fore grant Dr. Tam's petition and instruct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order and to conduct further proceedings consistent with this opinion.

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

EMMETT J. MICHAELS, APPELLANT, *v.* PENTAIR WATER POOL AND SPA, INC., A DELAWARE CORPORATION, RESPONDENT.

No. 59685

October 1, 2015 357 P.3d 387

Appeal from a final district court order in a products liability action. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

Consumer filed post-trial motion seeking a new trial, based on alleged misconduct committed by attorney of swimming pool filter manufacturer, in products liability action against manufacturer premised on explosion of filter canister. The district court denied the motion. Consumer appealed. The court of appeals, TAO, J., held that the district court was required to make detailed findings in support of its denial of consumer's new trial motion.

Vacated and remanded.

Winner & Carson, P.C., and *Robert A. Winner* and *Brent A. Carson*, Las Vegas, for Appellant.

Lewis Roca Rothgerber LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Buchalter Nemer* and *George J. Stephan*, Los Angeles, California, for Respondent.

1. NEW TRIAL.
   The district court was required to make detailed findings in support of its denial of consumer's post-trial motion for new trial, based on alleged misconduct committed by swimming pool filter manufacturer's attorney in products liability action, the failure of which warranted remand for such findings; manufacturer's attorney appeared to vouch for a witness and offer opinions about other witnesses, among other things, with at least some of apparent misconduct relating to heart of manufacturer's defense strategy and to most important questions jury was asked to answer, such that it was not clear that misconduct had not occurred, or that misconduct had not amounted to fundamental error.
2. APPEAL AND ERROR.
   A district court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.

3. Appeal and Error.
   The denial of a post-judgment motion for judgment as a matter of law is not independently appealable.
4. Appeal and Error.
   In determining whether an abuse of discretion occurred in a district court's decision to grant or deny a motion for a new trial, the court of appeals must view the evidence and all inferences most favorably to the party against whom the motion is made.
5. Trial.
   An attorney may not encourage the jurors to look beyond the law and the relevant facts in deciding the case before them.
6. New Trial.
   The district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights. NRCP 59(a)(2).
7. New Trial.
   Determining whether a new trial is warranted based on alleged attorney misconduct involves the application of a three-step analysis: first, the reviewing court must determine whether misconduct occurred; if such misconduct has occurred, the next step is to determine the proper legal standard to apply in assessing whether the misconduct warrants a new trial; then the reviewing court must determine whether the district court abused its discretion in applying that standard.
8. Appeal and Error.
   Whether an attorney's comments constitute misconduct is a question of law reviewed on appeal de novo.
9. Appeal and Error; Trial.
   When a party claims misconduct by opposing counsel, the legal standard under which that misconduct is reviewed depends on whether a timely trial objection was made; when a timely objection was not made at trial, any review of that misconduct, either post-trial by the trial court or on appeal, is considerably more circumscribed than if an objection was made.
10. New Trial.
    When resolving a motion for a new trial based on unobjected-to attorney misconduct, the district court shall first conclude that the failure to object is critical, and the district court must treat the attorney misconduct issue as having been waived, unless plain error exists; to decide whether there is plain error, the district court must then determine whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error.
11. New Trial.
    In the context of unobjected-to attorney misconduct, irreparable and fundamental error that will warrant a new trial is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different.
12. Appeal and Error.
    Plain error requires a party to show that no other reasonable explanation for the verdict exists.
13. New Trial.
    Analyzing whether plain error has occurred as a result of unobjected-to attorney misconduct, so as to warrant a new trial, involves weighing the misconduct against the reasonableness of the jury's verdict in light of the evidence in the record.

14. New Trial.
The court, when deciding whether plain error has occurred as a result of unobjected-to attorney misconduct, so as to warrant a new trial, must consider the context in which the misconduct occurred.

15. New Trial.
Determining whether plain error has occurred as a result of unobjected-to attorney misconduct, so as to warrant a new trial, requires the district court to closely examine the record, weigh the severity and persistence of the misconduct against the evidence presented, and assess what role, if any, the misconduct likely played in the jury's verdict.

16. Products Liability.
A manufacturer or distributor of a product is strictly liable for injuries resulting from a defect in the product that was present when the product left its hands.

17. Products Liability.
Products that are dangerous are defective because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.

18. Products Liability.
Reasonableness of design, in the context of a products liability action, may be determined with reference to such things as whether a safer design was possible or feasible, whether safer alternatives are commercially available, and other factors.

19. Products Liability.
Generally, a substantial alteration will shield a manufacturer from liability for injury that results from that alteration, but a product manufacturer remains liable if the alteration was insubstantial, foreseeable, or did not actually cause the injury.

20. Products Liability.
Because products liability claims allege strict liability, comparative negligence is not a defense to a prima facie case of such liability.

21. Products Liability.
When the risk of danger associated with a product is such that it cannot be corrected or mitigated by a commercially feasible change in the product's design available at the time the product was placed in the stream of commerce, the manufacturer must give adequate warning to consumers of the potential danger.

22. Products Liability.
Where a products liability plaintiff alleges that warnings were not adequately given with respect to the danger associated with a product that cannot be corrected or mitigated by a commercially feasible change in the product's design available at the time the product was placed in the stream of commerce, the plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries.

23. Trial.
An adverse inference jury instruction may be given when a district court concludes that particular evidence was negligently destroyed.

24. New Trial.
On remand of consumer's motion for new trial based on alleged misconduct by swimming pool filter manufacturer's attorney, in products liability action, the district court was required to clarify, at a minimum, whether it found that no misconduct occurred, or rather whether it concluded that misconduct did occur but was harmless in view of: (1) the nature of

the claims and defenses asserted by the parties; (2) the relative strength of the evidence presented by the parties; (3) the facts and evidence that were either disputed or not substantively disputed during the trial; (4) the type, severity, and scope of any attorney misconduct; (5) whether any misconduct was isolated and incidental on the one hand or repeated and persistent on the other; (6) the context in which any misconduct occurred; (7) the relationship of any misconduct to the parties' evidence and arguments; and (8) any other relevant considerations.

25. New Trial.

In reviewing the factors applicable to a decision of whether a new trial is warranted based on attorney misconduct, the district court's ultimate goal is to assess whether any misconduct offsets the evidence adduced at trial such that no other reasonable explanation for the verdict exists but that it was the product of the misconduct; in doing so, the district court must assume that the jury believed all of the evidence favorable to the party against whom the motion is made.

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Tao, J.:

The instant appeal arises from allegations of attorney misconduct in a products liability trial involving swimming pool filters. After the jury rendered a verdict in favor of the manufacturer, the plaintiff filed a post-trial motion seeking a new trial based upon alleged misconduct committed by the manufacturer's attorney. The district court denied the motion, but failed to make the detailed findings required by the Nevada Supreme Court.

The Nevada Supreme Court recently issued two opinions clarifying how claims of attorney misconduct must be handled both by the district court and subsequently on appeal. In this opinion, we take the opportunity to summarize those recent developments and to provide guidance to district courts tasked with resolving claims of misconduct. Because the district court in this case failed to make detailed findings regarding the alleged misconduct that might have enabled us to determine whether those cases would have affected its decision, we must remand the case to the district court to reconsider its decision in light of those cases and to make the necessary findings. To assist the district court, we identify some factors that must be considered on remand.

FACTS

Respondent Pentair Water Pool and Spa, Inc. (Pentair), manufactures various models of swimming pool filters for both commercial and residential swimming pools, including the Nautilus FNS filter. In 2006, appellant Emmett Michaels purchased a Nautilus FNS filter

for use in his backyard swimming pool. Michaels had owned his swimming pool for 27 years, and when his previous filter canister malfunctioned, he integrated the FNS canister into his preexisting filter system. Like many other homeowners, Michaels connected his pool filter system to an automatic timer that could be programmed to turn the system off at night and on again during the day.[1] On July 1, 2008, the filter system was turned off but Michaels manually turned it on in anticipation of guests arriving. The FNS filter canister exploded, and pieces struck Michaels in the left eye and ruptured his eyeball, which had to be removed and replaced with a prosthesis.[2] Thereafter, Michaels initiated the underlying action and sought damages based on his injuries. While Michaels asserted several claims for relief, only the products liability claim is the subject of the instant appeal.

Michaels alleged that the design of the FNS filter was legally defective because it lacked either (1) a redundant or secondary restraint to hold the canister together in the event of an explosive failure of the clamp; or (2) an external, automatic air release valve allowing any compressed air trapped within the canister to be released if pressure reached dangerous levels. Michaels also alleged that Pentair failed to give him proper warnings regarding the risk of explosion.

Following a two-week trial, the jury returned a verdict in favor of Pentair on all claims. Michaels filed a post-trial motion for judgment as a matter of law or, alternatively, for a new trial, which was denied by the district court. Michaels now appeals from the denial of that motion.

The operation of swimming pool filters

In order to properly understand the evidence and the arguments made by the parties, a brief explanation of the operation of swimming pool filters is appropriate. The Nautilus FNS filter is a so-called split-shell design consisting of two pieces held together by a steel clamp to form a cylinder in which removable filter grids are placed. In operation, water is pumped from the pool and forced under pressure through the filter grids, which trap debris and remove it from the pool water. The steel clamp that holds the two cylinder pieces together can be removed so that the canister may be separated and the filter grids periodically cleaned or replaced.

Pool filter systems are designed as either open systems, in which a water pump pushes pool water through the filter, or closed systems,

---

[1]During the trial, witness testimony was presented that "almost all" homeowners connect their filter systems to automatic timers, an assertion that was not disputed by Pentair.

[2]While, as discussed below, some of the precise circumstances surrounding Michaels' eye injury were disputed below and are again disputed on appeal, that the filter canister exploded and that the explosion was the proximate cause of the injury to Michaels' eye appears to be undisputed.

in which a water pump suctions water through the filter. In either system, a system of pipes carries water from the pool through the filter canister and then back to the pool. The flow of water through the system may be directed by a series of valves mounted on the pipes.

After a filter has been in operation for some time, debris from the pool can accumulate on the filter grids and eventually may clog the flow of water through the system, impeding the effectiveness of the system. To allow removal of some of the debris, some users manipulate the valves to reverse the flow of water through the filter grids and into a separation tank that collects the debris, in a process colloquially known as backwashing. Pentair discourages backwashing and its engineers consider it unsafe, but during trial its expert conceded that manufacturers were aware that users frequently backwashed filters and that such backwashing was foreseeable. In any event, after the filter grids have been backwashed, the valves can be switched back to their normal operating positions. Even with regular backwashing, however, the filter grid elements can eventually become so clogged with detritus that they may sometimes have to be removed and replaced entirely, which is why split-shell filter canisters such as the Nautilus FNS are designed with clamps allowing the canister to be opened.

So long as the filter system is operating normally, water continually moves through the filter cartridge and the water pressure within the filter canister remains more or less constant. However, the pressure within the system may vary from its normal operating levels under two conditions. First, if a large quantity of debris has collected on the filter grids and clogged the system, a water pressure differential may be created within the system as water is pumped into the filter canister under pressure but only trickles out through the clogged grids. This is not normally considered a dangerous occurrence, because water (unlike air) cannot be easily compressed and most filter systems can safely contain water pressure differentials without difficulty, although the ability of those systems to clean the water may become compromised.

Far more relevant to the instant case is the second condition, which may occur when the filtration system is turned completely off, causing the water to stop flowing and potentially permitting air to bleed into the system. In commercial pool systems, this condition rarely occurs because most commercial pools are left on continuously, except perhaps occasionally when being actively serviced. On the other hand, many residential pool systems are regularly turned on and off by homeowners (usually at night or during the winter months when the pool is rarely used) in order to save electricity. Indeed, testimony was presented that the majority of residential pool owners connect their pool filter systems to timers that automatically turn the system off at night and back on during the day.

When the system is turned off and then turned back on, air that bled into the system while it was off is pushed into the canister by

the flow of water. If the filter grids are clogged, the air may become trapped within the canister against the clog with nowhere to go. As more air and water continue to be pumped into the canister under pressure, air pressure may build up within the canister, creating a condition known in the industry as a dead-head. If the pressurized air cannot find a way to escape, the air pressure within the canister grows to dangerous levels as more air and water are forced into the system. When the air pressure within the canister exceeds the ability of the metal clamp to hold the canister together, the canister may explode.[3]

To reduce the risk of such explosive dead-heads, the instruction manual accompanying the FNS filter "recommends" that the consumer manually bleed excess air from the system each and every time the system is turned off and on. However, when a pool filter is connected to a timer that automatically turns the system off at night and on during the day with no action by the homeowner, the recommendations contained in the instruction manual cannot be complied with, because an automated timer system will not manually bleed out air every time the filter is cycled back on.

The evidence and arguments at trial

Michaels contended that the known risks of explosion rendered the design of the Nautilus FNS filter inherently unsafe when used in normal operation. Pentair countered that the explosion in this case was caused not by any inherent flaw in the design of the system, but rather by an explosive dead-head created by Michaels himself through improper and unforeseeable misuse of the FNS canister. Specifically, Pentair averred that Michaels improperly installed the FNS filter canister onto an obsolete 27-year-old pool filter system that was never designed for the FNS canister and contained a device known as a positive shut-off valve that could be misused in a way that increased the risk of dead-heads and explosions.

In support of his theory, Michaels presented the testimony of Dr. John Manning, an expert in mechanical engineering, as well as Dr. Alison Osinski, an aquatics expert. Both generally testified that the phenomenon of pool filters exploding under pressure was known in the industry, that the design of the FNS filter was unsafe, and that safer alternatives existed, including models sold by Pentair that possessed automatic external pressure-relief valves and redundant restraints. Osinski testified that six different companies offered split-shell filter canisters for sale that had redundant restraints and automatic external pressure relief valves, and that explosions

[3]Some filter canisters are sold as single piece or single tank canisters that cannot be opened, and the filter grids in those types of canisters cannot be replaced or removed for cleaning. Based upon testimony at trial, no explosions of single piece canisters are known to have occurred.

of split-shell filters having such safety features were virtually unknown. In contrast, Osinski noted that more than 50 such explosions were known to have occurred with split-shell filters sold without such features, many of which had caused serious trauma and even death to homeowners. The experts noted that Pentair sold a Sta-Rite System 3 split-shell filter with secondary restraints that Pentair advertised as "the world's safest and easiest to operate filter." The jury saw internal correspondence written by Pentair employees dated May 16, 1993, which recognized the danger of filter separation under pressure and noted that consumers could be expected to misuse split-shell pool filters in a way that could increase the risk of explosion.

