgment was based on in the sense of claim or issue preclusion, and judgment was purely monetary and an injunction was neither sought nor obtained. NRCP 60(b)(5).
2. APPEAL AND ERROR.
   The supreme court generally reviews a district court's decision to grant or deny a motion to set aside a judgment for an abuse of discretion. NRCP 60(b).
3. APPEAL AND ERROR.
   The supreme court reviews de novo a district court's interpretation of the Nevada Rules of Civil Procedure.

Before PARRAGUIRRE, DOUGLAS and CHERRY, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

NRCP 60(b)(5) allows the district court to set aside a judgment when, in material part, "a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable that an injunction should have prospective application." Here, we are asked to determine whether new or changed precedent from this court justifies NRCP 60(b)(5) relief. We conclude that NRCP 60(b)(5) does not allow a district court to set aside judgments solely based on new or changed precedent. Additionally, we conclude that NRCP 60(b)(5) does not allow a district court to set aside monetary judgments merely because new or changed precedent makes enforcement inequitable. Accordingly, we affirm the district court's order denying NRCP 60(b) relief.

FACTS

In 2004, appellants Barry and Patricia Ford guaranteed two commercial loans made by Colonial Bank. The FDIC subsequently acquired the loans when it was appointed as the receiver for Colonial Bank. The FDIC, in turn, assigned the loans to respondent Branch Banking and Trust Company (BB&T) in August 2009. The properties securing the commercial loans were foreclosed August 29, 2011, and BB&T brought a breach of guaranty action against the Fords in December 2011. After a partial summary judgment hearing, the district court determined that the amount of damages was the only issue remaining for trial.

At trial, the parties disputed whether NRS 40.459(1)(c) (2013) (current version codified at NRS 40.459(3)(c)), which reduces the amount of some deficiency judgments, could limit the amount the Fords owed BB&T. The district court concluded that former NRS 40.459(1)(c) only applied prospectively. Further, it concluded the statute would have an impermissible retroactive effect if applied to loans, like this one, that were assigned before NRS 40.459(1)(c) took effect on June 10, 2011. *See* 2011 Nev. Stat., ch. 311, §§ 5(c), 7 at 1740, 1743, 1748. Therefore, NRS 40.459(1)(c) could not apply to the Fords' loans, and they were liable for the full deficiency. The Fords never appealed the district court's final judgment.

More than one year after the district court entered its judgment, this court published *Sandpointe Apartments v. Eighth Judicial District Court*, 129 Nev. 813, 313 P.3d 849 (2013). *Sandpointe* holds that "NRS 40.459(1)(c) only applies prospectively," and an application of the statute is prospective if there has been no fore-

closure sale on the underlying loan as of June 10, 2011, the date the statute was enacted. *Sandpointe*, 129 Nev. at 816, 313 P.3d at 851. Whether or when a loan is assigned is not material. *Id.* Therefore, the district court erred in holding that NRS 40.459(1)(c) would be retroactive if applied to the Fords' loans because the foreclosure sale occurred August 29, 2011, more than two months after NRS 40.459(1)(c) took effect. Shortly after the *Sandpointe* opinion was published, the Fords asked the district court to set aside the judgment against them pursuant to NRCP 60(b)(5). The district court denied the Fords' motion, holding that NRCP 60(b)(5) was not an appropriate avenue for seeking relief based on new or changed precedent. The Fords now appeal that decision.

DISCUSSION

[Headnote 1]

On appeal, the Fords argue they can invoke NRCP 60(b)(5) to set aside the judgment against them because (1) *Sandpointe* reversed "a prior judgment upon which" the judgment against them was based, and (2) "it is no longer equitable" to enforce the judgment against them in light of this court's *Sandpointe* opinion. NRCP 60(b)(5).

[Headnotes 2, 3]

Generally, we review a trial court's decision "to grant or deny a motion to set aside a judgment under NRCP 60(b)" for an abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). However, we review de novo the district court's interpretation of the Nevada Rules of Civil Procedure. *See Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 662, 188 P.3d 1136, 1142 (2008); *see also Webb ex rel. Webb v. Clark Cnty. Sch. Dist.*, 125 Nev. 611, 618, 218 P.3d 1239, 1244 (2009). The district court denied the Fords' NRCP 60(b)(5) motion based on its interpretation of that rule, holding NRCP 60(b)(5) does not permit district courts to set aside judgments based on new or changed precedent. Therefore, de novo review is appropriate here. *See Moseley*, 124 Nev. at 662, 188 P.3d at 1142; *Webb*, 125 Nev. at 618, 218 P.3d at 1244.

The material portions of NRCP 60(b)(5) allow the district court to set aside a judgment when "[1] a prior judgment upon which [the challenged judgment] is based has been reversed or otherwise vacated, or [2] it is no longer equitable that an injunction should have prospective application." "Rule 60(b) of the Nevada Rules of Civil Procedure is modeled on Rule 60(b) of the Federal Rules of Civil Procedure, as written before the [FRCP's] amendment in 2007." *Bonnell v. Lawrence*, 128 Nev. 394, 398, 282 P.3d 712, 714 (2012). "Federal cases interpreting the Federal Rules of Civil Procedure 'are strong persuasive authority, because the Nevada Rules of Civil Procedure are based in large part upon their federal counterparts.'" *Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 118 Nev. 46, 53, 38 P.3d

872, 876 (2002) (quoting *Las Vegas Novelty, Inc. v. Fernandez*, 106 Nev. 113, 119, 787 P.2d 772, 776 (1990)).

The Fords contend that *Sandpointe* reversed a "prior judgment" that formed the basis of the judgment against them, meaning they may be entitled to relief under NRCP 60(b)(5). We reject the Fords' interpretation.

The "prior judgment" language in NRCP 60(b)(5) is identical to the pre-2007 version of its federal counterpart and substantively the same as the current federal rule.[1] *Compare* NRCP 60(b)(5) (the court may set aside a judgment when "a prior judgment upon which it is based has been reversed or otherwise vacated"), *with* FRCP 60(b)(5) (2006) (same), *and* FRCP 60(b)(5) (2014) (the court may set aside a judgment when "it is based on an earlier judgment that has been reversed or vacated"). The "prior judgment" portion of FRCP 60(b)(5) "does not apply merely because a case relied on as precedent by the court in rendering the present judgment has since been reversed." 11 Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 2863 (3d ed. 2012). Rather, "[t]his ground is limited to cases in which the present judgment is based on the prior judgment in the sense of claim or issue preclusion." *Id.*; *accord Tomlin v. McDaniel*, 865 F.2d 209, 210-11 (9th Cir. 1989), *overruled on other grounds by Gonzalez v. Crosby*, 545 U.S. 524 (2005); *Comfort v. Lynn Sch. Comm.*, 560 F.3d 22, 27 (1st Cir. 2009).

We find the federal analysis of FRCP 60(b)(5) persuasive and conclude NRCP 60(b)(5)'s "prior judgment" language does not reach new or changed precedent. The Fords' matter and *Sandpointe* do not involve the same parties or loans such that concerns about claim or issue preclusion arise. *See Weddell v. Sharp*, 131 Nev. 233, 350 P.3d 80 (2015) (clarifying the elements of claim preclusion); *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (setting forth the basic elements for claim and issue preclusion); *see also Sandpointe*, 129 Nev. 813, 313 P.3d 849. Therefore, *Sandpointe* is merely new precedent, and NRCP 60(b)(5)'s "prior judgment" language does not apply here.