Testimony from several of Pentair's employees confirmed key portions of Michaels' allegations. For example, Pentair's chief engineer, Ron Robol, testified that he believed the design of the FNS filter was safe. However, he agreed that the phenomenon of explosive dead-heads was known within the industry, and admitted that at various times Pentair had sold split-shell filter canisters equipped with automatic external pressure-relief valves designed to reduce the risk of explosion. He conceded that when Pentair sold split-shell canisters with automatic external air relief valves in the past, those valves worked fine. He also agreed that, between 1998 and 2008, Pentair received no claims of filter explosions relating to split-shell canisters sold with such automatic valves, but had received more than 50 reports of explosions in split-shell models sold without those valves.[4] Robol also admitted that filter canisters were designed to be cleaned by consumers, and the accidental creation of dead-heads, either through improper consumer cleaning, or simply because the system was turned on and off repeatedly, was "foreseeable" to manufacturers such as Pentair.

Similarly, Pentair's product manager of filtration, Robert Swindell, agreed through his deposition testimony that a consumer's failure to install the canister properly, to clamp it shut, and to release air pressure before or during cleaning were all "foreseeable" events. He acknowledged that Pentair's Sta-Rite 3 filtration system was safer than the FNS because it was held shut by eight individual clamps rather than a single clamp. Additionally, Pentair's Vice-President of Engineering, Garrett Burkitt, conceded at his deposition that Pentair was aware of claims of pool filter separations with its FNS canister, while Pentair employee Robert Wilkes admitted that safer alternatives to steel clamps existed, including a threaded screw-type ring

[4]The parties vigorously dispute the number of prior explosions in their appellate briefing. Michaels contends that 50 explosions were known to have occurred in filter canisters of split-shell design similar to the FNS canister. On the other hand, Pentair argues that only 4 prior explosions were known to have occurred with the FNS canister itself.

lock system for which no known instances of explosive filter separation had ever been reported.[5]

Pentair's defense focused upon the contention that the FNS filter canister was safe, partly because the explosion in this case was caused not by any inherent defect in the design of the FNS filter canister, but rather by Michaels' own unforeseeable, negligent, and dishonest actions. Specifically, Pentair contended that Michaels caused the explosion by dead-heading the system while improperly backwashing it, and then lied about how the explosion occurred. Pentair suggested that Michaels improperly grafted the FNS filter canister onto an older filter system that contained a positive shut-off valve that, when incorrectly used, would seal the canister and trap air within it, thereby artificially creating a dead-head when one otherwise would not have naturally occurred.

During trial, no witness called by either party affirmatively testified that Michaels had improperly used the positive shut-off valve to create an artificial dead-head within the system. Michaels explicitly denied doing so, and no witness identified any evidence suggesting such misuse. Instead, Pentair's implication that such misuse may have occurred rested upon two prongs. First, after the explosion but before trial, Michaels negligently disposed of parts of his pool filtration system, including the separation tank, the selector valve attached to the filter, the shut-off valves, and various pipes and plumbing. During the trial, Pentair requested, and the district court gave, an instruction that permitted the jury to make an inference adverse to Michaels based upon the failure to preserve the filter system for discovery and trial.[6] Pentair thus argued to the jury that, had the entire filter system been made available for inspection, evidence might have been uncovered that indicated Michaels seriously misused the system while backwashing it.

Second, Pentair made Michaels' credibility a major subject of the trial. Michaels testified that the canister exploded spontaneously when he merely turned the pool filter system on while standing a few feet away from the system. However, Pentair introduced photos of objects lying on the grass near the canister which, Pentair argued, suggested Michaels was conducting some kind of maintenance on

---

[5]Pentair also proffered lay witness testimony from Russell Cannon, a plumber who knew of no explosion incidents with the FNS canister filter during his many years servicing those filters, and from Darren Gagnon, a pool filter installer, who testified that he had installed the FNS filter for decades, knew of no explosions, and considered it a safe product.

[6]The instruction given by the district court was as follows:

> Twelve: Where relevant evidence which would properly be part of this litigation is within the control of the plaintiffs whose interest it would be to produce it, and they failed to do so without a satisfactory explanation, the jury may draw an inference that such evidence would have been unfavorable to the plaintiffs.

the filter when it exploded. While this contention was disputed by Michaels, medical records indicated that Michaels admitted to his physician that he had been servicing the filter when it exploded. Michaels also testified during trial that he never cleaned the filter himself during the two years he owned it, and that he thought the filter was being cleaned by his maintenance company, Pool Chlor. However, the owner of Pool Chlor testified that the company only managed the chemical levels in the pool and never cleaned Michaels' pool filter.

On cross-examination by Pentair, Michaels' experts agreed that their conclusion that Michaels' injury was caused by the defective design of the FNS filter was predicated upon Michaels' own description of how the explosion occurred, and if Michaels was proven to have lied, then their conclusions may no longer be valid. Pentair also argued that certain facts proven by Michaels' experts, while true, could be interpreted in different ways. For example, Pentair's statistical expert, Dr. Laurentius Marais, testified that while Pentair had received 50 reports of explosions in filter canisters lacking redundant safety features, those 50 claims must be considered in the context of the thousands of canisters sold nationally.

Thus, in lieu of evidence affirmatively demonstrating that Michaels had modified or misused the FNS filter canister in an unforeseeable way to cause the explosion, Pentair argued that inconsistencies in Michaels' evidence, coupled with the negligent disposal of parts of the filter system prior to trial, permitted the jury to infer that such a modification or misuse had occurred. Consequently, Pentair argued to the jury that Michaels failed to meet his burden of demonstrating by a preponderance of the evidence either that the design of the FNS filter was unsafe or that any design defect was the proximate cause of his injury.

ANALYSIS

On appeal, Michaels asserts various errors. However, because the trial court failed to properly analyze the claims of attorney misconduct made by Michaels in his post-trial motions under the standard set forth in *Lioce v. Cohen*, 124 Nev. 1, 174 P.3d 970 (2008), we need only address that contention.

[Headnote 1]

When the losing party in a civil trial alleges in a post-trial motion that it is entitled to a new trial because the prevailing party committed attorney misconduct during the trial, the Nevada Supreme Court has held that the district court must make detailed findings regarding the role that the alleged misconduct played at trial and the effect it likely had on the jury's verdict. *Id.* at 20, 174 P.3d at 982. *See BMW v. Roth*, 127 Nev. 122, 141 n.9, 252 P.3d 649, 661 n.9 (2011) (appellate consideration of alleged attorney misconduct that was not

the subject of specific district court findings "would be contrary to *Lioce*'s requirement of specific oral and written findings of misconduct to facilitate appellate review of orders granting or denying new trials based on attorney misconduct"). In this case, the district court did not make those findings. The portion of the district court's written order denying Michaels' request for relief due to attorney misconduct simply states that "[i]n considering plaintiff's allegations under *Lioce v. Cohen* . . . this Court does not find grounds warranting a new trial." The district court's written order contains no other findings relating to Michaels' claims of attorney misconduct.

Ordinarily, we could simply order a limited remand of this matter so that the district court can make the required findings. However, in reviewing the precedent of the Nevada Supreme Court, some of which is quite recent, we take this opportunity to provide guidance to the district court on the kinds of findings that must be made. Because the district court did not apply the reasoning of these more recent cases, and because *Lioce* itself does not set forth a specific list of what the district court's findings must include, we remand this matter to the district court to reconsider its conclusions in view of recent precedent and to make the findings necessary to support its ultimate decision.

Standard of review

[Headnotes 2-4]

A district court's decision to grant or deny a motion for a new trial is reviewed for an abuse of discretion.[7] *Lioce*, 124 Nev. at 20, 174 P.3d at 982. In determining whether such an abuse of discretion occurred, this court must view the evidence and all inferences most favorably to the party against whom the motion is made. *Grosjean v. Imperial Palace, Inc*., 125 Nev. 349, 366, 212 P.3d 1068, 1080 (2009).

---

[7]Michaels' district court motion also requested, in the alternative, judgment as a matter of law on various grounds. While the denial of a post-judgment motion for judgment as a matter of law is not independently appealable, *see Skender v. Brunsonbuilt Constr. & Dev. Co.*, 122 Nev. 1430, 1434 n.4, 148 P.3d 710, 713 n.4 (2006), in this case the order denying that motion and Michaels' motion for a new trial were entered prior to the final judgment in the underlying case. As a result, the order denying Michaels' motion for judgment as a matter of law is an interlocutory order, which we can review in the context of Michaels' appeal from the final judgment. *See Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (recognizing that interlocutory orders entered before final judgment can be reviewed in an appeal from the final judgment). However, for reasons discussed herein, we limit the scope of this opinion only to the question of attorney misconduct. Because attorney misconduct cannot be the basis for entry of judgment as a matter of law, in this opinion we address only Michaels' request for a new trial.

[Headnotes 5, 6]

An attorney may not "encourage[ ] the jurors to look beyond the law and the relevant facts in deciding the case before them." *Lioce*, 124 Nev. at 6, 174 P.3d at 973. "Under NRCP 59(a)(2), the district court may grant a new trial if the prevailing party committed misconduct that affected the aggrieved party's substantial rights." *Gunderson v. D.R. Horton, Inc*., 130 Nev. 67, 74, 319 P.3d 606, 611 (2014).

In *Lioce*, the Nevada Supreme Court articulated the applicable legal standards governing appellate review of a district court's denial of a motion for a new trial based on alleged attorney misconduct. *See Lioce*, 124 Nev. at 14-26, 174 P.3d at 978-86. *Lioce* required the district court to make post-trial findings on the effect of the misconduct upon the trial, but did not delineate the kinds of findings that are required. *Id.* In two recent cases, *Gunderson v. D.R. Horton, Inc*., 130 Nev. 67, 319 P.3d 606 (2014), and *BMW v. Roth*, 127 Nev. 122, 252 P.3d 649 (2011), the Nevada Supreme Court expanded upon its *Lioce* analysis and further explained how the district court, and appellate courts, should evaluate claims of misconduct. The district court in this case did not apply these new cases when it decided Michaels' motion, and so we take this opportunity to clarify the standard that must be followed in view of those cases.

[Headnotes 7, 8]

Determining whether a new trial is warranted involves the application of a three-step analysis. First, we must determine whether misconduct occurred. *Gunderson*, 130 Nev. at 74, 319 P.3d at 611. Whether an attorney's comments constitute misconduct is a question of law reviewed on appeal de novo. *BMW*, 127 Nev. at 132, 252 P.3d at 656. If such misconduct has occurred, the next step is to determine the proper legal standard to apply in assessing whether the misconduct warrants a new trial. *Gunderson*, 130 Nev. at 74, 319 P.3d at 611. Finally, we must determine whether the district court abused its discretion in applying that standard. *Id.*

[Headnotes 9-11]

When a party claims misconduct by opposing counsel, the legal standard under which that misconduct is reviewed depends on whether a timely trial objection was made. *See Lioce*, 124 Nev. at 17-19, 174 P.3d at 980-82. When a timely objection was not made at trial, any review of that misconduct, either post-trial by the trial court or on appeal, is considerably more circumscribed than if an objection was made. When resolving a motion for a new trial based on unobjected-to attorney misconduct, "the district court shall first conclude that the failure to object is critical and the district court must treat the attorney misconduct issue as having been waived, un-

less plain error exists." *Id.* at 19, 174 P.3d at 982. To decide whether there is plain error, the district court must then determine "whether the complaining party met its burden of demonstrating that its case is a rare circumstance in which the attorney misconduct amounted to irreparable and fundamental error." *Id*. And "[i]n the context of unobjected-to attorney misconduct, irreparable and fundamental error is error that results in a substantial impairment of justice or denial of fundamental rights such that, but for the misconduct, the verdict would have been different." *Id*. Thus, in this case, because no objection was lodged at trial, a new trial would only be warranted if Pentair committed misconduct and the misconduct amounted to "plain error."

[Headnotes 12-14]

Plain error requires a party to show " 'that no other reasonable explanation for the verdict exists.' " *Id*. (quoting *Ringle v. Bruton*, 120 Nev. 82, 96, 86 P.3d 1032, 1041 (2004)). Analyzing whether such plain error has occurred involves weighing the misconduct against the reasonableness of the jury's verdict in light of the evidence in the record. *Gunderson*, 130 Nev. at 78, 319 P.3d at 614 ("In evaluating [the effect of misconduct on a verdict], we 'look at the scope, nature, and quantity of misconduct as indicators of the verdict's reliability' " (quoting *Grosjean*, 125 Nev. at 365, 212 P.3d at 1079)). Moreover, the court must consider the "context" in which the misconduct occurred. *Id*.

Necessarily, then, a determination of whether unobjected-to misconduct has created plain error requires balancing the severity of the misconduct against the weight of the evidence supporting the jury's verdict. In doing so, however, we must bear in mind that "credibility determinations and the weighing of evidence are left to the trier of fact." *See Grosjean*, 125 Nev. at 366, 212 P.3d at 1080. Where the record demonstrates that the jury's verdict is strongly supported by overwhelming evidence, the verdict can generally be explained by the evidence itself and even serious misconduct may not warrant a new trial. On the other hand, where the evidence in the record is insufficient to reasonably explain the jury's verdict even when viewed in the light most favorable to the prevailing party, or if it does so only very weakly or implausibly, then trial misconduct is likely to have resulted in fundamental error, because in those circumstances the jury's verdict was more likely to have been a product of the misconduct rather than of a fair consideration of the evidence presented. *Id*. at 364, 212 P.3d at 1079 (attorney misconduct warrants new trial in "the rare occasion when the attorney misconduct 'offsets the evidence adduced at trial in support of the verdict' " (quoting *Lioce*, 124 Nev. at 19, 174 P.3d at 982)).

Furthermore, the court must consider the "context" of the misconduct. *Gunderson*, 130 Nev. at 78, 319 P.3d at 614. Misconduct

that was largely collateral to the principal issues in dispute is less likely to have resulted in plain error than misconduct that touched directly upon the central questions the jury was asked to resolve. By way of hypothetical example, Nevada Rule of Professional Conduct (RPC) 3.4(e) prohibits an attorney from stating "a personal opinion as to . . . the credibility of a witness." *See Lioce*, 124 Nev. at 21-22, 174 P.3d at 983 ("[A]n attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases and may amount to prejudicial misconduct necessitating a new trial."). When an attorney improperly vouches for the credibility of an inconsequential witness whose testimony related to a collateral issue and whose credibility was never attacked by the opposing party, such misconduct likely played a lesser role in the jury's verdict than if the attorney vouched for a witness whose credibility was directly challenged and whose truthfulness regarding a key issue was the principal or sole question for the jury's consideration. Similarly, vouching for the credibility of a witness whose testimony was largely cumulative to other evidence or irrelevant to the main issues in genuine dispute is less likely, in context, to warrant a new trial than if the witness's testimony were the only evidence supporting a key contention.

Finally, the frequency of the misconduct must be considered. A single, isolated instance of misconduct is likely to have had a lesser impact on the trial than repeated or persistent instances of misconduct. *See Gunderson*, 130 Nev. at 75, 319 P.3d at 612 ("[T]he district court must take into account that, by engaging in continued misconduct, the offending attorney has accepted the risk that the jury will be influenced by his misconduct. . . . although specific instances of misconduct alone might have been curable by objection and admonishment, the effect of persistent or repeated misconduct might be incurable." (internal quotation omitted)).

[Headnote 15]

Thus, determining whether "plain error" has occurred as a result of unobjected-to misconduct requires the court to closely examine the record, weigh the severity and persistence of the misconduct against the evidence presented, and assess what role, if any, the misconduct likely played in the jury's verdict. *See BMW*, 127 Nev. at 133, 252 P.3d at 656-57.

Overview of products liability law

[Headnotes 16-18]

Because alleged attorney misconduct must be evaluated in "context," a brief examination of the substantive law that governed the trial is necessary. On appeal, the only claim remaining before us is the products liability claim, which is a strict liability claim. In Nevada, a manufacturer or distributor of a product is strictly liable

for injuries resulting from a defect in the product that was present when the product left its hands. *Allison v. Merck & Co., Inc.*, 110 Nev. 762, 767, 878 P.2d 948, 952 (1994). "[P]roducts are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function." *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970) (internal quotations omitted). "Reasonableness" may be determined with reference to such things as whether a safer design was possible or feasible, whether safer alternatives are commercially available, and other factors. *See McCourt v. J.C. Penney Co., Inc.*, 103 Nev. 101, 104, 734 P.2d 696, 698 (1987) (stating that "[a]lternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous").

[Headnotes 19-20]

Furthermore, manufacturers are not necessarily liable for injuries caused by a product that was substantially modified or misused by the consumer or by an intermediary. "Generally, a substantial alteration will shield a manufacturer from liability for injury that results from that alteration," but a product manufacturer remains liable if the alteration was insubstantial, foreseeable, or did not actually cause the injury.[8] *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 140, 808 P.2d 522, 525 (1991).

[Headnotes 21, 22]

When the risk of danger associated with a product is such that it cannot be corrected or mitigated by a commercially feasible change in the product's design available at the time the product was placed in the stream of commerce, the manufacturer must give adequate warning to consumers of the potential danger. *See id.* at 138, 808 P.2d at 524. Where a plaintiff alleges that such warnings were not adequately given, the "plaintiff carries the burden of proving, in part, that the inadequate warning caused his injuries." *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 190, 209 P.3d 271, 274 (2009).

Michaels' assertions of attorney misconduct

Michaels argues that, during closing argument, Pentair's counsel made various impermissible statements that were not based in evidence or that reflected the personal opinion of counsel. Michaels'

[8]Because products liability claims allege strict liability, comparative negligence is not a defense to a prima facie case of such liability. *Maduike v. Agency Rent-a-Car*, 114 Nev. 1, 7, 953 P.2d 24, 27 (1998) ("[C]omparative negligence reductions do not apply when the claim is based on strict liability."). Comparative fault is, however, a defense to a negligence claim. Thus, even though the only claim on appeal before us is the strict liability cause of action, evidence of comparative fault was admitted and argued at trial in connection with Michaels' negligence claim.

counsel did not timely object to any of the statements now cited as error on appeal.

In *Lioce*, the Nevada Supreme Court directed district courts confronted with post-trial motions alleging attorney misconduct as follows:

> [W]e now require that, when deciding a motion for a new trial, the district court must make specific findings, both on the record during oral proceedings and in its order, with regard to its application of the standards described above to the facts of the cases before it. In doing so, the court enables our review of its exercise of discretion in denying or granting a motion for a new trial.

124 Nev. at 19-20, 174 P.3d at 982. *See also BMW*, 127 Nev. at 141 n.9, 252 P.3d at 661 n.9.

Conceivably, in some cases in which a district court fails to make requisite findings in support of a decision, that decision may nonetheless be affirmed on appeal if the record as a whole demonstrates that the ultimate conclusion was correct even if the reasons for it are not clearly articulated. For example, if the most cursory review of the briefs or the record clearly demonstrates that no misconduct occurred as a matter of law, then a remand for the district court to simply state the obvious would seem wasteful and unnecessary. During oral argument, Pentair's counsel suggested that a remand in this case was unnecessary for precisely this reason. Had our review of the record in this case clearly indicated either that no misconduct occurred, or that any attorney misconduct that occurred could not possibly have affected the jury's verdict, then we could perhaps resolve this appeal based upon the record alone without the need for additional findings by the district court.

In this case, however, the record reveals that Pentair's attorney made a variety of statements during closing argument that could plausibly constitute the kind of attorney misconduct that concerned the Nevada Supreme Court in *Lioce*.[9] For example, Pentair's counsel appeared to vouch for a witness, Dr. Casey (Michaels' treating physician who contradicted Michaels' version of events), by stating that "I think he is a credible and honest witness." Counsel also appeared to offer opinions about other witnesses, including witnesses from Pool Chlor, stating "I don't know about you, but I know what

[9]In *Lioce*, the Nevada Supreme Court conducted a detailed analysis of the scope and severity of the alleged misconduct before concluding that a remand for additional findings was necessary; indeed, the supreme court went so far as to conclude that misconduct occurred as a matter of law before remanding. 124 Nev. at 20-25, 174 P.3d at 982-85. In this opinion, we are not required to go that far.

I thought about those people's testimony."[10] By offering personal opinions about the credibility of witnesses, Pentair's counsel may have violated RPC 3.4(e), which states that, during the course of a trial, an attorney shall not state "a personal opinion as to . . . the credibility of a witness." *See Lioce*, 124 Nev. at 21-22, 174 P.3d at 983 ("[A]n attorney's statements of personal opinion as to the justness of a cause, the credibility of a witness, or the culpability of a litigant is . . . improper in civil cases and may amount to prejudicial misconduct necessitating a new trial."). The district court's written order fails to indicate whether the court fully considered these arguments, whether it concluded that they did not constitute misconduct, or whether it instead concluded that they represented misconduct but that no fundamental error occurred.[11]

[Headnote 23]

Another instance of potential misconduct appeared to occur in relation to the adverse inference jury instruction given by the trial court. An adverse inference instruction may be given when a district court concludes that particular evidence was negligently destroyed. *Franchise Tax Bd. of Cal. v. Hyatt*, 130 Nev. 662, 702, 335 P.3d 125, 152 (2014), *cert. granted in part*, 135 S. Ct. 2940 (2015). The adverse inference instruction "merely allows the fact-finder to determine, based on other evidence, that a fact exists." *Id*. The adverse inference instruction in this case (jury instruction number 12) was given by the court as a sanction for very specific conduct, namely,

---

[10]Counsel's closing argument contains other injections of personal opinion, such as: "Why is Mr. Michaels . . . saying that he is looking away from the plate? Why is he saying that? . . . I'll give you what I think the answer is."; "I don't think that is the physical evidence. I don't think the physical evidence supports that."; "I have an explanation for you—for your consideration as to what I think is consistent with the physical evidence in this case. I think the lid did separate up. . . . I think what was happening was Mr. Michaels just cleaned and back washed and cleaned the filter that day. . . . So I think that what happened is he cleaned it."; "I don't think Sunrise Hospital Medical Center is going to do that."; "I really think we all know what really happened." Counsel even proffered his own personal medical diagnosis of the severity of Michaels' injuries and how they were incurred, arguing that "if he fell straight down on concrete, you think his head would be swollen. I do."

[11]We note that this was a two-week jury trial and the trial transcript appears not to have been available to the district court when it considered Michaels' motion, and therefore we acknowledge that it may well be easier for us to scour the record and locate these statements now than it was for the district court when the motion was first presented. We also note that official transcripts of the trial may not be available when a district court is confronted with post-trial motions alleging attorney misconduct, because the deadline for filing a motion for new trial expires ten days after entry of judgment, NRCP 59, and in longer trials the full transcript may not be available until well after that time period has elapsed. Thus, in many cases it may be difficult for the parties to fully cite to specific instances of misconduct in their post-trial briefing and for the district court to make precise findings, especially when the precise wording of an attorney's argument is disputed.

Michaels' negligent disposal of pieces of the filter system before trial. But during closing argument, Pentair's counsel appeared to invite the jury to apply this instruction to other evidence that had no relation either to the discovery violation, the district court's sanction, or the purpose of the instruction given by the court. Specifically, Pentair's counsel argued that the adverse inference instruction applied to a plumbing expert that Michaels purportedly retained. Counsel argued:

> There is another expert they didn't bring in, where you could think that maybe that expert wasn't going to say good things. Who did the plaintiffs call, the plaintiff's lawyer, right after the accident to come and take [pictures]. I don't remember the gentleman's name, but he was a plumbing expert. That much I remember. Remember Mr. Kesky. I played his deposition. . . . He said [that he] discussed the plumbing issues with the expert. But did the plaintiffs bring him in here. . . . Is there a reason for that. I remind you of the instruction, where the plaintiffs have the evidence, because they are the only ones in control of that expert, he was the one that has his investigator there, not us, Pentair had no chance at any of this, you take it against [Michaels].

However, the record does not appear to indicate that any such plumbing expert was ever retained by Michaels; the district court did not make any findings on this question. Furthermore, even if a plumbing expert had been retained, counsel's invitation for the jury to apply the adverse inference instruction to Michaels' failure to call that witness is problematic because the adverse inference instruction was not given as a sanction for that conduct.[12]

Consequently, we cannot conclude from the record that attorney misconduct was so clearly absent from the trial that additional findings by the district court would be superfluous and unnecessary.[13]

---

[12]According to the deposition testimony of Terry Keskey, a plumbing company visited Michaels' home shortly after the explosion. But under Nevada law, merely consulting a plumber in the wake of a pool explosion does not equate to retaining an expert who must, or is even qualified to, testify at trial. *See Higgs v. State*, 126 Nev. 1, 16, 222 P.3d 648, 658 (2010) ("NRS 50.275 is the blueprint for the admissibility of expert witness testimony" and a witness is not permitted to be qualified as an expert unless certain specific legal requirements have been satisfied).

[13]We emphasize that, by including these observations, we do not conclude that the arguments cited here necessarily represented reversible misconduct; the district court must make the necessary findings on remand before they can be considered by us on appeal. Conversely, we also do not intend to suggest that any instances of alleged misconduct cited by Michaels but omitted from our discussion could not have constituted misconduct. Rather, we include these particular instances merely as illustrations in response to Pentair's contention that a remand is unnecessary because the district court could not possibly have concluded that reversible misconduct occurred at any point in the trial.

We also cannot conclude that the instances of potential misconduct that appear in the record were necessarily so minor or irrelevant that they must be found by the district court to have played no role whatsoever in the jury's verdict. In this case, the jury found in favor of Pentair, but the evidence supporting that verdict was far from overwhelming or clear. Several of Pentair's witnesses conceded the essential points that Pentair knew of prior explosions occurring in split-shell filters and that safer alternatives to such filter designs were commercially feasible. Similarly, Pentair did not present any substantive evidence that Michaels unforeseeably misused or modified the FNS filter in any way.[14] Rather, in the absence of substantive evidence, Pentair invited the jury to infer that such unforeseeable modifications might have happened because some pieces of the filter system were missing and because the testimony of Michaels' witnesses was supposedly not credible. Thus, at least some of the apparent misconduct in this case related to the heart of Pentair's defense strategy and to the most important questions the jury was asked to answer. Under these circumstances, we cannot conclude that the alleged misconduct related only to matters of no consequence and could not possibly have resulted in fundamental injustice. Thus, in this case, the record indicates that misconduct could be deemed to have occurred, and that the evidence supporting the products liability verdict was weak. However, in the absence of detailed findings, we cannot determine whether no other reasonable explanation exists for the verdict but the alleged misconduct.

In this case, had the district court engaged in a comprehensive analysis, it could have concluded that misconduct occurred and that the misconduct was both severe and repeated. *See Gunderson*, 130 Nev. at 75, 319 P.3d at 612. Furthermore, when viewed in context, the district court could have concluded that the misconduct played a critical role in the case. *See id*. at 78, 319 P.3d at 614 (instances of misconduct must be evaluated "as determined by their context"); *see also Grosjean v. Imperial Palace, Inc*., 125 Nev. 349, 364, 212 P.3d 1068, 1079 (2009).

Accordingly, the record in this case is not so clear that detailed findings by the district court are clearly unnecessary. Furthermore,

---

[14]A number of Pentair's employees and engineers conceded that accidental dead-heads during cleaning were foreseeable. Thus, even if it were true that Michaels had caused such a dead-head to occur while cleaning the filter canister, as Pentair's counsel suggested during his closing argument, such a conclusion may have been legally irrelevant to the question of whether the FNS filter was improperly designed. Comparative negligence is not a defense to strict liability, and therefore even if Michaels had improperly dead-headed the system while cleaning it, Pentair may still be liable for manufacturing a dangerous product so long as dead-heading was a foreseeable event.

the district court's failure to engage in the exercise of making specific and detailed findings particularly matters when the district court acted without considering the Nevada Supreme Court's reasoning in *BMW* and without the benefit of *Gunderson*.[15] Had such detailed findings been made, we could more easily determine whether those new cases would have affected the district court's analysis. Therefore, we must remand this matter to the district court for additional findings and further direct the district court to reconsider its conclusion in view of these cases and the standard set forth in this opinion.[16]

[Headnote 24]

On remand, the district court must clarify, at a minimum, whether it found that no misconduct occurred or rather whether it concluded that misconduct did occur but was harmless under the standards of *Lioce* in view of: (1) the nature of the claims and defenses asserted by the parties; (2) the relative strength of the evidence presented by the parties; (3) the facts and evidence that were either disputed or not substantively disputed during the trial; (4) the type, severity, and scope of any attorney misconduct; (5) whether any misconduct was isolated and incidental on the one hand or repeated and persistent on the other; (6) the context in which any misconduct occurred; (7) the relationship of any misconduct to the parties' evidence and arguments; and (8) any other relevant considerations.

[Headnote 25]

In reviewing these factors, the district court's ultimate goal is to assess whether any misconduct "offsets the evidence adduced at trial" such that "no other reasonable explanation for the verdict" exists but that it was the product of the misconduct. *See Grosjean*, 125 Nev. at 363, 212 P.3d at 1079 (internal quotations omitted). In doing so, the district court must "assume that the jury believed all of the evidence favorable to" the party against whom the motion is made. *Id*. at 366, 212 P.3d at 1080. Nevertheless, when serious and repeated attorney misconduct has demonstrably occurred, the district court's deference to the jury is more limited than if such misconduct

---

[15]The district court also did not have the benefit of the Nevada Supreme Court's recent decision in *Franchise Tax Board of California v. Hyatt*, 130 Nev. at 702, 335 P.3d at 152, *cert. granted in part*, 135 S. Ct. 2940 (2015), which clarified the law relating to adverse inference instructions resulting from lost evidence.

[16]The only issue presented to us in this appeal concerned the products liability claim, and therefore this remand is limited only to that claim. Because Michaels did not present argument on the other claims for relief adjudicated below, we do not disturb those portions of the verdict, and the district court need not address those claims on remand.

had not occurred, and the trial court must carefully consider whether the misconduct led the jury astray and caused it to base its verdict upon something other than the evidence and the applicable law.