The Fords also argue they are entitled to relief under NRCP 60(b)(5) because, after *Sandpointe*, it is no longer equitable to enforce the judgment against them. We also reject this interpretation of NRCP 60(b)(5).

NRCP 60(b)(5) allows a district court to set aside a judgment when "it is no longer equitable that *an injunction* should have prospective application." (Emphasis added.) The pre-2007 version of FRCP 60(b)(5) allows a district court to set aside a judgment when

[1]In 2007, the federal rules were amended to make stylistic changes only; the changes were not intended to modify the substance of the rules. FRCP 60 advisory committee's note (2007 amendments).

"it is no longer equitable that *the judgment* should have prospective application." (Emphasis added.)[2] Nevada's Advisory Committee expressly noted that it was modifying the federal rule such that the Nevada rule would only consider the prospective application of injunctions, not judgments generally.[3] NRCP 60 advisory committee's note. Therefore, NRCP 60(b)(5)'s drafters evidenced a clear intent to set aside only *injunctions* where continued enforcement would be inequitable. *See Moseley*, 124 Nev. at 662 n.20, 188 P.3d at 1142 n.20 (stating this court may interpret the NRCP like a statute and subject to de novo review). The judgment against the Fords is purely monetary, and BB&T neither sought nor obtained an injunction. Therefore, the judgment against the Fords cannot be set aside under NRCP 60(b)(5), even if enforcement might be inequitable.

Thus we conclude that new or changed precedent does not constitute reversal of a "prior judgment" under NRCP 60(b)(5). Additionally, NRCP 60(b)(5) relief is not available for monetary judgments simply because enforcement of the judgment might be inequitable in light of new or changed precedent. Accordingly, we affirm the district court's order denying the Fords' NRCP 60(b)(5) motion.

DOUGLAS and CHERRY, JJ., concur.

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[2]The current version of FRCP 60(b)(5) allows a judgment to be set aside when "applying [*the judgment*] prospectively is no longer equitable." The change here was meant to be purely stylistic, not substantive. FRCP 60 advisory committee's note (2007 amendments).

[3]The Advisory Committee's Note states, "[t]he federal rule is revised as follows . . . [i]n part (4), the words 'an injunction' are substituted for 'the judgment.'" NRCP 60 advisory committee's note. The reference to "part (4)" is clearly a typographical error. Part (4) of both the FRCP 60(b) and NRCP 60(b) simply state "the judgment is void." Therefore, "part (4)" was not modified at all. However, as discussed above, part (5) of NRCP 60(b) substitutes the words "the judgment" from the federal rules with the words "an injunction." As such, Nevada's Advisory Committee clearly intended to reference part (5) in its note, but mistakenly wrote part (4).

SAUNDRA TORRES, Appellant, *v.* NEVADA DIRECT INSURANCE COMPANY, Respondent.

No. 61103

SAUNDRA TORRES, Appellant, *v.* NEVADA DIRECT INSURANCE COMPANY, Respondent.

No. 61640

July 30, 2015 353 P.3d 1203

Consolidated appeals from a district court judgment in an action by an injured party against an insurance company and a post-judgment order awarding costs. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

After obtaining a default judgment against both driver and owner of other vehicle, injured driver sued the owner's automobile liability insurer to recover upon the judgment under the insurance policy. Following a bench trial, the district court entered judgment in favor of insurer. Driver appealed. The supreme court, Hardesty, C.J., held that: (1) motor vehicle financial responsibility law precluded insurer from avoiding coverage as to driver, (2) substantial evidence supported the district court's determination on driver's promissory estoppel claim, and (3) driver did not have standing to pursue bad-faith claim.

Affirmed in part, reversed in part, and remanded.

Ganz & Hauf and *Adam Ganz* and *Marjorie L. Hauf*, Las Vegas, for Appellant.

Murchison & Cumming, LLC, and *Michael J. Nunez, Douglas J. Duesman*, and *Dustun H. Holmes*, Las Vegas, for Respondent.

1. Appeal and Error.
   On appeal, the supreme court gives deference to the district court's factual findings but reviews its conclusions of law, including statutory interpretation issues, de novo.
2. Statutes.
   When a statute's language is unambiguous, the supreme court does not resort to the rules of construction and will give that language its plain meaning; but, if the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, the supreme court looks to the provision's legislative history and the context and the spirit of the law or the causes that induced the Legislature to enact it.
3. Insurance.
   Motor vehicle financial responsibility law precluded automobile liability insurer from avoiding coverage as to injured third-party driver, who had obtained a default judgment against insured tortfeasor, even though the insured had failed to comply with policy's notice and cooperation clauses; law provided that liability of insurance carrier becomes absolute whenever injury or damage covered by the policy occurs. NRS 485.3091.

4. Insurance.
   No post-injury violation of an automobile liability insurance policy will release the insurer under statutory absolute-liability provision. NRS 485.3091.
5. Evidence; Insurance.
   Automobile liability insurer's statutory offer of judgment to injured third-party driver, which did not occur in driver's underlying personal injury lawsuit, but rather in a separate declaratory relief action brought by insurer, could not be considered for purpose of satisfying insurer's obligations under absolute-liability statute. NRS 48.105(1), 485.3091.
6. Estoppel.
   Substantial evidence supported the district court's conclusion that letters sent by automobile liability insurer to injured third-party driver before she filed her personal injury lawsuit, stating that insurer would review the demand and contact driver's attorney with an offer, were insufficient to induce reliance or establish a promise, as would support driver's promissory estoppel claims, when letters did not constitute a clear promise to pay, nor did they specify an amount to be paid.
7. Appeal and Error.
   Even if there is conflicting evidence, the supreme court will not overturn a district court judgment if it is supported by substantial evidence; substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion.
8. Appeal and Error.
   If the evidence, though conflicting, can be read to support a district court's conclusion, the supreme court must approve the court's determinations.
9. Insurance.
   Third-party driver, who was injured in collision with insured's vehicle, did not have a contractual relationship with the insurer and, thus, had no standing to bring claim against insurer for bad faith in violation of the implied covenant of good faith and fair dealing; motor vehicle financial responsibility law contained no express language that permitted a third-party claimant to pursue an independent bad-faith claim against an insurer. NRS 485.3091.
10. Appeal and Error.
    A decision to dismiss a complaint for failure to state a claim upon which relief can be granted is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. NRCP 12(b)(5).
11. Pretrial Procedure.
    Dismissing a complaint for failure to state a claim upon which relief can be granted is appropriate only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief. NRCP 12(b)(5).
12. Appeal and Error.
    All legal conclusions are reviewed de novo.
13. Contracts; Insurance.
    The implied covenant of good faith and fair dealing is a common-law duty applicable in all contracts; a breach of this duty can only occur when there is a special relationship between the parties, such as that between an insurer and insured.
14. Insurance.
    Third-party claimants do not have a contractual relationship with insurers and thus have no standing to claim bad faith.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

Appellant sustained injuries in a car accident. After obtaining a default judgment against both the driver and the owner of the other vehicle, appellant sued the owner's insurer to recover upon the judgment under the insurance policy. In this appeal from the district court's take-nothing judgment, we consider whether an injured party like appellant may assert NRS 485.3091,[1] Nevada's absolute-liability statute, in order to sue the tortfeasor's insurer after obtaining a judgment against the tortfeasor, and whether an injured party can pursue a bad faith claim against the insurer. We also consider whether the insurer's actions established a valid promissory estoppel claim.