CONCLUSION

For the foregoing reasons, we vacate the district court's denial of Michaels' motion for new trial and remand this matter to the district court for further proceedings consistent with this opinion.

GIBBONS, C.J., concurs.

SILVER, J., concurring:

I concur in the result only. In my view, the majority decision prematurely highlights portions of the alleged misconduct during closing argument and unnecessarily comments on the strength of the evidence presented at trial. Yet, the majority also acknowledges that the district court seemingly did not have the benefit of transcripts when it considered the new trial motion due to the timing involved in such post-trial motions, and that it did not have the benefit of authority and guidance from the supreme court's decision in *Gunderson v. D.R. Horton, Inc.*, 130 Nev. 67, 319 P.3d 606 (2014). The majority further notes that, in denying the new trial motion, the district court did not consider the supreme court's reasoning in *BMW v. Roth*, 127 Nev. 122, 252 P.3d 649 (2011). No further instruction or analysis is required for this court to resolve this appeal. Therefore, a limited remand in this matter directing the district court to make detailed findings regarding specific instances of alleged misconduct would have sufficed. Respectfully, I concur with only the result reached by the majority.

CRISTIE N. ANDERSON, INDIVIDUALLY; AND JAMAAR ANDERSON, APPELLANTS, *v.* MANDALAY CORPORATION, A NEVADA CORPORATION DBA MANDALAY BAY RESORT AND CASINO, RESPONDENT.

No. 61305

CRISTIE N. ANDERSON, INDIVIDUALLY; AND JAMAAR ANDERSON, APPELLANTS/CROSS-RESPONDENTS, *v.* MANDALAY CORPORATION, A NEVADA CORPORATION DBA MANDALAY BAY RESORT AND CASINO, RESPONDENT/CROSS-APPELLANT.

No. 61871

October 15, 2015 358 P.3d 242

Consolidated appeals from a district court order granting summary judgment, certified as final under NRCP 54(b), and an order granting, in part, a motion for attorney fees, costs, and interest in a tort action. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Hotel patron brought action against hotel for vicarious liability after hotel employee raped her in her hotel room. The district court granted summary judgment for hotel and denied patron's motion to amend her complaint to add claims for negligent security, retention, and supervision. Patron appealed. The supreme court, PARRAGUIRRE, J., held that: (1) genuine issue of material fact as to whether employee's conduct was reasonably foreseeable precluded summary judgment, and (2) amendment of complaint would not have been futile.

Reversed and remanded.

David T. Wall, Las Vegas; *Eglet Prince* and *Robert T. Eglet, Tracy A. Eglet*, and *Danielle A. Tarmu*, Las Vegas, for Appellants/Cross-Respondents.

Kravitz, Schnitzer & Johnson, Chtd., and *Martin J. Kravitz* and *Jordan P. Schnitzer*, Las Vegas, for Respondent/Cross-Appellant.

1. APPEAL AND ERROR.
   The supreme court reviews summary judgment rulings de novo.
2. JUDGMENT.
   Summary judgment is improper whenever a reasonable jury could return a verdict for the nonmoving party. NRCP 56(c).
3. JUDGMENT.
   When reviewing the record to determine whether the movant is entitled to summary judgment, the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party. NRCP 56(c).

4. Labor and Employment.
   Whether an employee's act is reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment, in context of an employer's vicarious liability for employee's intentional torts, sets forth a factual inquiry. NRS 41.745(1)(c).
5. Judgment.
   Genuine issue of material fact as to whether hotel employee's conduct, raping hotel patron in her hotel room, was reasonably foreseeable under facts and circumstances of case considering nature and scope of his employment, as to make hotel vicariously liable for conduct, precluded summary judgment for hotel in patron's action against it. NRS 41.745(1)(c).
6. Innkeepers.
   Amendment of hotel patron's complaint to add claims for negligent security, retention, and supervision would not have been futile, in her action against hotel for vicarious liability after hotel employee raped her in her hotel room, where reasonable jury could have concluded that employee's attack on patron was foreseeable. NRCP 12(b)(5).
7. Appeal and Error.
   Although the supreme court generally reviews a district court's decision on a motion for leave to amend a complaint for abuse of discretion, futility is a question of law reviewed de novo because it is essentially asking whether the plaintiff could plead facts that would entitle her to relief. NRCP 12(b)(5).
8. Negligence.
   Although unlawful conduct can interrupt and supersede the causation between a negligent act and injury, an unlawful act will not supersede causation if it was foreseeable.

Before the Court En Banc.[1]

OPINION

By the Court, Parraguirre, J.:

NRS 41.745(1)(c) makes employers vicariously liable for employees' intentional torts if a plaintiff can show the intentional conduct was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of [the employee's] employment." Here, we are asked to determine whether it was reasonably foreseeable that an employee would rape a hotel guest. We are also asked to determine whether the employee's criminal conduct was so unforeseeable that direct negligence claims against the employer would be futile. Based on the particularized facts of this case, which are detailed below, we conclude a reasonable jury could find that the employee's criminal conduct was reasonably foreseeable. Similarly, we conclude direct negligence claims against the

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

employer would not be futile because a reasonable jury might find that the criminal conduct was foreseeable. Accordingly, we reverse and remand.

FACTS

Cristie Anderson and her husband sued Mandalay Bay Resort and Casino (Mandalay) after Alonzo Monroy Gonzalez, a Mandalay employee, raped Anderson in her hotel room at Mandalay. Anderson and her husband asserted claims against Mandalay for negligent hiring, vicarious liability, and loss of consortium. During discovery, Anderson asked for leave to amend her complaint to add claims for negligent security, retention, and supervision. Mandalay sought summary judgment, and at the summary judgment hearing, Anderson's counsel abandoned all claims except the vicarious liability claim. The district court granted Mandalay's motion for summary judgment, concluding Mandalay was not vicariously liable for Gonzalez's criminal act. The district court also denied, as futile, Anderson's motion to amend her complaint. Anderson timely appealed those decisions.[2]

Anderson came to Las Vegas on September 8, 2008, to attend a trade show on behalf of her employer. She checked into room 8916 at Mandalay. After performing some work-related duties, she and her coworkers went out for dinner and drinks. Anderson became intoxicated and returned to Mandalay around 2 a.m. on September 9, 2008. Surveillance footage shows that she and Gonzalez shared an elevator; both exited on the eighth floor. Anderson entered her room, shut the door behind her, and went to sleep.

Later, Anderson woke up vomiting and felt someone wiping her face with a washcloth. She realized a uniformed man, later identified as Gonzalez, was in her room. Gonzalez raped Anderson. He immediately left the room when Anderson oriented herself. Anderson called the front desk, and Mandalay security interviewed Gonzalez after finding him on the eighth floor. He admitted to entering room 8916 but claimed he only entered to sweep up broken glass that was in the hallway and underneath the room's door. Gonzalez later claimed to have had consensual sex with Anderson. Las Vegas Metropolitan Police took over the investigation, and Gonzalez ultimately pleaded guilty to sexual assault.

Gonzalez worked at Mandalay as a House Person, whose principle job duties are to clean the common areas of the hotel and assist

[2]Mandalay filed a notice of cross-appeal seeking attorney fees, costs, and interest from Anderson. However, Mandalay never filed an opening brief on cross-appeal, as required by NRAP 28.1(c)(2), and its answering brief does not set forth its cross-appeal arguments. Therefore, Mandalay has not actually presented this court with a cross-appeal.

in cleaning and serving guest rooms, as needed. A House Person working Gonzalez's shift would have little supervision. Mandalay provided Gonzalez with a keycard that was traceable to him and opened the guest rooms on his assigned floors. On the night in question, floors 8-12 were assigned to him. Gonzalez used that keycard to enter Anderson's room.

Before hiring Gonzalez, Mandalay performed a criminal background check using a social security number he provided. That number was connected to Gonzalez's name and indicated he had no criminal record. Mandalay solicited Gonzalez's employment references and filled out I-9 documents reporting Gonzalez's eligibility to work; however, it is not clear that Mandalay contacted those references and properly updated information on Gonzalez's I-9.

Gonzalez's prior disciplinary history shows that Mandalay suspended him for 31 days after he and two other men were implicated in a series of insulting and threatening comments made over Mandalay's employee radios. The allegations included using the radios to broadcast the sound of toilets flushing, animal noises, and threats to a female supervisor. The threats were "I know where you live Juanita," "I will be waiting for you in the parking garage," and "You are a bitch Juanita and you deserve what you are going to get." Although Mandalay never definitively identified or ruled out Gonzalez as making any threats, it did find that Gonzalez misused employee radios and lied about it.

During district court proceedings, Anderson presented evidence of five prior sexual assaults perpetuated by Mandalay employees on Mandalay's premises. The victims in three of the assaults were guests, and two were other Mandalay employees. Additionally, evidence was presented showing Mandalay received about one report a month claiming an employee entered an occupied room without authorization. Anderson submitted eight Las Vegas Metropolitan Police reports about Mandalay employees stealing from guest rooms during unauthorized entries. Anderson also presented in court comments from travel sites reporting similar problems. Anderson also presented an expert report indicating Mandalay had insufficient security when Gonzalez attacked Anderson, and ongoing security defects created a volatile environment.

Ultimately, the district court granted Mandalay's motion for summary judgment, concluding NRS 41.745(1) and *Wood v. Safeway, Inc.*, 121 Nev. 724, 121 P.3d 1026 (2005), barred vicarious liability against Mandalay because Gonzalez's acts were truly independent, not committed in the course of the very task assigned, and not reasonably foreseeable. The district court also denied as futile Anderson's request for leave to amend.

DISCUSSION

On appeal, Anderson argues the district court erred in granting Mandalay's motion for summary judgment. Additionally, Anderson argues the district court erred in denying her leave to amend her complaint.

Mandalay was not entitled to summary judgment

[Headnotes 1-3]

This court reviews summary judgment rulings de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate when the record shows there is no genuine issue of material fact remaining, and the movant is entitled to judgment as a matter of law. *Id.* (citing NRCP 56(c)). Therefore, summary judgment is improper whenever "a reasonable jury could return a verdict for the non-moving party." *Sprague v. Lucky Stores, Inc.*, 109 Nev. 247, 249, 849 P.2d 320, 322 (1993). When reviewing the record, "the evidence, and any reasonable inferences drawn from it, must be viewed in a light most favorable to the nonmoving party." *Wood*, 121 Nev. at 729, 121 P.3d at 1029.

NRS 41.745(1)(c) sets forth a factual inquiry

[Headnote 4]

NRS 41.745 makes employers vicariously liable for employees' intentional torts when—among other circumstances—an employee's act is "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment." NRS 41.745(1)(c). Inquiries focused on the facts and circumstances of a case are typically factual, not legal. *See, e.g.*, *Mayfield v. Koroghli*, 124 Nev. 343, 352, 184 P.3d 362, 368 (2008); *Basile v. Union Plaza Hotel & Casino*, 110 Nev. 1382, 1384, 887 P.2d 273, 275 (1994); *see also* 65 C.J.S. *Negligence* § 8 (2010) (stating that the question of negligence is "determined by a consideration of all the particular set of facts and circumstances").

Further, the Legislature clarified NRS 41.745(1)(c)'s reasonable foreseeability standard, stating the "conduct of an employee is reasonably foreseeable if a person of ordinary intelligence and prudence could have reasonably anticipated the conduct and the probability of injury." NRS 41.745(1)(c). This definition of reasonable foreseeability stems from premises liability cases, Hearing on A.B. 595 Before the Assembly Judiciary Comm., 69th Leg., at 13-14 (Nev., June 19, 1997) (citing *El Dorado Hotel, Inc. v. Brown*, 100 Nev. 622, 627, 691 P.2d 436, 440 (1984), *overruled on other grounds by Vinci v. Las Vegas Sands, Inc.*, 115 Nev. 243, 245, 984 P.2d 750,

751 (1999)), and this court has held its determination presents an issue of fact, *Basile*, 110 Nev. at 1384, 887 P.2d at 275. Therefore, we conclude NRS 41.745(1)(c)'s reasonable foreseeability standard sets forth a factual inquiry.[3]

A reasonable jury could conclude Gonzalez's act was reasonably foreseeable

[Headnote 5]

Because NRS 41.745(1)(c) presents a factual inquiry, summary judgment is only proper if a reasonable jury could not rule in Anderson's favor. *Sprague*, 109 Nev. at 249, 849 P.2d at 322. More specifically, we must determine whether a reasonable jury could conclude Gonzalez's conduct was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of [Gonzalez's] employment." NRS 41.745(1)(c). We conclude a reasonable jury could find that Gonzalez's conduct was reasonably foreseeable; therefore the district court erred in granting Mandalay's motion for summary judgment. *See Wood*, 121 Nev. at 729, 121 P.3d at 1029 (this court reviews summary judgment rulings de novo).

This court has considered reasonable foreseeability under NRS 41.745(1)(c) in only one published case. *See id.* at 739-40, 121 P.3d at 1036-37. In *Wood*, a janitor employed with a cleaning company raped a Safeway employee at the Safeway store where they both worked. *Id.* at 727-28, 121 P.3d at 1028-29. There, the janitor had no criminal history; the employer required proof of identification, checked employment references, and filled out the proper immigration documents; and the employer had no sexual harassment complaints over the last ten years. *Id.* at 740, 121 P.3d at 1037. This court held, as a matter of law, that the janitor's attack was not reasonably

---

[3]NRS 41.745's legislative history clearly supports this conclusion. The Legislature intended for NRS 41.745(1)(c) to reject this court's conclusion that employers would be liable for the intentional torts of employees when, " 'in the context of the particular enterprise[,] an employee's conduct is not so unusual or startling that it would seem unfair to include the loss resulting from it among other costs of the employer's business.' " *State, Dep't of Human Res., Div. of Mental Hygiene & Mental Retardation v. Jimenez*, 113 Nev. 356, 365, 935 P.2d 274, 280 (1997) (emphasis omitted) (quoting *Rogers v. Kemper Constr. Co.*, 124 Cal. Rptr. 143, 148-49 (Ct. App. 1975)), *opinion withdrawn*, 113 Nev. 735, 941 P.2d 969 (1997); *see* A.B. 595, Bill Summary, 69th Leg. (Nev. 1997); Hearing on A.B. 595 Before the Assembly Judiciary Comm., 69th Leg., at 8-9, 14-15 (Nev., June 19, 1997). The bill's proponents read *Jimenez* as making employers strictly liable for employees' intentional torts, and they believed NRS 41.745(1)(c)'s reasonable foreseeability standard would allow employers to submit the issue of vicarious liability to a jury. *See* Hearing on A.B. 595 Before the Assembly Judiciary Comm., 69th Leg., at 9-10 (Nev., June 19, 1997).

foreseeable, and the victim could not hold the janitor's employer vicariously liable for his intentional acts under NRS 41.745(1)(c). *Id.*

According to Mandalay, *Wood* demonstrates that Gonzalez's criminal conduct was unforeseeable. We disagree. After viewing the evidence and drawing all reasonable inferences in Anderson's favor, *Wood*, 121 Nev. at 729, 121 P.3d at 1029, we conclude the facts and circumstances here are sufficiently distinguishable from *Wood* for a reasonable jury to determine that Gonzalez's act was reasonably foreseeable under NRS 41.745(1)(c). The janitor in *Wood* was never the subject of a sexual harassment complaint, and his employer had not had a complaint of that nature in the past ten years. *See id.* at 740, 121 P.3d at 1037. Here, however, at least five Mandalay employees had sexually assaulted guests and coworkers before Gonzalez attacked Anderson. Additionally, Mandalay knew employees entrusted with keyed access to occupied rooms abused that access to commit property crimes. Therefore, Mandalay had notice its employees were capable of sexual assault, and some employees abused their keycard access to enter guest rooms without authorization. Moreover, Mandalay suspended Gonzalez for 31 days in response to allegations that he harassed and threatened a female supervisor. After Gonzalez's suspension ended, Mandalay restored his keycard access to occupied rooms and assigned him to a shift with minimal supervision. Considering the prior on-premises attacks, employees' regular keycard abuse, Gonzalez's disciplinary history, and Mandalay's decision to provide Gonzalez keyed access to guest rooms with minimal supervision, a reasonable jury could conclude it was foreseeable that Gonzalez would abuse his keycard access to sexually assault a Mandalay guest.