We conclude that an insurer cannot circumvent the state's absolute-liability statute. Accordingly, a statutory third-party claimant can sue the insurer to enforce compliance with NRS 485.3091, and we thus conclude that the district court erred in denying appellant relief under NRS 485.3091. However, we conclude nothing in the statute grants a third-party claimant an independent cause of action for bad faith against an insurer. We further conclude that the district court did not err in denying relief on appellant's promissory estoppel claim. Thus, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

In April 2006, Jario Perez-Castellano was driving a vehicle owned by Adiel Mollinedo-Cruz and insured by Nevada Direct Insurance Company (NDIC) when he crashed into appellant Saundra Torres's car, injuring Saundra. Neither Mollinedo-Cruz nor Perez-Castellano contacted NDIC. Torres filed a complaint against Mollinedo-Cruz and Perez-Castellano for negligence, negligent entrustment, and punitive damages stemming from the car accident. Mollinedo-Cruz and Perez-Castellano answered the complaint, denying all of the allegations and raising several affirmative defenses. Mollinedo-Cruz and Perez-Castellano then stopped participating in the action.

NDIC subsequently filed a complaint for declaratory relief against Mollinedo-Cruz, Perez-Castellano, and Torres. NDIC argued that because Mollinedo-Cruz violated the policy in failing to cooperate with the post-accident investigation, NDIC was not re-

[1]In relevant part, the statute provides that every motor vehicle insurance policy must contain a provision requiring that "[t]he liability of the insurance carrier with respect to the insurance required by this chapter becomes absolute whenever injury or damage covered by the policy occurs." NRS 485.3091(5)(a).

sponsible for his defense or indemnification in Torres's suit against Mollinedo-Cruz. NDIC made an offer of judgment for $1 more than Mollinedo-Cruz's policy limit to Torres, but she declined the offer. The district court entered default judgments against Mollinedo-Cruz and Perez-Castellano in the declaratory relief case and concluded that NDIC was not obligated to defend or indemnify either of them for the accident with Torres. But the district court concluded that the default judgments "[did] not apply to and are not binding" on Torres and she could "pursue any and all claims/defenses available to her under" Mollinedo-Cruz's insurance policy. Torres subsequently acquired a default judgment against Mollinedo-Cruz and Perez-Castellano in her original liability action.

Torres then filed a new complaint against NDIC. Torres claimed that NDIC breached the insurance policy when it failed to pay her claim, she was entitled to damages based on a theory of promissory estoppel, and NDIC breached the implied covenant of good faith and fair dealing. NDIC filed a motion to dismiss Torres's promissory estoppel and breach of the implied covenant of good faith and fair dealing claims for failure to state a claim. The district court denied NDIC's motion on Torres's promissory estoppel claim but granted the motion on Torres's claim that NDIC breached the implied covenant of good faith and fair dealing.

At the conclusion of a two-day bench trial, the district court entered judgment in favor of NDIC. The district court concluded that Torres was neither a named contracting party nor an intended third-party beneficiary of the insurance contract. The court further concluded that Torres was not a judgment creditor of NDIC because NDIC obtained its default judgment—"that it had no duty to defend or indemnify" anyone for the accident with Torres—before Torres obtained her default judgment against Mollinedo-Cruz and Perez-Castellano.[2] The court also concluded that NDIC fulfilled any obligations under the insurance contract because NDIC made an offer of judgment for the policy limit to Torres, which she rejected.

In regard to Torres's promissory estoppel argument, the district court determined that letters sent from NDIC to Torres indicating that it was reviewing her medical records and it would "review the demand and contact [Torres's counsel] with an offer" did not amount to a promise to pay any amount, and that none of the correspondence between NDIC and Torres precluded Torres from taking action. Torres now appeals.

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[2]Neither Torres nor NDIC argue in their opening or responding briefs that Torres was a judgment creditor of NDIC. However, Torres included such an argument in her reply brief. NRAP 28(c) limits a reply brief to "answering any new matter set forth in the opposing brief." Therefore, we decline to address this issue on appeal.

DISCUSSION

In resolving this appeal, we must first determine whether Torres has a statutory claim against NDIC under the so-called absolute-liability statute, NRS 485.3091. We then consider whether sufficient evidence supports the district court's promissory estoppel conclusions and whether the district court erred in dismissing Torres's breach of the implied covenant of good faith and fair dealing claim.

The district court erred in declining to apply NRS 485.3091

Torres argues that the district court erred when it failed to apply NRS 485.3091 to her action. Torres also argues that the district court erred when it considered the statutory offer of judgment made in the separate declaratory relief action and concluded it satisfied NDIC's obligations under NRS 485.3091. We agree.

[Headnotes 1, 2]

On appeal, this court gives deference to the district court's factual findings but reviews its conclusions of law, including statutory interpretation issues, de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009); *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). When a statute's language is unambiguous, this court does not resort to the rules of construction and will give that language its plain meaning. *Clark Cnty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012). But, "[i]f the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, this court . . . 'look[s] to the provision's legislative history and' . . . 'the context and the spirit of the law or the causes which induced the [L]egislature to enact it.'" *Id.* (citations omitted) (quoting *We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008)); *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

[Headnote 3]

In Nevada, all motor vehicles must be insured for at least $15,000 bodily injury or death liability per incident, and $10,000 in property damage liability. NRS 485.185; NRS 485.3091(1)(b)(1), (1)(b)(3) NRS 485.3091 also contains an absolute-liability provision that states that

> [e]very motor vehicle liability policy is subject to the following provisions which need not be contained therein:
>
> (a) The liability of the insurance carrier with respect to the insurance required by this chapter becomes absolute whenever injury or damage covered by the policy occurs. The policy may not be cancelled or annulled as to such liability by any agreement between the insurance carrier and the insured after

> the occurrence of the injury or damage. No statement made by the insured or on behalf of the insured and no violation of the policy defeats or voids the policy.

NRS 485.3091(5)(a). Accordingly, Torres argues that NDIC was required to pay her at least $15,000, the statutory minimum, for required liability insurance.

The language of NRS 485.3091 is unambiguous and specifically states that the terms of NDIC's insurance policy include that liability "becomes absolute whenever injury or damage covered by the policy occurs." NRS 485.3091(5)(a). NRS 485.3091(5)(a) also clearly states that "no violation of the policy defeats or voids the policy." *See Midland Risk Mgmt. Co. v. Watford*, 876 P.2d 1203, 1206-07 (Ariz. Ct. App. 1994) (finding the language of the Arizona statute, worded the same as that of Nevada, was "straightforward").

Despite the absolute-liability provision, NDIC argues that its indemnity obligation was previously determined in a prior declaratory relief action to which Torres was a party. There, the district court found that Mollinedo-Cruz and Perez-Castellano did not comply with NDIC's post-accident policy, and thus, NDIC did not have to defend or indemnify "any and all claims arising out of the April 2, 2006, automobile accident involving Saundra Torres." In the instant case, the district court relied on this previous finding and determined that Torres was not a judgment creditor of NDIC based on this declaratory relief order.

However, the next paragraph of that declaratory relief order resolves this action in favor of Torres: "The Default Judgments taken against Defendants Mollinedo and Castellano do not apply to and are not binding upon Saundra Torres, who is still allowed to pursue any and all claims/defenses available to her under the terms and conditions of the subject insurance policy." And thus, the district court erred when it did not consider the entire declaratory judgment order.

[Headnote 4]

More importantly, we hold that no post-injury violation of a policy will release the insurer under the absolute-liability provision. This view is consistent with the many states that have adopted similar "frozen liability" statutes.[3] At common law, the insurer was

[3]*See, e.g.*, Ala. Code § 32-7-22(f)(1) (LexisNexis 2010 & Supp. 2014); Alaska Stat. § 28.20.440(f)(1) (2014); Ariz. Rev. Stat. Ann. § 28-4009(C)(5)(a) (2013); Ark. Code Ann. § 27-19-713(f)(1) (2014); Colo. Rev. Stat. § 42-7-414(2)(a) (2014); Del. Code Ann. tit. 21, § 2902 (f)(1) (2005); Haw. Rev. Stat. § 287-29(1) (2007); 625 Ill. Comp. Stat. Ann. 5/7-317(f)(1) (West 2008); Iowa Code Ann. § 321A.21(6)(a) (West 2005); La. Rev. Stat. Ann. § 32:900(F)(1) (2013); Mich. Comp. Laws Ann. § 257.520(f)(1) (West 2006); Mo. Ann. Stat. § 303.190(6)(1) (West 2010); Mont. Code Ann. § 61-6-103(5)(a) (2013); Neb. Rev. Stat. § 60-538(1) (2010); N.C. Gen. Stat. § 20-279.21(f)(1) (2013); N.D. Cent. Code

permitted to rescind an insurance policy for material misrepresentations made in acquisition of the policy or for breach of the insurance contract. *See Prudential v. Estate of Rojo-Pacheco*, 962 P.2d 213, 217 (Ariz. Ct. App. 1997); *Costley v. State Farm Fire & Cas. Co.*, 894 S.W.2d 380, 385-86 (Tex. App. 1994). Derogating from the common law, absolute-liability statutes are interpreted to require payment of the minimum statutorily required insurance benefits, if the law required the policy to be in place, even if the insured has breached the insurance contract or made misrepresentations in the insurance application. *See Midland Risk Mgmt.*, 876 P.2d at 1206-07 (requiring insurer to indemnify the insured despite misrepresentations on the insurance application because of the state's absolute-liability statute); *Harris v. Prudential Prop. & Cas. Ins. Co.*, 632 A.2d 1380, 1381-82 (Del. 1993) (holding that noncooperation of insured cannot defeat application of absolute-liability statute where innocent third party is injured); *Dave Ostrem Imps., Inc. v. Globe Am. Cas./GRE Ins. Grp.*, 586 N.W.2d 366, 367-68 (Iowa 1998) (stating that condition precedent to coverage cannot defeat application of absolute-liability statute); *Cowan v. Allstate Ins. Co.*, 594 S.E.2d 275, 276-77 (S.C. 2004) (recognizing the appellate court's holding in *Shores v. Weaver*, 433 S.E.2d 913, 917 (S.C. Ct. App. 1993), *superseded by statute on other grounds as stated in McGee v. S.C. Dep't of Motor Vehicles*, 698 S.E.2d 841 (S.C. Ct. App. 2010), that breach of a policy's notice requirements by the insured did not release the insurer from liability).

Here, Mollinedo-Cruz's and Perez-Castellano's noncompliance with the notice and cooperation clauses of the policy does not void NDIC's indemnity obligations. Thus, NDIC cannot avoid NRS 485.3091's absolute-liability requirements.

This holding is also consistent with the public policy underlying this financial responsibility law. *See Federated Am. Ins. Co. v. Granillo*, 108 Nev. 560, 563, 835 P.2d 803, 804 (1992) (stating that NRS 485.3091 is based on an "interest in protecting accident victims . . . [t]hese laws were enacted to benefit the public as well as the insured"); *Hartz v. Mitchell*, 107 Nev. 893, 896, 822 P.2d 667, 669 (1991) ("Nevada has a strong public policy interest in assuring that individuals who are injured in motor vehicle accidents have a source of indemnification. Our financial responsibility law reflects Nevada's interest in providing at least minimum levels of financial protection to accident victims."). To provide such a policy and al-

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§ 39-16.1-11(6)(a) (2008); Ohio Rev. Code Ann. § 4509.53(A) (LexisNexis 2014); Okla. Stat. Ann. tit. 47, § 7-324(f)(1) (West 2007); Or. Rev. Stat. § 742.456 (2013); R.I. Gen. Laws § 31-32-24(f)(1) (2010); S.C. Code Ann. § 56-9-20(5)(b)(1) (2006); S.D. Codified Laws § 32-35-74(1) (2004); Tenn. Code Ann. § 55-12-122(e)(1) (2012); Va. Code Ann. § 46.2-479(1) (2014); Wash. Rev. Code Ann. § 46.29.490(6)(a) (West 2012); W. Va. Code Ann. § 17D-4-12(f)(1) (LexisNexis 2013); Wyo. Stat. Ann. § 31-9-405(f)(1) (2013).

low no mechanism for an injured party to recover under the statute would be inconsistent with the statute's purpose. *See Gallagher v. City of Las Vegas*, 114 Nev. 595, 599-600, 959 P.2d 519, 521 (1998) ("Our interpretation should be in line with what reason and public policy would indicate the [L]egislature intended, and should avoid absurd results.").

Accordingly, we conclude that the district court erred in denying Torres relief under NRS 485.3091.[4]

The district court erred when it found that NDIC's statutory offer of judgment in the declaratory relief case discharged NDIC from abiding by NRS 485.3091

[Headnote 5]

Torres also argues that the district court erred when it considered the statutory offer of judgment made in the declaratory relief action. NDIC essentially concedes the district court erred, but such error was harmless. We agree with Torres.

Evidence regarding settlement offers is not admissible at trial "to prove liability for or invalidity of the claim or its amount." NRS 48.105(1). One of NRS 48.105(1)'s "undisputed purposes . . . [is] to prevent evidence of settlement offers from 'haunt[ing] a future legal proceeding.'" *Davis v. Beling*, 128 Nev. 301, 313, 278 P.3d 501, 510 (2012) (second alteration in original) (quoting *Morrison v. Beach City LLC*, 116 Nev. 34, 39, 991 P.2d 982, 985 (2000)).

Here, the district court permitted the evidence to be admitted to show "that an offer was made on the particular dates in question, and the amount of the offer, and for no other purpose." Thus, by the district court's reasoning alone, it should not have considered the offer for the purpose of satisfying NDIC's obligations under NRS 485.3091.[5] *See also Allstate Ins. Co. v. Miller*, 125 Nev. 300, 311,

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[4]Torres argues that she relied on NRS 485.3091(5)(a) for her breach of contract claim, and that under this statute, she was an intended third-party beneficiary to the insurance contract. We reject this argument and agree with the majority of courts that have determined that an injured party is not a third-party beneficiary. *Herrig v. Herrig*, 844 P.2d 487, 492 (Wyo. 1992) ("The third-party-beneficiary argument has been rejected by virtually every court to address the issue, and we join those courts today."); *see, e.g.*, *Page v. Allstate Ins. Co.*, 614 P.2d 339, 339-40 (Ariz. Ct. App. 1980); *All Around Transp., Inc. v. Cont'l W. Ins. Co.*, 931 P.2d 552, 557 (Colo. App. 1996) (determining that an injured claimant does not have standing "to commence a direct contract action as a third-party beneficiary on the liability policy itself, absent an explicit policy or statutory provision allowing such an action").