Mandalay contends that no other state would hold it vicariously liable for Gonzalez's act because that act could not have fallen within the scope of his employment. This argument lacks merit for two reasons. First, this argument mischaracterizes the relevant inquiry. Generally, an employer is only liable for the intentional torts committed within the scope of employment. *See* 27 Am. Jur. 2d *Employment Relationship* § 356; Restatement (Second) of Agency § 219(1) (2010). Reasonable foreseeability is often one of several considerations courts use to determine whether an intentional tort was within the scope of employment. *See* Restatement (Second) of Agency §§ 228(1)(d), 229(2)(f) (2010); *see also State, Dep't of Admin. v. Schallock*, 941 P.2d 1275, 1282-84 (Ariz. 1997); *Sage Club v. Hunt*, 638 P.2d 161, 162-63 (Wyo. 1981). Conversely, NRS 41.745(1) does not contain an overarching "scope of employment" inquiry. Instead, NRS 41.745(1) promulgates three distinct circumstances in which an employer is liable for an employee's intentional tort: (1) the employee's act was not "a truly independent venture,"

(2) the employee acted "in the course of the very task assigned," or (3) the employee's act was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment." Therefore, Nevada will hold an employer vicariously liable for an employee's intentional tort—even though it was outside the scope of employment—if that intentional tort was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his or her employment." NRS 41.745(1)(c).

Second, other jurisdictions have concluded that sexual assault can be reasonably foreseeable, either as part of a vicarious liability inquiry or a direct negligence inquiry. For example, the Arizona Supreme Court concluded a jury might properly find it was reasonably foreseeable that one employee would rape another because the accused had a history of sexually harassing female coworkers. *Schallock*, 941 P.2d at 1282-83 ("One can hardly be surprised when sexual harassment that has occurred for years continues."). North Dakota's Supreme Court similarly concluded a jury could find it was reasonably foreseeable that a social worker would sexually abuse a minor in foster care because such abuse was not uncommon. *Nelson v. Gillette*, 571 N.W.2d 332, 341-42 (N.D. 1997). New Mexico's Court of Appeals concluded a jury might find a sexual assault was reasonably foreseeable in a negligence action simply because the employer knew the employee abused alcohol and became violent when drinking. *Pittard v. Four Seasons Motor Inn, Inc.*, 688 P.2d 333, 341 (N.M. Ct. App. 1984). Thus, sexual assault is not unforeseeable, per se, and Nevada is not alone in allowing juries to determine whether the facts and circumstances of a case show that an employee's tortious conduct was reasonably foreseeable. Considering the facts and circumstances here, a reasonable jury could conclude Gonzalez's act was reasonably foreseeable.

The district court erred in concluding it would be futile for Anderson to amend her complaint

[Headnotes 6, 7]

The district court denied as futile Anderson's motion for leave to amend her complaint because it believed Anderson's claims for negligent security, retention, and supervision could not succeed. We disagree. Although we generally review a district court's decision on a motion for leave to amend for abuse of discretion, *Whealon v. Sterling*, 121 Nev. 662, 665, 119 P.3d 1241, 1244 (2005), futility is a question of law reviewed de novo because it is essentially an NRCP 12(b)(5) inquiry, asking whether the plaintiff could plead facts that would entitle her to relief. *See Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008); *see also*

Sanford v. MemberWorks, Inc., 625 F.3d 550, 557 (9th Cir. 2010) ("Where, as here, the district court denies leave to amend on futility grounds, we will uphold such denial if it is clear, upon *de novo* review, that the complaint would not be saved by any amendment." (internal quotation marks omitted)).

[Headnote 8]

Because we hold that a reasonable jury could conclude Gonzalez's attack was foreseeable, Anderson's proposed amendments are not futile. Although unlawful conduct can interrupt and supersede the causation between a negligent act and injury, an unlawful act will not supersede causation if it was foreseeable. *Bower v. Harrah's Laughlin, Inc.*, 125 Nev. 470, 491-92, 215 P.3d 709, 724-25 (2009). Here, we have already concluded a reasonable jury could find that Gonzalez's act was reasonably foreseeable; therefore, amendment would not be futile.

Additionally, the district court erroneously relied on NRS 651.015 in concluding that Anderson's negligent security claim was futile. That statute, titled "Civil liability of innkeepers for death or injury of person on premises *caused by person who is not employee*," expressly applies only when the injury is caused by a "person who is not an employee under the control or supervision of the owner or keeper." NRS 651.015(1), (2) (emphasis added). Because Gonzalez was Mandalay's employee, the district court erred in relying on NRS 651.015 at all.

CONCLUSION

We conclude that NRS 41.745(1)(c) sets forth a factual inquiry, and a reasonable jury could find that Gonzalez's conduct was "reasonably foreseeable under the facts and circumstances of the case considering the nature and scope of his . . . employment." NRS 41.745(1)(c). Therefore, the district court erred in granting Mandalay's motion for summary judgment. The district court also erred in holding that it would be futile for Anderson to amend her complaint to include claims for negligent security, retention, and supervision because Gonzalez's criminal conduct may not have been a superseding cause, and NRS 651.015 does not apply here. Accordingly, we reverse the district court's order granting Mandalay's motion for summary judgment and denying Anderson's motion for leave to amend, and we remand this matter to the district court for further proceedings.

Hardesty, C.J., and Douglas, Cherry, Saitta, and Gibbons, JJ., concur.

KAZUO OKADA, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND WYNN RESORTS LIMITED, A NEVADA CORPORATION; ELAINE WYNN; AND STEPHEN WYNN, REAL PARTIES IN INTEREST.

No. 68310

October 15, 2015 359 P.3d 1106

Original petition for a writ of prohibition or mandamus challenging a district court order denying a motion for a protective order.

Resort corporation brought action against former member of its board of directors seeking declaration that it had complied with its articles of incorporation in deeming member an unsuitable person and forcing redemption of his stock shares. The district court denied member's motion for protective order, which challenged location and duration of his deposition. Member petitioned for writ of prohibition or mandamus. The supreme court, HARDESTY, C.J., held that: (1) it would exercise its discretion to consider petition, (2) the district court acted within its discretion in denying motion for protective order challenging location of deposition, and (3) the district court's rejection of member's three-day proposal for duration of deposition was not arbitrary or capricious.

Petition denied.

Holland & Hart, LLP, and *J. Stephen Peek, Bryce K. Kunimoto, Robert J. Cassity*, and *Brian G. Anderson*, Las Vegas; *BuckleySandler, LLP*, and *David S. Krakoff, Benjamin B. Klubes, Joseph J. Reilly*, and *Adam Miller*, Washington, D.C., for Petitioner.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, Las Vegas; *Wachtell, Lipton, Rosen & Katz* and *Paul K. Rowe* and *Bradley R. Wilson*, New York, New York; *Glaser Weil Fink Howard Avchen & Shapiro, LLC*, and *Robert L. Shapiro*, Los Angeles, California, for Real Party in Interest Wynn Resorts Limited.

Jolley Urga Woodbury & Little and *William R. Urga* and *David J. Malley*, Las Vegas; *Munger, Tolles & Olson, LLP*, and *Ronald L. Olson, Mark B. Helm, Jeffrey Y. Wu*, and *Soraya C. Kelly*, Los Angeles, California, for Real Party in Interest Elaine P. Wynn.

Campbell & Williams and *Donald J. Campbell* and *J. Colby Williams*, Las Vegas, for Real Party in Interest Stephen A. Wynn.

1. Mandamus.

   The supreme court would exercise its discretion to consider petition for writ of prohibition or mandamus of former member of resort corporation's board of directors, following denial of his motion for protective order, which challenged location and duration of his deposition, in corporation's action against member seeking declaration that it had complied with its articles of incorporation in deeming member an unsuitable person and forcing redemption of his stock shares; petition raised important issues of law that needed clarification, as member asked the supreme court to direct district court to resolve his motion based on correct legal standards, but the supreme court had not previously considered what standards were, and, while district court's decision was supported by the record, it should have made specific findings on the record when ruling on motion.

2. Mandamus.

   Under certain circumstances, a writ of mandamus may be issued to compel the district court to vacate or modify a discovery order.

3. Appeal and Error; Pretrial Procedure.

   Discovery matters are generally within the district court's sound discretion, and the supreme court will not disturb a district court's ruling regarding discovery unless the district court has clearly abused its discretion.

4. Mandamus.

   The supreme court generally will not exercise its discretion to review discovery orders through writ petitions, unless the challenged discovery order is one that is likely to cause irreparable harm, such as (1) a blanket discovery order, issued without regard to the relevance of the information sought; or (2) an order that requires disclosure of privileged information.

5. Mandamus.

   In certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by the supreme court's invocation of its original jurisdiction.

6. Pretrial Procedure.

   The district court acted within its discretion in denying motion for protective order filed by former member of resort corporation's board of directors, which challenged location of his deposition, in corporation's action against member seeking declaration that it had complied with its articles of incorporation in deeming member an unsuitable person and forcing redemption of his stock shares; the district court's comment that this probably was not circumstance in which it would order parties to go to different country was preceded by comment from corporation's attorney regarding cost, convenience, and efficiency of requiring translators, videographers, and parties' attorneys to travel to different country instead of requiring only member to travel to state, and court recognized potential for discovery disputes to arise based on behavior by member's attorneys in related litigation and logistical difficulties inherent in resolving them if parties and the district court were separated by 16-hour time difference. NRCP 26(c), 30(a)(1), (b)(1).

7. Pretrial Procedure.

   General rule, under which the deposition of a defendant takes place where the defendant resides or, in the case of a corporate defendant's representative, where the corporation has its principal place of business, does not apply when it is the plaintiff who is seeking to avoid being deposed in the forum where he or she has instituted the underlying action; the reason is that the plaintiff picked the forum and should not be heard to complain about the inconvenience of being deposed there. NRCP 26(c), 30(b)(6).

8. Pretrial Procedure.
   For purposes of the general rule, under which the deposition of a defendant takes place where the defendant resides or, in the case of a corporate defendant's representative, where the corporation has its principal place of business, a defendant who files a compulsory counterclaim is treated as a defendant, whereas a defendant who files a permissive counterclaim is treated as a plaintiff. NRCP 26(c), 30(b)(6).
9. Pretrial Procedure.
   Courts may consider the three factors of (1) cost, (2) convenience, and (3) litigation efficiency, or the five factors of (1) the location of counsel for the parties in the forum district, (2) the number of corporate representatives a party is seeking to depose, (3) the likelihood of significant discovery disputes arising, which would necessitate resolution by the forum court, (4) whether the persons sought to be deposed often engage in travel for business purposes, and (5) the equities with regard to the nature of the claim and the parties' relationship, in determining whether a protective order is warranted to change the location of a defendant's deposition; both the three-factor inquiry and the five-factor inquiry provide a nonexhaustive list of factors to be considered. NRCP 30(a)(1), (b)(1).
10. Pretrial Procedure.
    District courts have wide discretion in resolving disputes relating to the location of a deposition.
11. Pretrial Procedure.
    The district court's rejection of three-day proposal set forth by former member of resort corporation's board of directors for duration of his deposition was not arbitrary or capricious exercise of its discretion, in corporation's action against member seeking declaration that it had complied with its articles of incorporation in deeming member an unsuitable person and forcing redemption of his stock shares; the district court expressly stated that member could move to have deposition shortened if it became apparent that questions were becoming duplicative or unduly burdensome, member did not suggest that corporation had already had opportunity to obtain information it was seeking from another source, parties did not dispute that amount of controversy was substantial and that issues at stake were important, and factors justified from deviating from presumptive one-day time frame, such as member needing an interpreter and that he would be questioned about numerous or lengthy documents. NRCP 26(b)(2), 30(d)(1).

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, C.J.:

This writ petition arises from litigation between plaintiff Wynn Resorts and a former member of its board of directors, defendant Kazuo Okada. Wynn Resorts noticed Okada's deposition for ten

[1]The Honorable James E. Wilson, Jr., District Judge in the First Judicial District Court, and The Honorable Steve L. Dobrescu, District Judge in the Seventh Judicial District Court, were designated by the Governor to sit in place of The Honorable Ron Parraguirre, Justice, and The Honorable Kristina Pickering, Justice, who voluntarily recused themselves from participation in the decision of this matter. Nev. Const. art. 6, § 4(2).

days in Las Vegas even though Okada resides in Hong Kong and owns businesses in Tokyo, Japan. Okada filed a motion for a protective order, requesting that his deposition be taken in Tokyo or, alternatively, Hong Kong, and that it be shortened to three days. The district court denied his motion, and Okada filed this writ petition, contending that the district court ignored a common-law presumption that his deposition should take place where he resides and that the district court ignored NRCP 30(d)(1)'s presumption that depositions should be limited to one day.

While we elect to entertain this writ petition because it presents important issues of law that need clarification, we nevertheless deny Okada's request for writ relief. As for the deposition's location, we agree with the district court's rejection of Okada's argument regarding the common-law presumption and conclude that the district court was within its discretion in determining that Okada failed to demonstrate good cause for having his deposition moved to a location other than Las Vegas. As for the deposition's duration, we conclude that the district court properly exercised its discretion in departing from NRCP 30(d)(1)'s presumptive one-day time frame and adopting Wynn Resorts' ten-day proposal.