[5]Moreover, we note that NDIC's offer did not occur in the instant underlying case, but in a separate declaratory relief action brought by NDIC. There, Torres sought to amend her answer to include counterclaims for relief for the same causes of action she pleaded in the instant underlying case. Crucially, acceptance of the offer of judgment would have prevented Torres from pursuing any other

212 P.3d 318, 326 (2009) ("[T]he mere offering of the policy limit does not necessarily end a primary liability insurer's contractual obligations.").

Substantial evidence supports the district court's determination on Torres's promissory estoppel claim

[Headnote 6]

Torres next argues that the district court abused its discretion in not awarding her damages based upon a promissory estoppel theory, because she relied on NDIC's representations that an offer would be forthcoming and the court did not address all of the doctrine's elements. Torres further argues that the district court abused its discretion when it determined that Torres's claims were too speculative. We disagree.

[Headnotes 7, 8]

Even if there is conflicting evidence, this court will not overturn a district court judgment if it is supported by substantial evidence. *Jackson v. Nash*, 109 Nev. 1202, 1213, 866 P.2d 262, 270 (1993). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) (internal quotations omitted). "If the evidence, though conflicting, can be read to support [a conclusion], this court must approve the trial court's determinations." *Shell Oil Co. v. Ed Hoppe Realty Inc.*, 91 Nev. 576, 578, 540 P.2d 107, 108 (1975).

In *Pink v. Busch*, this court stated:

> To establish promissory estoppel four elements must exist: "(1) the party to be estopped must be apprised of the true facts; (2) he must intend that his conduct shall be acted upon, or must so act that the party asserting estoppel has the right to believe it was so intended; (3) the party asserting the estoppel must be ignorant of the true state of facts; (4) he must have relied to his detriment on the conduct of the party to be estopped."

100 Nev. 684, 689, 691 P.2d 456, 459-60 (1984) (quoting *Cheqer, Inc. v. Painters & Decorators Joint Comm., Inc.*, 98 Nev. 609, 614, 655 P.2d 996, 998-99 (1982)). We conclude that the two requirements upon which the district court based its determination—the existence of a promise or conduct the party to be estopped intended to be acted upon and detrimental reliance—evince substantial ev-

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claims against NDIC. Ultimately, the district court denied her motion to amend and stated that Torres was "still allowed to pursue any and all claims/defenses available to her under the terms and conditions of the subject insurance policy." And Torres subsequently pursued those claims in the instant underlying case.

idence to support the district court's conclusion that there was no promissory estoppel.

First, the district court determined that NDIC's conduct did not amount to a promise or conduct upon which it intended Torres to rely. Normally, a cause of action will not be supported by a mere promise of future conduct. 31 C.J.S. *Estoppel and Waiver* § 116 (2008). "The promise giving rise to a cause of action for promissory estoppel must be clear and definite, unambiguous as to essential terms, and the promise must be made in a contractual sense." *Id.* (footnotes omitted). In *American Savings & Loan Ass'n v. Stanton-Cudahy Lumber Co.*, we determined that a letter sent from American Savings and Loan to Stanton-Cudahy clearly constituted a promise for payment. 85 Nev. 350, 354, 455 P.2d 39, 41-42 (1969). The letter read, "[W]e will issue two checks—one-half of total amount of request for payment will be made to Tahoe Wood Products, Inc.; and one-half to your firm." *Id.* at 353, 455 P.2d at 40. Stanton-Cudahy reasonably and foreseeably relied upon that promise when it continued to perform work. *Id.* at 354, 455 P.2d at 42.

Here, the district court determined that the communications between NDIC and Torres's attorney at the time did not amount to a promise to pay any amount. The court found that NDIC sent Torres three letters before Torres filed her personal injury lawsuit. In a letter dated September 28, 2006, NDIC stated that it would "review the demand and contact [Torres's attorney's] office with an offer." Another letter dated October 30, 2006, informed Torres's attorney that "[t]he medical bills ha[d] been sent for medical review," and that "a copy of the Summary and Analysis report will be sent to [his] office soon." The court also found that Torres's attorney testified that he knew his demand letter had expired without NDIC making an offer.

We conclude that sufficient evidence supports the district court's conclusion that the letters were insufficient to induce reliance or establish a promise. Unlike the letter in *American Savings*, the letters here did not constitute a clear promise to pay, nor did they specify an amount to be paid. Moreover, Torres could not have reasonably relied on the September 28 letter because, even if an offer had been forthcoming, it may have been insignificant.

Second, Torres did not establish detrimental reliance on NDIC's representations. A promisor will only be liable for conduct intended to induce reliance on a promise "if the action induced amounts to a substantial change of position." 28 Am. Jur. 2d *Estoppel and Waiver* § 51 (2011); *see also Am. Sav. & Loan Ass'n*, 85 Nev. at 354, 455 P.2d at 41-42. "There can be no promissory estoppel where complainant's act is caused by his or her own mistake in judgment." 31 C.J.S. *Estoppel and Waiver* § 116 (2008).

The district court concluded that the "letters did not induce any measureable detrimental reliance" and that Torres's claims that she

did not contact Mollinedo-Cruz and Perez-Castellano on her own because she relied on NDIC's representations were too speculative. Substantial evidence supports the district court's conclusions. Torres's lawyer testified at trial that he attempted to contact Mollinedo-Cruz and Perez-Castellano before filing Torres's claim. Torres also eventually acquired a default judgment against Mollinedo-Cruz and Perez-Castellano for the accident. Thus, Torres did not detrimentally rely on the letters because she did not refrain from trying to contact Mollinedo-Cruz and Perez-Castellano, nor did the letters prevent Torres from getting a judgment in her favor.

The district court properly dismissed Torres's claim for breach of the implied covenant of good faith and fair dealing

[Headnote 9]

Prior to trial, the district court dismissed Torres's claim that NDIC breached the implied covenant of good faith and fair dealing. Torres argues that the district court erred in dismissing her claim and that this court should extend claims for bad faith. We disagree.

[Headnotes 10-12]

A decision to dismiss a complaint under NRCP 12(b)(5) is rigorously reviewed on appeal with all alleged facts in the complaint presumed true and all inferences drawn in favor of the complainant. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672. All legal conclusions are reviewed de novo. *Id.*

[Headnote 13]

The implied covenant of good faith and fair dealing is a common-law duty applicable in all contracts. *K Mart Corp. v. Ponsock*, 103 Nev. 39, 48, 732 P.2d 1364, 1370 (1987), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). A breach of this duty can only occur when there is a special relationship between the parties, such as that between an insurer and insured. *Id.* at 49, 732 P.2d at 1370.

[Headnote 14]

Third-party claimants do not have a contractual relationship with insurers and thus have no standing to claim bad faith. *Gunny v. Allstate Ins. Co.*, 108 Nev. 344, 345, 830 P.2d 1335, 1335-36 (1992). While we intimated in dicta in *Gunny* that a third-party claimant who is a specific intended beneficiary of an insurance policy might have a sufficient relationship to support a bad faith claim, *see id.* at 345-46, 830 P.2d at 1336, nothing in Nevada's absolute-liability statute creates a contractual relationship between an insurer and a third party for bad faith.

The majority of jurisdictions also conclude that third-party claimants do not have a private right of action against an insurer. *See, e.g.*, *Scroggins v. Allstate Ins. Co.*, 393 N.E.2d 718, 721 (Ill. App. Ct. 1979) (holding that "the rule in Illinois and nearly all jurisdictions" is that absent express statutory language, an injured third party cannot pursue a direct action against an insurer for breach of duty to exercise good faith); *Herrig v. Herrig*, 844 P.2d 487, 493-94 (Wyo. 1992) (observing that the majority of courts do not recognize a private right of action for a third-party claimant and Wyoming's statute did not create such a private right of action). And, furthermore, in the few jurisdictions that have allowed a bad faith claim against an insurer, the third-party claimants relied on express statutory language authorizing such direct actions. *See, e.g.*, *Hovet v. Allstate Ins. Co.*, 89 P.3d 69, 73 (N.M. 2004) (holding that an injured third-party claimant, after a judicial determination of fault, may sue an insurer for unfair claims practices in violation of New Mexico's Insurance Code under New Mexico statute that provided that "[a]ny person . . . who has suffered damages as a result of a violation [of the Insurance Code] by an insurer or agent is granted a right to bring an action in district court to recover actual damages" (internal quotations omitted)).

Here, NRS 485.3091 provides no express language that permits a third-party claimant to pursue an independent bad faith claim against an insurer. Absent such a provision, we will not read language into a statute granting a private cause of action for an independent tort. *See Richardson Constr., Inc. v. Clark Cnty. Sch. Dist.*, 123 Nev. 61, 65, 156 P.3d 21, 23 (2007) ("[W]hen a statute does not expressly provide for a private cause of action, the absence of such a provision suggests that the Legislature did not intend for the statute to be enforced through a private cause of action."). Thus, we conclude that Torres does not have standing to pursue a bad faith claim.

Accordingly, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this opinion.[6]

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

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[6]Torres also appeals the district court's award of costs to NDIC as the prevailing party pursuant to NRS 18.110. Because of our holding in this opinion, we reverse the costs award.

IN RE BRYCE L. MONTIERTH AND MAILE L. MONTIERTH, DEBTORS.

BRYCE L. MONTIERTH AND MAILE L. MONTIERTH, APPELLANTS, *v.* DEUTSCHE BANK, RESPONDENT.

No. 62745

July 30, 2015 354 P.3d 648

Certified questions under NRAP 5 concerning the status of a promissory note when the note and deed of trust on a mortgage are split at the time of foreclosure. United States Bankruptcy Court, District of Nevada; Bruce A. Markell, Bankruptcy Court Judge.

The supreme court, HARDESTY, C.J., held that: (1) separating note and deed of trust between principal, note holder, and agent, deed of trust beneficiary, did not render either instrument void or render note unsecured and unenforceable, and thus, agent was authorized to foreclose on behalf of principal; and (2) the recordation of a beneficial interest in a deed of trust by agent of the note holder constituted a "ministerial" act, for purposes of the ministerial act exception to the automatic stay in a bankruptcy proceeding.

Questions answered in part.

Crosby & Fox, LLC, and *Troy S. Fox* and *David M. Crosby*, Las Vegas, for Appellants.

Tiffany & Bosco, P.A., and *Gregory L. Wilde*, Las Vegas; *Severson & Werson* and *Jan Timothy Chilton*, San Francisco, California, for Respondent.

Snell & Wilmer, LLP, and *Andrew M. Jacobs* and *Kelly H. Dove*, Las Vegas, for Amicus Curiae Mortgage Electronic Registration Systems, Inc.

1. MORTGAGES.
   Separating note and deed of trust between principal and agent did not render either instrument void or render note unsecured and unenforceable, and thus, agent was authorized to foreclose on behalf of principal, even though agent was the named beneficiary on the deed of trust; because an agency relationship existed between the note holder, the principal, and its agent, the deed of trust beneficiary, the note holder could require its agent to assign the mortgage to the note holder, making the note secured.
2. MORTGAGES.
   Perfection of a deed of trust occurs upon proper execution and recordation; thus, a security interest attaches to the property as between the mortgagor and mortgagee upon execution and as against third parties upon recordation.
3. MORTGAGES.
   After being split, a note and a security deed, and their respective interests, survive even if held by different parties; further, if an agency re-

lationship exists between those two parties such that the note holder, as principal, can require its agent to assign the mortgage to it, then the note remains secured.

4. MORTGAGES.
   A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures. Restatement (Third) of Property: Mortgages § 5.4(c) (1997).
5. BANKRUPTCY.
   The recordation of a beneficial interest in a deed of trust by agent of the note holder constituted a ministerial act for purposes of the ministerial act exception to the automatic stay in a bankruptcy proceeding; trust beneficiary was acting as an agent of note holder, and agent was fulfilling a contractual obligation and had no discretion to disobey. NRS 106.210.
6. BANKRUPTCY.
   A ministerial act exception to an automatic stay applies to automatic occurrences that entail no deliberation, discretion, or judicial involvement.
7. BANKRUPTCY.
   Ministerial acts exempt from automatic stay are essentially clerical in nature and involve obedience to instructions or laws instead of discretion, judgment, or skill.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

The United States Bankruptcy Court for the District of Nevada has certified two questions of law to this court concerning the legal effect on a foreclosure when the promissory note and the deed of trust are split at the time of foreclosure.[1] The bankruptcy court asks "what occurs when the promissory note and the deed of trust remain split at the time of the foreclosure" and whether recordation of an assignment of a deed of trust "is a purely ministerial act [that] would not violate the automatic stay." However, under the facts of this case, the real question involves what occurs when the promissory note is held by a principal and the beneficiary under the deed of trust is the principal's agent at the time of foreclosure. We conclude that reunification of the note and the deed of trust is not required to foreclose because the beneficiary of the deed of trust is authorized to foreclose on behalf of the note holder as its agent. We also conclude that, as a matter of law, the recording of an assignment of a deed of

[1]In certifying its questions to this court, the bankruptcy court seeks clarification of footnote 14 in this court's opinion in *Edelstein v. Bank of New York Mellon*, where we stated that "[b]ecause it is not at issue in this case, we need not address what occurs when the promissory note and the deed of trust remain split at the time of the foreclosure." 128 Nev. 505, 524 n.14, 286 P.3d 249, 262 n.14 (2012).

trust is a ministerial act; however, we decline to determine the effect of that ministerial act on the application of the stay statute as this is a question involving federal law.

FACTS

In June 2005, appellants Bryce and Maile Montierth signed a promissory note in favor of 1st National Lending Services for $170,400. The note provided that "the Lender may transfer [the] [n]ote." The note was subsequently transferred to respondent Deutsche Bank.[2]

The note was secured by a deed of trust on the Montierths' property in Logandale, Nevada. The beneficiary of the deed of trust was Mortgage Electronic Registration Systems, Inc. (MERS), "solely as nominee for Lender and Lender's successors and assigns." Additionally, the deed of trust provided:

> MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but, if necessary . . . , MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender including, but not limited to, releasing and canceling this Security Instrument.