FACTS

Kazuo Okada is a Japanese citizen who lives in Hong Kong and is a former member of Wynn Resorts' board of directors. Okada is also the president, secretary, and treasurer of Aruze USA, a financial holding company with its principal place of business in Tokyo. Aruze, which is a wholly owned subsidiary of Universal Entertainment Corporation, a Japanese corporation, owns 20 percent of Wynn Resorts' stock.

In 2010, Wynn Resorts began an investigation to determine whether Okada was engaged in business dealings in the Philippines that might render him an "Unsuitable Person" to be on Wynn Resorts' board of directors, which, if demonstrated, would jeopardize Wynn Resorts' entitlement to certain gaming licenses. Contemporaneous with Wynn Resorts' investigation, Okada filed suit against Wynn Resorts in Nevada state court in which he sought an order compelling Wynn Resorts to produce certain corporate documents. As part of that lawsuit, which the parties refer to as the "Books and Records" case, and which was randomly assigned to the same district court judge presiding over the underlying matter, Okada traveled to Las Vegas to be deposed. By all accounts, Okada's deposition in the Books and Records case was fraught with difficulties, based in large part on the need to translate each deposition question into Japanese and each of Okada's answers into English, the presence of a second translator to verify the accuracy of the first translator's translation, and what Wynn Resorts characterizes as "obstructionist behavior" on the part of Okada's attorneys.

It is unclear how or if the Books and Records litigation was resolved, but by 2012, the investigation into Okada's business dealings had led Wynn Resorts' board of directors to conclude that Okada was indeed an "Unsuitable Person." According to Wynn Resorts' interpretation of its articles of incorporation, this status authorized Wynn Resorts to redeem the stock shares that Okada (through Aruze and Universal) owns. Consequently, Wynn Resorts' board voted to redeem all of Okada's stock and issued him a promissory note with a value of just under $2 billion.

When Okada refused Wynn Resorts' tender, Wynn Resorts instituted the underlying action against Okada, Aruze, and Universal in which Wynn Resorts asked for, among other things, a declaration that it had complied with its articles of incorporation in deeming Okada an "Unsuitable Person" and in forcing the redemption of his Wynn Resorts stock shares. Aruze and Universal filed counterclaims seeking, among other things, the opposite declaratory relief. Aruze also asserted claims against individual members of Wynn Resorts' board of directors, including real parties in interest Stephen Wynn and Elaine Wynn, who, in turn, asserted counterclaims against Aruze.

As part of the discovery process, Wynn Resorts filed a notice of deposition of Okada, which scheduled Okada's deposition in Las Vegas over the course of ten days. Okada moved for a protective order, challenging both the location and duration of the deposition. He asserted that as a defendant, his deposition should presumptively be conducted where he resides (Hong Kong) or at his codefendant companies' places of business (Tokyo) and that the deposition should not exceed three days.

At a hearing on Okada's motion, Okada attempted to convince the district court that federal courts apply a "presumption" in favor of holding a defendant's deposition where the defendant resides or, in the case of a corporate representative being deposed, where the corporation has its principal place of business. In response, the district court expressed doubt, stating, "Where do you get that? Where do you get this presumption? Because it's not how it is in Nevada State Court." Later on, the district court indicated that it "might order [the parties] to go to Tokyo under certain circumstances, but this probably isn't one of them."

As for the duration of the deposition, Okada argued that a ten-day deposition was excessive, pointing out that NRCP 30(d)(1) presumptively limits a deposition "to 1 day of 7 hours." Okada conceded that in light of the case's factual complexities, and given the need for translators, a one-day deposition would not allow sufficient time. Consequently, Okada offered to stipulate to a three-day deposition, evidently based on the premise that the case's complexities would

justify an additional day and that the need for translators would justify another additional day. In response, the district court judge observed, the "[o]ne day rule hasn't applied in my court since it passed. I've suspended it in every case." The district court then proceeded to discuss with the parties whether Okada's three-day proposal was feasible in light of the problems in the previous deposition in the Books and Records case. Finding that three days would be insufficient, the district court indicated that the ten-day deposition in Las Vegas should proceed as scheduled but that Okada could seek to shorten it if he believed that Wynn Resorts was prolonging the deposition simply to harass him. The district court also indicated that one of the ten days should be allocated to Elaine Wynn so that she could depose Okada with respect to her claims.

The district court entered a written order denying Okada's motion, and Okada filed this petition for a writ of prohibition or mandamus, asking that this court direct the district court to "resolve [his] Motion based on the correct legal standards." This court stayed Okada's deposition pending our resolution of his petition.[2]

DISCUSSION

[Headnotes 1-5]

Under certain circumstances, "a writ of mandamus may be issued to compel the district court to vacate or modify a discovery order."[3] *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 678 (2011). Generally, "[d]iscovery matters are within the district court's sound discretion, and we will not disturb a district court's ruling regarding discovery unless the court has clearly abused its discretion." *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012); *see Hyde & Drath v. Baker*, 24 F.3d 1162, 1166 (9th Cir. 1994) ("A district court has wide discretion to establish the time and place of depositions."). "[W]e generally will not exercise our discretion to review discovery orders through [writ petitions], unless the challenged discovery order is one that is likely to cause irreparable harm, such as [(1)] a blanket discovery order, issued without regard to the relevance of the information sought, or [(2)] an order that requires disclosure of privileged information." *Club Vista*, 128 Nev. at

---

[2]Following oral argument in this matter, this court entered an order denying Okada's writ petition, lifting the stay, and indicating that this opinion would follow.

[3]Although "a writ of prohibition is a more appropriate remedy for the prevention of improper discovery," *Valley Health*, 127 Nev. at 171 n.5, 252 P.3d at 678 n.5, Okada is not seeking to prevent improper discovery but only to restrict the location and duration of that discovery.

228, 276 P.3d at 249. "Nevertheless, in certain cases, consideration of a writ petition raising a discovery issue may be appropriate if an important issue of law needs clarification and public policy is served by this court's invocation of its original jurisdiction." *Las Vegas Sands Corp. v. Eighth Judicial Dist. Court*, 130 Nev. 578, 581, 331 P.3d 876, 878-79 (2014) (internal quotation omitted).

Here, although the challenged order does not fall within either of this court's two presumptive categories for considering a discovery-related writ petition, we exercise our discretion to consider Okada's petition because it raises important issues of law that need clarification. *Id.* Namely, although Okada asks this court to direct the district court to resolve his motion for a protective order "based on the correct legal standards," this court has not previously considered what those standards are. Additionally, while the district court's ultimate decision in this matter is supported by the record as explained herein, we note that district courts should make specific findings on the record when ruling on motions implicating the issues addressed in this opinion. *See Lioce v. Cohen*, 124 Nev. 1, 19-20, 174 P.3d 970, 982 (2008) (recognizing that specific findings promote meaningful review of a lower court's discretionary ruling). Accordingly, this opinion sets forth basic frameworks for district courts to use in addressing issues regarding the location and duration of depositions of parties.[4]

Deposition location

[Headnote 6]

NRCP 30 governs generally the taking of depositions, but the rule does not set forth any restrictions as to where the deposition must take place. *See* NRCP 30(a)(1) ("A party may take the testimony of any person, including a party, by deposition upon oral examination . . . ."); NRCP 30(b)(1) ("The notice shall state the time and place for taking the deposition and the name and address of each person to be examined . . . ."). Although the absence of any location-based restrictions suggests that "the examining party may set the place for the deposition of another party wherever he or she wishes," 8A Charles Alan Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2112 (3d ed. 2010), the examining party's wishes are "subject to the power of the court to grant a protective order." *Id.* Protective orders, in turn, are governed by NRCP 26(c)(2), which permits a district court, "for good cause shown," to "protect a party . . . from annoyance, embarrassment, oppression, or undue burden or expense" by ordering that a deposi-

[4]Because Okada is a party, we do not address the application of NRCP 30 to a nonparty.

tion "may be had only on specified terms and conditions, including a designation of the time or place."

[Headnotes 7, 8]

Thus, NRCP 26(c)'s language indicates that the deponent must show "good cause" for not being required to travel to the deposition location. *Cf. Cadent Ltd. v. 3M Unitek Corp.*, 232 F.R.D. 625, 629 (C.D. Cal. 2005) (recognizing that FRCP 26(c), which is the analog to NRCP 26(c), requires the party seeking the protective order to establish "good cause"). Nonetheless, courts have recognized that a "general rule" has evolved, independent of Rule 26(c), under which the deposition of a defendant takes place where the defendant resides or, in the case of a corporate defendant's Rule 30(b)(6) representative, where the corporation has its principal place of business.[5] *See New Medium Techs. LLC v. Barco N.V.*, 242 F.R.D. 460, 466 (N.D. Ill. 2007) (summarizing cases and recognizing this general rule).

Based on this general rule, Okada contends that a "presumption" exists in favor of holding a defendant's deposition where he resides or where the corporation has its principal place of business and that it is the plaintiff's burden to demonstrate why the deposition should be held elsewhere. *See Culver v. Wilson*, No. 3:14-CV-660-CRS-CHL, 2015 WL 1737779, at *3 (W.D. Ky. April 16, 2015) (observing that the "general rule[ ] create[s] a presumption that there is good cause [under Rule 26(c)] for a protective order when a deposition is noticed for a location other than the defendant's place of

[5]Courts describe this general rule as having evolved from the principle that, "in the absence of special circumstances, a party seeking discovery must go where the desired witnesses are normally located." *Farquhar v. Shelden*, 116 F.R.D. 70, 72 (E.D. Mich. 1987) (citing *Salter v. Upjohn Co.*, 593 F.2d 649, 671 (5th Cir. 1979)). Notably, this general rule does not apply when it is the plaintiff who is seeking to avoid being deposed in the forum where he or she has instituted the underlying action, the reason being that the plaintiff picked the forum and should not be heard to complain about the inconvenience of being deposed there. *See, e.g.*, *O'Sullivan v. Rivera*, 229 F.R.D. 187, 189 (D. N.M. 2004); *Farquhar*, 116 F.R.D. at 72; *Petersen v. Petersen*, No. 14-1516, 2014 WL 6774293, at *1 (E.D. La. Dec. 2, 2014).

In this respect, we note that a defendant who files a compulsory counterclaim is treated as a defendant, whereas a defendant who files a permissive counterclaim is treated as a plaintiff. *See, e.g.*, *Wis. Real Estate Inv. Tr. v. Weinstein*, 530 F. Supp. 1249, 1253 (E.D. Wis. 1982); *Zuckert v. Berkliff Corp.*, 96 F.R.D. 161, 162 (N.D. Ill. 1982); *Pinkham v. Paul*, 91 F.R.D. 613, 615 (D. Me. 1981). Here, although Okada did not assert any counterclaims against Wynn Resorts, Aruze and Universal did. But Wynn Resorts only noticed Okada's deposition personally, not in his capacity as Aruze's or Universal's NRCP 30(b)(6) representative. As a result, we need not consider whether Okada must testify in Clark County because of the counterclaims asserted by Aruze or Universal.

residence" (internal quotation omitted)); *see also In re Outsidewall Tire Litig.*, 267 F.R.D. 466, 471-73 (E.D. Va. 2010) (recognizing the existence of a presumption); *Six W. Retail Acquisition, Inc. v. Sony Theatre Mgmt. Corp.*, 203 F.R.D. 98, 107 (S.D.N.Y. 2001) (same). We agree with the district court's rejection of Okada's presumption argument, as it runs counter to the language in NRCP 26(c), which requires the person seeking a protective order from the district court to establish "good cause" for obtaining that protection. Thus, the district court in this case properly declined to place an affirmative burden on Wynn Resorts to justify why Okada's deposition should be taken in Las Vegas.

[Headnote 9]

This is not to say, however, that we disavow the general rule altogether, as the defendant's residence or corporation's principal place of business factors into several of the considerations that district courts should evaluate when addressing a defendant's motion for a protective order regarding the location of a deposition. *See* 7 James Wm. Moore et al., *Moore's Federal Practice* § 30.20(1)(b)(ii) (3d ed. 2015) (recognizing that the "presumptions as to where the deposition should take place are merely decisional rules that facilitate the determination when other relevant factors do not favor one side over the other"). In this respect, we endorse the approach taken by courts that consider the three factors of "cost, convenience and litigation efficiency" in determining whether a protective order is warranted to change the location of a defendant's deposition. *See, e.g.*, *Buzzeo v. Bd. of Educ., Hempstead*, 178 F.R.D. 390, 393 (E.D.N.Y. 1998) ("[T]he general 'good cause' standard of Rule 26(c) of the Federal Rules of Civil Procedure—as shown through an analysis of cost, convenience and litigation efficiency—is the appropriate standard under which to evaluate the motion [for a protective order]."); *Mill-Run Tours, Inc. v. Khashoggi*, 124 F.R.D. 547, 550-51 (S.D.N.Y. 1989) (considering these three factors in ruling on a motion for a protective order); *Harrier Techs., Inc. v. CPA Glob. Ltd.*, No. 3:12CV167 (WWE), 2014 WL 4537458, at *3 (D. Conn. Sept. 11, 2014) (same); *Scooter Store, Inc. v. Spinlife.com, LLC*, No. 2:10-CV-18, 2011 WL 2118765, at *2-4 (S.D. Ohio May 25, 2011) (same).

[Headnote 10]

Similarly, we endorse the approach taken by courts that consider the following five factors:

> (1) the location of counsel for the parties in the forum district; (2) the number of corporate representatives a party is seeking to depose; (3) the likelihood of significant discovery disputes

> arising, which would necessitate resolution by the forum court; (4) whether the persons sought to be deposed often engage in travel for business purposes; and (5) the equities with regard to the nature of the claim and the parties' relationship.

7 Moore, *supra*, § 30.20(1)(b)(ii) (setting forth factors and compiling cases that have applied those factors). While we note that the five-factor inquiry appears better suited to analyzing an NRCP 30(b)(6) deposition than that of an individual defendant, we emphasize that both the three-factor inquiry and the five-factor inquiry provide a nonexhaustive list of factors that are to be considered regarding the location of a defendant's deposition, and that district courts have wide discretion in resolving disputes relating to the location of a deposition.[6] *See Club Vista*, 128 Nev. at 228, 276 P.3d at 249 ("Discovery matters are within the district court's sound discretion . . . ."); *see also Hyde & Drath*, 24 F.3d at 1166 ("A district court has wide discretion to establish the time and place of depositions."). These factors take into consideration the defendant's residence or principal place of business, but they also provide a broader scope of analysis than a general rule favoring deposing the defendant where he or she resides. Additionally, as opposed to a general rule that puts the burden on the party seeking discovery, these factors are more in line with NRCP 30(a), which does not express a preference for the location of a deposition, and NRCP 26(c), which permits a court to enter a protective order designating the time and place of a deposition when the party whose deposition has been noticed shows good cause for the court to do so.

In this case, the record demonstrates that these factors influenced the district court's decision-making process. For instance, the district court's comment that it "might order [the parties] to go to Tokyo under certain circumstances, but this probably isn't one of them," was preceded by a comment from Wynn Resorts' attorney regarding the cost, convenience, and efficiency of requiring translators, videographers, and both parties' Las Vegas-based attorneys to travel to Tokyo instead of requiring only Okada to travel to Las Vegas. Similarly, the district court recognized the potential for discovery disputes to arise based upon the "obstructionist behavior" by Okada's attorneys in his Books and Records deposition and the logistical difficulties inherent in resolving those disputes if the parties and the district court were separated by a 16-hour time difference.

---

[6]For instance, although it was not raised as an issue in this case, some courts have resolved such disputes by requiring the nontraveling party to pay the expenses of the traveling party. *See New Medium*, 242 F.R.D. at 468-69; 8A Wright & Miller, *supra*, § 2112 (noting that this may be an effective means of resolving such disputes).

Moreover, the district court pointed out that the equities favored Wynn Resorts, as Okada was capable of traveling to Las Vegas for his Books and Records deposition when he was seeking affirmative relief from a Nevada court, and no evidence clearly demonstrated that he would be prejudiced by having to do so again.

Thus, although the district court did not make specific findings in its order, the record demonstrates that the relevant factors were implicated in the district court's determination that Okada did not establish good cause to justify his deposition being held somewhere other than Las Vegas. We therefore perceive no abuse of discretion in the district court's decision to deny Okada's motion for a protective order, and we deny Okada's request for writ relief with respect to the location of his deposition.

Deposition duration

[Headnote 11]

NRCP 30(d)(1) provides that "[u]nless otherwise stipulated or ordered by the court, a deposition is limited to 1 day of 7 hours." The rule also provides that "[t]he court or discovery commissioner must allow additional time consistent with Rule 26(b)(2) if needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impedes or delays the examination." NRCP 26(b)(2), in turn, sets forth three general considerations that district courts should take into account in determining whether the length of a deposition should exceed NRCP 30(d)(1)'s presumptive one-day time frame: (1) whether the discovery being "sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive"; (2) whether the party seeking the discovery has already had an "ample opportunity . . . to obtain the information sought"; and (3) whether the discovery being sought "is unduly burdensome or expensive, taking into account the needs of the case, the amount in controversy, limitations on the parties' resources, and the importance of the issues at stake in the litigation."

In his writ petition, Okada points to the district court judge's comment that the "[o]ne day rule hasn't applied in my court since it passed" and contends that the district court necessarily abused its discretion in permitting Wynn Resorts to take his deposition over the course of ten days. But because Okada acknowledges that more than one day will be "needed to fairly examine [him]," NRCP 30(d)(1), the district court's comment regarding NRCP 30(d)(1)'s presumptive one-day time frame has no bearing on whether the district court arbitrarily or capriciously exercised its discretion in denying Okada's motion for a protective order.[7] Moreover, the district

[7]To be clear, however, the one-day rule does apply to all courts. Whether a court finds a basis to deviate from the rule is the issue.

court expressly stated that Okada could move to have the deposition shortened if it became apparent that the deposition questions were becoming duplicative or unduly burdensome, and Okada does not suggest that Wynn Resorts has already had an opportunity to obtain the information it is seeking from another source. Nor do the parties dispute that the amount in controversy is substantial and that the issues at stake are important. Thus, the district court's decision to permit a ten-day deposition, contingent on Okada being permitted to move to shorten it, aligns with the relevant general considerations under NRCP 26(b)(2).

In addition to NRCP 26(b)(2)'s general considerations, we note that the district court's decision is supported by other specific factors that justify deviating from NRCP 30(d)(1)'s presumptive one-day time frame, namely: (1) "the witness needs an interpreter," (2) "the examination will cover events occurring over a long period of time," (3) "the witness will be questioned about numerous or lengthy documents," and (4) "the need for each party [in a multiparty case] to examine the witness." 8A Wright & Miller, *supra*, § 2104.1 (quoting FRCP 30(d) advisory committee's note (2000)). Even Okada acknowledges that these factors would have justified a three-day deposition, and given the district court's familiarity with the parties, not only in this case but in the Books and Records case, we are unable to conclude that the district court arbitrarily or capriciously exercised its discretion in rejecting Okada's three-day proposal and deciding that his deposition could last ten days. We therefore deny Okada's request for writ relief with respect to the duration of his deposition.

Douglas, Cherry, Saitta, and Gibbons, JJ., and Wilson, D.J., and Dobrescu, D.J., concur.

EUREKA COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; KENNETH F. BENSON, INDIVIDUALLY; DIAMOND CATTLE COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, A NEVADA REGISTERED FOREIGN LIMITED PARTNERSHIP, APPELLANTS, *v.* THE STATE OF NEVADA STATE ENGINEER; THE STATE OF NEVADA DIVISION OF WATER RESOURCES; AND KOBEH VALLEY RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 61324

MICHEL AND MARGARET ANN ETCHEVERRY FAMILY, LP, A NEVADA REGISTERED FOREIGN LIMITED PARTNERSHIP; DIAMOND CATTLE COMPANY, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND KENNETH F. BENSON, AN INDIVIDUAL, APPELLANTS, *v.* STATE ENGINEER OF NEVADA, OFFICE OF THE STATE ENGINEER, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES; AND KOBEH VALLEY RANCH, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 63258

October 29, 2015 359 P.3d 1114

Consolidated appeals challenging district court orders denying judicial review of the State Water Engineer's decisions affecting water rights. Seventh Judicial District Court, Eureka County; Dan L. Papez, Judge.

Existing senior water rights holders petitioned for judicial review of State Engineer's grant of mine operator's applications for water use permits. The district court denied the petition. Water rights holders appealed. The supreme court, PICKERING, J., held that State Engineer's decision to approve the applications and issue the permits was not supported by sufficient evidence that successful mitigation efforts could be undertaken so as to dispel the threat to the existing rights holders.

Reversed and remanded.

Allison, MacKenzie, Ltd., and *Karen A. Peterson, Jennifer Mahe*, and *Dawn Ellerbrock*, Carson City; *Theodore Beutel*, District Attorney, Eureka County, for Appellant Eureka County.

Schroeder Law Offices, P.C., and *Laura A. Schroeder* and *Therese A. Ure*, Reno, for Appellants Kenneth F. Benson; Diamond Cattle Company, LLC; and Michel and Margaret Ann Etcheverry Family, LP.

Adam Paul Laxalt, Attorney General, and *Micheline N. Fairbank*, Senior Deputy Attorney General, Carson City, for Respondents the State of Nevada Division of Water Resources and the State Engineer.

Parsons Behle & Latimer and *Ross E. de Lipkau* and *John R. Zimmerman*, Reno; *Parsons Behle & Latimer* and *Francis M. Wikstrom*, Salt Lake City, Utah, for Respondent Kobeh Valley Ranch, LLC.

Dyer, Lawrence, Flaherty, Donaldson & Prunty and *Francis C. Flaherty*, Carson City, for Amicus Curiae NV Energy, Inc.

Lewis Roca Rothgerber, LLP, and *Daniel F. Polsenberg*, Las Vegas; *Taggart & Taggart, Ltd.*, and *Paul G. Taggart*, Carson City; *Gregory J. Walch* and *Dana R. Walsh*, Las Vegas, for Amici Curiae Municipal Water Purveyors.

1. WATER LAW.

   Even assuming that under statute governing approval or rejection of water permit applications, State Engineer had authority to grant an application that conflicted with existing rights, based upon a determination that the applicant would be able to mitigate any adverse impacts to existing rights, State Engineer's decision to approve the applications and issue the permits was not supported by sufficient evidence that successful mitigation efforts could be undertaken so as to dispel the threat to the existing rights holders, where, contrary to State Engineer's assertions, applicant's pumping for its molybdenum mine would not merely impact existing water rights, it would cause the complete depletion of the source of existing water rights, and evidence of what proposed mitigation would entail was lacking. NRS 533.370(2).

2. CONSTITUTIONAL LAW; WATER LAW.

   Under Due Process Clause, those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which State Engineer's decision may be based; this necessarily means that the opportunity to challenge the evidence must be given before the State Engineer grants proposed use or change applications. U.S. CONST. amend. 14; NRS 533.365(5).

Before the Court EN BANC.

OPINION[1]

By the Court, PICKERING, J.:

These consolidated appeals challenge the district court's orders denying judicial review of the State Water Engineer's decisions

[1]We originally reversed and remanded in an unpublished order. Appellants and other interested persons not party to these appeals moved to publish the

affecting water rights. Under NRS 533.370(2), the State Engineer "shall reject" an application for a proposed use of water or change of existing water rights where that "proposed use or change conflicts with existing rights." The parties ask this court to determine whether this section allows for the State Engineer to take into account the applicant's ability to mitigate the drying up of existing rights holders' water sources when determining if a proposed use or change will conflict with existing rights. However, even assuming that under NRS 533.370(2) the State Engineer has authority to grant an application that conflicts with existing rights based upon a determination that the applicant will be able to mitigate, the State Engineer's decision to approve the applications and issue the permits at issue here is not supported by sufficient evidence that successful mitigation efforts may be undertaken so as to dispel the threat to the existing rights holders. We thus reverse the district court's decision denying judicial review of the State Engineer's decisions and remand.

I.

[Headnote 1]

At the heart of this appeal is the Mount Hope Mine, a large proposed molybdenum mine that General Moly, Inc. seeks to establish in Eureka County. The mine's contemplated life is 44 years, and will require an estimated total of 11,300 acre feet of water per year (afa). To provide the water for the mine, General Moly seeks to pump groundwater by well from the Kobeh Valley and Diamond Valley groundwater basins, basins that already source many existing water rights, which will cause a drawdown of the water table throughout the two valleys. According to a water resources monitoring plan created by Eureka Moly, LLC, a subsidiary of General Moly, the vast majority of this water for the Mount Hope Mine "will be consumptively used in processing activities of the [mining] Project (*i.e.*[,] no water will be returned to the aquifer)."

General Moly created respondent Kobeh Valley Ranch, LLC (KVR) to hold and control the water rights for the project. Water rights already appropriated by a predecessor entity associated with the mining project were transferred to KVR, as were existing applications to appropriate water that the predecessor had filed in 2005. Between 2006 and 2010, KVR also filed numerous applications to change the point of diversion, the place of use, and the manner of use of other of its existing water rights. Appellant Eureka County protested KVR's applications on numerous grounds, including that KVR's groundwater appropriations would conflict with existing

---

order as an opinion. We grant the motions and publish this opinion in place of our earlier order. *See* NRAP 36(f).

rights under NRS 533.370(2). A number of holders of senior water rights sourced in Kobeh Valley and Diamond Valley also protested on those, and other, grounds. The State Engineer originally held a hearing on the applications, then pending, in 2008, after which he approved some of KVR's applications over these objections, but upon review the district court vacated the ruling and remanded the matter back to the State Engineer for a new hearing.

The State Engineer held another hearing in 2010, in which he accepted the evidence presented at the first hearing and allowed additional evidence to be presented regarding specific water usage at the proposed mining project. The State Engineer ultimately granted all of KVR's applications in his Ruling Number 6127.

Pertinent to this appeal, the State Engineer recognized that certain springs located on the Kobeh Valley floor that are in hydrologic connection with the underlying water table and that source existing, senior water rights would be "impacted" by KVR's pumping. However, the State Engineer found that KVR could fully mitigate any impact, and to that end required KVR to prepare, with the assistance of Eureka County, a monitoring, management, and mitigation plan (3M Plan) for approval by the State Engineer before KVR diverted any water. The State Engineer then issued KVR the various use and change permits requested.

Eureka County, as well as appellants Kenneth F. Benson, Diamond Cattle Company, LLC, and Michel and Margaret Ann Etcheverry Family, LP (collectively referred to as Benson-Etcheverry), all of whom hold existing, senior rights in the valleys, petitioned the district court for judicial review of Ruling 6127. The district court denied the petition, finding that substantial evidence supported the State Engineer's decision that KVR would be able to mitigate any adverse impacts to existing water rights. The district court further held that NRS 533.370(2) "does not prevent the State Engineer from granting applications that may impact existing rights if the existing right can be protected through mitigation, thus avoiding a conflict with existing rights."

While Ruling 6127 was before the district court, KVR developed a 3M Plan in coordination with Eureka County. Though the State Engineer approved the 3M Plan, he retained ultimate authority over it, stating that the 3M Plan was approved with the "understanding that components of the Plan are subject to modification based on need, prior monitoring results, or changes in the approved water rights." Benson-Etcheverry petitioned the district court for judicial review of this decision, but the district court denied that petition as well.

Eureka County and Benson-Etcheverry appeal the district court's order denying judicial review of Ruling 6127. Benson-Etcheverry

also appeal the district court's subsequent order denying judicial review of the State Engineer's approval of the 3M Plan.

II.

A.

The State Engineer, who is charged with administering water rights in this state, *Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1061, 944 P.2d 835, 843 (1997), is required to approve applications to appropriate new water rights or to change the place, manner, or use of existing water rights if the applicant meets certain statutory requirements. NRS 533.370(1). However:

> Except as otherwise provided in subsection 10 [which excepts applications for environmental or temporary permits], where there is no unappropriated water in the proposed source of supply, *or where its proposed use or change conflicts with existing rights* or with protectable interests in existing domestic wells as set forth in NRS 533.024, or threatens to prove detrimental to the public interest, the State Engineer *shall reject the application and refuse to issue the requested permit*.

NRS 533.370(2) (emphases added).

The State Engineer and KVR submit that the State Engineer may conditionally grant proposed use or change applications on the basis of future successful mitigation, thereby ensuring that the new or changed appropriation does not conflict with existing rights, in accordance with NRS 533.370(2). This court has never addressed whether the statute may be read in this manner, and we need not do so at this time. Even assuming that the State Engineer may grant a proposed use or change application on the basis of the appropriator's ability to successfully mitigate and bring the existing water rights back to their full beneficial use, substantial evidence does not support the State Engineer's decision that this is the case here. *Town of Eureka v. Office of State Eng'r of State of Nev., Div. of Water Res.*, 108 Nev. 163, 165, 826 P.2d 948, 949 (1992) ("With questions of fact, the reviewing court must limit itself to a determination of whether substantial evidence in the record supports the State Engineer's decision.").

B.

The State Engineer in his Ruling 6127 recognized that there would be "extensive" drawdown of the water table in Kobeh Valley near KVR's main well field area due to KVR's groundwater pumping, which could "impact" existing "rights on springs and streams in hydrologic connection with the water table . . . includ[ing] valley floor springs." He also recognized that:

> Water rights that could potentially be impacted are those rights on the valley floor where there is predicted drawdown of the water table due to mine pumping. The Applicant recognizes that certain water rights on springs in Kobeh Valley are likely to be impacted by the proposed pumping. These springs produce less than one gallon per minute and provide water for livestock purposes.