The Montierths' last payment on the note was made in June 2009. Deutsche Bank recorded a notice of default and initiated foreclosure. The Montierths opted into Nevada's Foreclosure Mediation Program (FMP), but the first two mediation attempts were unsuccessful. The Montierths petitioned for judicial review of the attempted mediation, and the district court found that Deutsche Bank failed to participate in the mediation in good faith.

Deutsche Bank then filed another notice of default, and the Montierths again elected to mediate. Less than two weeks before the scheduled mediation, the Montierths filed for bankruptcy. At the time the Montierths filed for bankruptcy, the note and the deed of trust were separate—Deutsche Bank held the note and MERS was the beneficiary of the deed of trust.

After the Montierths filed for bankruptcy, MERS assigned its interest in the deed of trust to Deutsche Bank on November 25, 2011, but the assignment was not recorded until December 23, 2011. Prior to the recordation of the assignment, Deutsche Bank filed a proof of

[2]The full title of the transferee is Deutsche Bank National Trust Company, as Trustee of the IndyMac INDX Mortgage Loan Trust 2005-AR31, Mortgage Pass-Through Certificates, Series 2005-AR31 under the Pooling and Servicing Agreement dated November 1, 2005.

claim in the Montierths' bankruptcy, claiming that it was a secured creditor.

On September 5, 2012, Deutsche Bank filed a motion for relief from the automatic bankruptcy stay so that it could foreclose on the Montierths' property. The Montierths objected to Deutsche Bank's standing to bring the motion. The Montierths also objected to Deutsche Bank's proof of claim insofar as it alleged secured creditor status. Both objections were premised on the argument that Deutsche Bank was not a secured creditor because it did not have a unified note and deed of trust when the bankruptcy petition was filed and the automatic stay precluded the reunification of the instruments.

Before reaching a decision on Deutsche Bank's motion and the Montierths' claim objection, the bankruptcy court issued an order certifying the following questions of law to this court:

> [W]hat occurs when the promissory note and the deed of trust remain split at the time of foreclosure?
>
> [What is] the legal effect of the recordation of an assignment of a beneficial interest in a deed of trust?

We previously accepted these questions pursuant to NRAP(5) and *Volvo Cars of North America, Inc. v. Ricci*, 122 Nev. 746, 137 P.3d 1161 (2006).

DISCUSSION

The Montierths argue that Nevada is a "Restatement state" and, pursuant to the Restatement (Third) of Property, the note is unsecured until it is reunited with the deed of trust. Relying on the Restatement, the Montierths argue that " '[w]hen the right of enforcement of the note and the mortgage are split, the note becomes, as a practical matter, unsecured.' " (quoting Restatement (Third) of Prop.: Mortgages § 5.4 cmt. a (1997)).

Deutsche Bank argues that the splitting of the note and the deed of trust does not alter the status of or void either instrument. Deutsche Bank further argues that "catastrophic results" would occur if this court accepts the Montierths' argument that a note split from its deed of trust is unsecured upon the filing of bankruptcy because hundreds of thousands of home loans are secured by deeds of trust held by MERS, and, upon bankruptcy, if lenders were unsecured, they would receive a fraction of the debt owed and be unable to foreclose.

Deutsche Bank held secured creditor status, and reunification is not necessary

[Headnotes 1, 2]

"[A]n unrecorded deed is valid immediately between the mortgagor and the mortgagee." 59 C.J.S. *Mortgages* § 256 (2009). In

Nevada, "perfection of a deed of trust occurs upon proper execution and recordation." *In re Madrid*, 725 F.2d 1197, 1200 (9th Cir. 1984), *superseded by statute on other grounds*, Bankr. Amendments & Fed. Judgeship Act of 1984, Pub. L. No. 98-353, 98 Stat. 333, *as recognized in In re Ehring*, 900 F.2d 184, 187 (9th Cir. 1990). Thus, a security interest attaches to the property as between the mortgagor and mortgagee upon execution and as against third parties upon recordation.

[Headnote 3]

In *Edelstein v. Bank of New York Mellon*, this court stated that "[s]eparation of the note and security deed creates a question of what entity would have authority to foreclose, but does not render either instrument void." 128 Nev. 505, 520, 286 P.3d 249, 259 (2012) (internal quotation omitted). After being split, "[t]he documents, and their respective interests, survive even if held by different parties." *In re Phillips*, 491 B.R. 255, 275 (Bankr. D. Nev. 2013) (citing *Edelstein*, 128 Nev. at 520, 286 P.3d at 259). Further, "[i]f an agency relationship exists between those two parties such that [the note holder], as principal, can require its agent, MERS, to assign the [m]ortgage to it, then the [n]ote remains secured . . . ." *In re Martinez*, 444 B.R. 192, 204 (Bankr. D. Kan. 2011).

To be sure, in *Edelstein* we discussed that "both the promissory note and the deed must be held together to foreclose; '[t]he [general] practical effect of [severance] is to make it impossible to foreclose the mortgage.'" 128 Nev. at 518, 286 P.3d at 258 (alterations in original) (quoting Restatement (Third) of Prop.: Mortgages § 5.4 cmt. c (1997)). Because it was not pertinent to our analysis in *Edelstein*, we did not include the exceptions provided in the Restatement. The Restatement specifies that foreclosure is not impossible if there is either a principal-agent relationship between the note holder and the mortgage holder, or the mortgage holder "otherwise has authority to foreclose in the [note holder]'s behalf." *See* Restatement (Third) of Prop.: Mortgages § 5.4 cmts. c, e (1997). We agree with the Restatement's reasoning.

Here, the deed of trust was first recorded in favor of MERS in June 2005, when the mortgage was first created. Like in *Martinez*, the deed of trust in this case designated MERS as nominee, or agent, for the note holder and the note holder could compel an assignment of the deed of trust. *See Martinez*, 444 B.R. at 195, 204; *see also Edelstein*, 128 Nev. at 518, 286 P.3d at 258. Because the security interest attached and was perfected before bankruptcy, and separation of the note from the deed of trust did not alter the interests of the parties in this instance, *see Phillips*, 491 B.R. at 275; *In re Corley*, 447 B.R. 375, 380-81 (Bankr. S.D. Ga. 2011) (explaining that MERS, as the designated nominee of the note holder, had a "fully-secured, first priority deed to [the] secure debt"), we conclude that Deutsche Bank

was a secured creditor when the Montierths filed for bankruptcy. Accordingly, this court rejects the notion that separating the note and the deed of trust between a principal and an agent renders either instrument "void," or that the deed becomes unenforceable even though the named beneficiary is acting as agent for the note holder. *See Edelstein*, 128 Nev. at 517-18, 286 P.3d at 257-58.

[Headnote 4]

Reunification of the note and the deed of trust is not required to foreclose because of an existing principal-agent relationship between MERS and Deutsche Bank. The Restatement (Third) of Property permits the beneficiary of the deed of trust, or mortgagee, to enforce the mortgage on behalf of the note holder if the mortgagee has authority to foreclose from the note holder. "A mortgage may be enforced only by, or in behalf of, a person who is entitled to enforce the obligation the mortgage secures." Restatement (Third) of Prop.: Mortgages § 5.4(c) (1997); *see id.* at § 5.4 cmt. e & illus. 9 (illustrating that an agent can "enforce the mortgage at [the principal's] direction"). Thus, in the present case, MERS would be authorized to foreclose on behalf of Deutsche Bank at Deutsche Bank's direction because MERS is its agent, and reunification of the instruments would not be required.

Recordation of an assignment is a "ministerial act"

[Headnote 5]

The Montierths argue that under NRS 106.210, an assignment would be required from MERS to Deutsche Bank to proceed with the foreclosure. Deutsche Bank maintains that no assignment is required from an agent to its principal, but even if an assignment is necessary, it is not required until the trustee exercises its power of sale pursuant to NRS 106.210.[3]

Based on these conflicting arguments, the bankruptcy court's second certified question would require this court to determine whether the recordation of an assignment is a "ministerial act" such that it falls within an exception to the automatic stay mandated by bankruptcy law.[4] This is a question of federal law and outside of the pur-

[3]The bankruptcy court did not ask this court to comment on, and thus we do not address, the validity of the foreclosure process in the instant case. Furthermore, based on our conclusions in this opinion, it is not necessary for us to address the parties' arguments regarding NRS 106.210.

[4]The automatic bankruptcy stay is governed by 11 U.S.C. § 362, and the United States Court of Appeals for the Ninth Circuit put forth the "ministerial act" exception in *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000). Further, whether "the assignment of the mortgage, once the original grant by the mortgagor to the mortgagee has been perfected" involves a "transfer of the property of the debtor" is governed by the definitions found in 11 U.S.C. § 544. *See In re Halabi*, 184 F.3d 1335, 1337 (11th Cir. 1999).

view of this court's authority to answer questions from the certifying court "if there are involved in any proceeding before [the certifying] court[ ] questions of law of *this* state." NRAP 5(a) (emphasis added); *see Reinkemeyer v. Safeco Ins. Co. of Am.*, 117 Nev. 44, 50, 16 P.3d 1069, 1072 (2001) (explaining that this court lacks authority to answer certified questions that fall outside the purview of NRAP 5). This court may reframe the certified questions presented to it, *see Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1105-06 (2013), and thus, we reframe the bankruptcy court's second question to narrow its focus: "Is the state law effect of the recordation of an assignment of a beneficial interest in a deed of trust by an agent of the note holder a ministerial act under Nevada law?" We conclude that an agent's recordation at the direction of its principal is a ministerial act under Nevada's characterization of ministerial acts. And to the extent that the definition of "ministerial act" used by the federal court in *In re Pettit*, 217 F.3d 1072, 1080 (9th Cir. 2000), is determined by state law, we conclude that MERS' recordation of its assignment to Deutsche Bank was a ministerial act.

The Montierths argue that the assignment of the deed of trust from MERS to Deutsche Bank was not a "ministerial act" because it gives the benefited party the right to enforce the note. In addition, they argue that recordation of the assignment is not a ministerial act because recording the assignment is a discretionary act that can occur whenever MERS decides. We disagree.

[Headnotes 6, 7]

The United States Court of Appeals for the Ninth Circuit adopted the "ministerial act" exception to the automatic stay in bankruptcy procedures in *Pettit*. 217 F.3d at 1080-81. A ministerial act exception applies to "automatic occurrences that entail no deliberation, discretion, or judicial involvement . . . ." *Id*. at 1080. Ministerial acts are "essentially clerical in nature," *In re Soares*, 107 F.3d 969, 974 (1st Cir. 1997), and "involve[ ] obedience to instructions or laws instead of discretion, judgment, or skill." *In re Rugroden*, 481 B.R. 69, 78 (Bankr. N.D. Cal. 2012) (internal quotation omitted).

Examples of ministerial acts include a lower court clerk's entry of a judgment following proceedings in the lower court but filed after a bankruptcy proceeding was initiated by a party to the judgment, *Rexnord Holdings, Inc. v. Bidermann*, 21 F.3d 522, 527-28 (2d Cir. 1994), and the IRS's issuance and recording of deeds to the debtor's property at the end of the statutory redemption period, *Rugroden*, 481 B.R. at 79. In *Rexnord*, the court concluded that "the simple and 'ministerial' act of the entry of a judgment by the court clerk" does not constitute the continuation of a judicial proceeding. 21 F.3d at 527. Likewise in *Rugroden*, the court concluded that because the

statutes required the IRS to issue and record the deeds, there was absolutely no discretion involved in the action, and it was therefore ministerial. 481 B.R. at 79.

Nevada has also clarified the distinction between ministerial acts and discretionary acts:

> We have defined a discretionary act as that "which require[s] the exercise of personal deliberation, decision and judgment." A ministerial act is an act performed by an individual in a prescribed legal manner in accordance with the law, without regard to, or the exercise of, the judgment of the individual.

Pittman v. Lower Court Counseling, 110 Nev. 359, 364, 871 P.2d 953, 956 (1994) (alteration in original) (citation omitted) (quoting *Travelers Hotel, Ltd. v. City of Reno*, 103 Nev. 343, 345-46, 741 P.2d 1353, 1354 (1987)), *overruled on other grounds by Nunez v. City of N. Las Vegas*, 116 Nev. 535, 1 P.3d 959 (2000). For example, in *Humboldt Mill & Mining Co. v. Terry*, this court recognized the statutory obligations of a clerk's duties in recording a judgment. 11 Nev. 237 (1876). There, this court concluded that a clerk's "duties are purely ministerial" and "[h]e has nothing to consider, order, adjudge or decree." *Id.* at 242. Only after prompting and direction by an authorized party does a "clerk act[ ] as the agent of the statute" to enter a judgment. *Id.*

While this court has primarily recognized ministerial acts based on statutory requirements, we now recognize a similar contractual obligation to recording an assignment based on a principal-agent relationship. Here, the deed of trust that the Montierths executed provided that:

> Borrower understands and agrees that MERS holds only legal title to the interests granted by Borrower in this Security Instrument; but, if necessary to comply with law or custom, MERS (as nominee for Lender and Lender's successors and assigns) has the right: to exercise any or all of those interests, including, but not limited to, the right to foreclose and sell the Property; and to take any action required of Lender . . . .

MERS has but one choice in Deutsche Bank's demand for assignment in order to comply with NRS 106.210: performance in accordance with the contract terms. MERS has "nothing to consider," *Humboldt Mill*, 11 Nev. at 242, and only after Deutsche Bank's prompting and direction does MERS fulfill its agency role and perform according to the agreement.

We conclude that MERS' recordation of its assignment to Deutsche Bank was a ministerial act. MERS was operating as the agent of Deutsche Bank, and both the assignment and the recordation "involved obedience to instructions" from Deutsche Bank. *See In re Rugroden*, 481 B.R. at 78; *see also In re Bower*, 462 B.R. 347, 354

(Bankr. D. Mass. 2012) ("While MERS admittedly holds more than a mere possessory interest in the [m]ortgage, it lacks the authority to act without direction from the note holder or servicer in light of its nominee status."); *cf. Edelstein*, 128 Nev. at 518, 286 P.3d at 258 (concluding that MERS has an agency relationship with a lender and its successors and assigns). Thus, MERS could not exercise discretion in assigning its interest to Deutsche Bank and recording that assignment.

Accordingly, we answer the bankruptcy court's first question by concluding that Deutsche Bank's interest was secured at the time of the filing of bankruptcy. Reunification of the note and the deed of trust is not necessary to foreclose because the beneficiary is an agent for the principal note holder. We modify and answer the bankruptcy court's second question by concluding that in Nevada, the recordation of an assignment from a beneficiary of a deed of trust is a ministerial act, because the agent is fulfilling a contractual obligation and has no discretion to disobey.

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