(footnotes omitted).[2] But the evidence to which the State Engineer cited demonstrates that more than just an "impact" to these low-flow springs would occur. For instance, the State Engineer cited to KVR's hydrogeology expert Terry Katzer's testimony at the 2010 hearing that KVR's pumping would dry up certain springs and stock watering wells:

> Q: Okay. Will the pumping over time cause impacts to springs in direct stock watering wells in the floor of Kobeh Valley?
>
> A: I believe it will. And I can't name the springs because I am not that familiar with them. Mud Springs, for instance, I know where that is. I've been there. It will probably dry that up with time. And other springs that are in close proximity to the well field.
>
> Q: Stock watering wells?
>
> A: Stock watering wells, yes, probably.

Flow modeling reports by KVR's hydrogeology and groundwater modeling expert, Dwight Smith, to which the State Engineer also cited, confirmed this assessment:

> Springs located in lower altitudes in the Roberts Mountains . . . are more likely to be impacted due to closer proximity to the KVCWF[Kobeh Valley Central Well Field], resulting in larger predicted drawdown at these locations. Discharge at Mud Spring (Site 721) and Lone Mountain Spring (Site 742), located near the southeast edge of the KVCWF near proposed well 226, are predicted to be impacted and will likely cease to flow based on predicted drawdowns of 40 to 50 feet. Both of these springs discharge less than approximately one gallon per minute.

Smith also testified that Mud Springs and another spring called Lone Mountain Springs would cease to flow fairly soon after KVR begins pumping.

---

[2]Eureka County challenges the "less than a gallon per minute" finding, but KVR's 2010 flow modeling report indicates that these springs produced less than a gallon per minute. And, while the inventory KVR prepared in 2011 shows an estimated less than five gallon flow for Mud Spring, this is not inconsistent with a less than one gallon flow finding.

The federal Bureau of Land Management (BLM) claims unadjudicated reserved rights sourced from Lone Mountain Springs. And respondent Etcheverry Family, LP, holds permitted existing rights in Mud Springs, rights consisting of 10.86 afa to use for stock watering purposes.

Therefore, contrary to the State Engineer's, KVR's, and amici's assertions, KVR's pumping would not merely impact existing water rights; the very evidence upon which the State Engineer relied demonstrates that KVR's appropriation would cause the complete depletion of the source of existing water rights. The Legislature did not define exactly what it meant by the phrase "conflicts with" as used in NRS 533.370(2), but if an appropriation that would completely deplete the source of existing water rights does not "conflict with" those existing rights, then it is unclear what appropriation ever could. Furthermore, dictionary definitions from around the time a statute is enacted can aid this court in deciphering that statute's meaning, *Douglas v. State*, 130 Nev. 285, 287, 327 P.3d 492, 494 (2014), and contemporaneous reference material with the Legislature's adoption of the "conflicts with" aspect of NRS 533.370(2), defines "conflict," in verb form, as "[t]o be in opposition; be contrary or at variance." *See* 2 *The Century Dictionary and Cyclopedia, with a New Atlas of the World*, at 1186 (rev. enl. ed. 1911); 1913 Nev. Stat., ch. 140, § 63. To the extent that KVR's proposed appropriations would deplete the water available to satisfy existing rights at issue, they are undeniably "in opposition" thereto, and thus "conflict with" the existing rights under NRS 533.370(2).[3]

C.

Considered separate and apart from any potential mitigation techniques, the appropriations in question are in conflict with existing water rights in the valleys. But the State Engineer found KVR could implement mitigation techniques that would ameliorate the depletion of Mud Springs: "The State Engineer finds that this flow loss can be adequately and fully mitigated by the Applicant should predicted impacts occur." Furthermore, because "the only way to fully ensure that existing water rights are protected is by closely monitoring hydrologic conditions while groundwater pumping occurs," the State Engineer found that "a monitoring, management and mitigation plan prepared with input from Eureka County must be

[3]The State Engineer's ruling states that though the BLM originally protested KVR's appropriations, it withdrew its protests "after reaching a stipulation on monitoring, management and mitigation" with KVR. It seems the State Engineer assumed this was sufficient to dispense with the conflict under NRS 533.370(2), but this is a less than clear conclusion. In any event, Etcheverry Family, LP, has not withdrawn its protest of KVR's applications.

approved by the State Engineer prior to pumping groundwater for the project." The State Engineer thus concluded that: "Based upon substantial evidence and testimony, and the monitoring, management and mitigation plan requirement, the State Engineer concludes that the approval of the applications will not conflict with existing water rights . . . ."

Nowhere in the ruling, however, does the State Engineer articulate what mitigation will encompass, even in the most general sense. And evidence of what that mitigation would entail and whether it would indeed fully restore the senior water rights at issue is lacking: there was no mitigation plan in the record before the district court or in existence when KVR's applications were granted. Indeed, KVR's representative Patrick Rogers acknowledged that he didn't "know what we [General Moly] would propose in a mitigation plan. A mitigation plan hasn't been developed yet. It would be speculative to say what we would or would not propose."

The State Engineer and KVR point to KVR's experts' testimony as evidence that mitigation could occur and would be successful. But Katzer, an hydrology expert, testified only that there were "a variety of [mitigation] techniques. You could increase the well if it's being fed by a well or you could run a pipeline to it from part of the distribution system." KVR's other expert, Smith, similarly testified that if predicted water table drawdown were to occur due to KVR's pumping, "certainly there can be mitigation measures taken, many of which could include shifting[ ] pumping around the well field as an easy example." While KVR's experts testified as to the existence of a few possible mitigation techniques, they did not specify what techniques would work, much less techniques that could be implemented to mitigate the conflict with the existing rights in this particular case. And concerns over precisely how KVR, or its parent company Eureka Moly, would mitigate these conflicts are not without cause: Martin Etcheverry testified that after KVR did some experimental pumping, one of his springs, Nichols Springs, was noticeably lower than before the pumping and that it had not yet returned to its pre-pumping levels. And according to Eureka County's natural resource manager, the Nichols Springs lowering was brought to Eureka Moly's attention multiple times, including at a meeting at the BLM's Battle Mountain office, but that neither KVR nor Eureka Moly had done anything to address the lowering of that spring.

The State Engineer and KVR alternatively assert the existing rights holders conceded that mitigation could be accomplished. But the existing rights holders, including Martin Etcheverry, merely recognized in their 2010 hearing testimony that they would be satisfied if KVR could completely and successfully mitigate the interference with their rights.

The State Engineer implies on appeal that KVR's mitigation could encompass providing substitute water to the senior rights holders by arguing that said holders are entitled only to the beneficial use of the amount of their water rights, and have no right to the historical source of their water rights. *See Desert Irrigation, Ltd. v. State*, 113 Nev. 1049, 1059, 944 P.2d 835, 842 (1997) ("[E]ven those holding certificated, vested, or perfected water rights do not own or acquire title to water. They merely enjoy the right to beneficial use."). But to the extent KVR's mitigation would involve substitute water sources—which is not reflected in the State Engineer's decision or the evidence that was presented to him—there was no evidence before the State Engineer that KVR applied for or committed certain of its already obtained water rights to mitigation or where the substituted water would otherwise come from. And, using the State Engineer's numbers regarding the amount of water in the basin, there may not be any water left to use for mitigation after KVR's appropriation. The State Engineer found Kobeh Valley had 15,000 afa total. KVR's appropriation is 11,300 afa, and the other committed rights had 1,100 afa, which left 2,600 afa for future appropriation. However, there is 5,530 afa in nonadjudicated claims to vested or reserved rights on file in the State Engineer's office.

This is setting aside the further, specious assumption that water from a different source would be a sufficient replacement. Take, for example, the testimony given by an existing rights holder before the State Engineer that he had seen problems before with piping in water for animals because the pipes can freeze and interfere with the flow in the extreme winter cold. Given these, seemingly supported, concerns over such potential problems, it is therefore unclear that substitution water, if available, would be sufficient. *See, e.g.*, *Weibert v. Rothe Bros., Inc.*, 618 P.2d 1367, 1373 (Colo. 1980) ("In order to determine the adequacy of the [augmentation] plan to accomplish its intended purpose, it is necessary to consider the adequacy of the replacement water rights."); *see also Rocky Ford Irrigation Co. v. Kents Lake Reservoir Co*., 135 P.2d 108, 114 (Utah 1943) (examining whether the exchange of water deteriorates water quality or quantity to such a degree as to "materially impair[ ] the use").

Added to this, a surface water rights holder may be found to have abandoned its right if it no longer delivers the water or maintains the source of diversion. NRS 533.060(4)(a)-(d). Requiring that existing rights holders use water other than from the source that they currently have rights in might mean the existing rights holder would need to obtain a new permit to appropriate that new water. *See* NRS 533.060(5) ("Any such right to appropriate any of the water must be initiated by applying to the State Engineer for a permit to appro-

priate the water as provided in this chapter."). KVR did not address before the State Engineer this potential obstacle to providing water from an alternate source to mitigate, and neither did the State Engineer's ruling.

Finally, KVR asserts that the State Engineer's determination that "it is readily feasible to avoid conflicts when mitigating impacts to water sources that produce relatively minor amounts of water" merely reflects the State Engineer's "experience and common sense." But this is precisely the problem with the State Engineer's ruling: though the State Engineer certainly may use his experience to inform his decision making, his decisions must be supported by substantial evidence in the record before him, which is not the case here. *Town of Eureka*, 108 Nev. at 165, 826 P.2d at 949.

D.

Essentially, and with all other arguments aside, the State Engineer and KVR's position is that the State Engineer may leave for a later day, namely the day the 3M Plan is put before him, the determination of exactly what KVR's mitigation would entail. But the State Engineer's decision to grant an application, which requires a determination that the proposed use or change would not conflict with existing rights, NRS 533.370(2), must be made upon presently known substantial evidence, rather than information to be determined in the future, for important reasons.

[Headnote 2]

First, those who protest an application to appropriate or change existing water rights must have a full opportunity to be heard, a right that includes the ability to challenge the evidence upon which the State Engineer's decision may be based. *Revert v. Ray*, 95 Nev. 782, 787, 603 P.2d 262, 264 (1979); *see also* NRS 533.365(5) ("Each applicant and each protestant shall . . . provide to the State Engineer and to each protestant and each applicant information required by the State Engineer relating to the application or protest."). *Cf. Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974) ("[T]he Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation."). This necessarily means that the opportunity to challenge the evidence must be given *before* the State Engineer grants proposed use or change applications. Those who protest an application's grant cannot be forced to wait and challenge a future 3M Plan because, as Benson-Etcheverry note: "The appeal as to Ruling No. 6127 can result in vacating the Ruling, among other remedies. However, appeal of the 3M Plan can only result in vacating the Plan." In other words, challenging the sufficiency of a later developed mitiga-

tion plan cannot undo a decision to grant applications for a proposed use or change that may have been erroneous. And allowing the State Engineer to grant applications conditioned upon development of a future 3M Plan when the resulting appropriations would otherwise conflict with existing rights, could potentially violate protestants' rights to a full and fair hearing on the matter, a rule rooted in due process. *Revert*, 95 Nev. at 787, 603 P.2d at 264.

Furthermore, the State Engineer's decision to grant an application must be sufficiently explained and supported to allow for judicial review. *Id.* at 787, 603 P.2d at 265; *see also Port of Jacksonville Mar. Ad Hoc Comm., Inc. v. U.S. Coast Guard*, 788 F.2d 705, 708 (11th Cir. 1986) (even under deferential substantial evidence review, courts must not merely "rubber stamp" agency action: they must determine that the "agency articulated a rational connection between the facts presented" and the decision) (internal quotation omitted). The State Engineer thus may not defer the determination of what mitigation would encompass to a later date: even if he may grant applications where the resulting appropriations would conflict with existing rights based upon the finding that the applicant would be able to successfully mitigate that deleterious effect, an assumption we do not adopt today, the finding must be based upon evidence in the record to support that mitigation would be successful and adequate to fully protect those existing rights. *See City of Reno v. Citizens for Cold Springs*, 126 Nev. 263, 276, 236 P.3d 10, 18-19 (2010) (law requiring local governments to make a finding about plans for adequate services and infrastructure prior to amending a master plan to allow further development "require[d] something more than the deferral of the issue or broad, evasive conclusions about how officials can build or expand utilities if necessary").

III.

In sum, substantial evidence does not support the State Engineer's finding that KVR would be able to "adequately and fully" mitigate the fact that its groundwater appropriations will cause Kobeh Valley springs that sources existing rights to cease to flow. The State Engineer's decision to grant KVR's applications, when the result of the appropriations would conflict with existing rights, and based upon unsupported findings that mitigation would be sufficient to rectify the conflict, violates the Legislature's directive that the State Engineer must deny use or change applications when the use or change would conflict with existing rights. NRS 533.370(2). As appellants have met their burden to show the State Engineer's decision was incorrect, NRS 533.450(10), the State Engineer's decision to grant KVR's applications cannot stand.

We therefore reverse and remand these matters to the district court for proceedings consistent with this opinion.[4] Because we reverse and remand on this basis, we do not reach the remaining issues raised in these consolidated appeals.

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

ERNEST A. BECKER, IV, INDIVIDUALLY; ERNEST A. BECKER, IV, AND KATHLEEN BECKER, AS TRUSTEES OF THE ERNEST A. BECKER, IV, AND KATHLEEN C. BECKER FAMILY TRUST; EB FAMILY HOLDINGS, LLC; KIMBERLY RIGGS; SALLIE BECKER; BRIAN BECKER; AND WILLIAM A. LEONARD, TRUSTEE, APPELLANTS, *v.* ERNEST AUGUST BECKER, V, RESPONDENT.

No. 65335

October 29, 2015 362 P.3d 641

Certified question under NRAP 5 concerning the extent to which stocks in a closely held corporation are exempt property in bankruptcy proceedings under NRS 21.090(1)(bb) and NRS 78.746. United States Bankruptcy Court, District of Nevada; Bruce T. Beesley, Bankruptcy Court Judge.

The supreme court, GIBBONS, J., held that debtors may exempt stock in corporations, but stock may still be subject to charging order.

Question answered.

Nitz Walton & Heaton, Ltd., and *James H. Walton*, Las Vegas, for Appellants Ernest A. Becker, IV, individually; Ernest A. Becker, IV, and Kathleen Becker, as Trustees of the Ernest A. Becker, IV, and Kathleen C. Becker Family Trust; EB Family Holdings, LLC; Kimberly Riggs; Sallie Becker; and Brian Becker.

Schwartzer & McPherson Law Firm and *Jason A. Imes* and *Lenard E. Schwartzer*, Las Vegas, for Appellant William A. Leonard.

---

[4]From the record and Ruling 6127, it is unclear which of KVR's applications for proposed use or change in Kobeh Valley, if it can be pinpointed, is the appropriation that will cause the springs to dry up. Therefore, we must overturn the entire decision.

Mark Segal, Chartered, and *Mark Bruce Segal*, Las Vegas; *The Law Office of Monica T. Centeno*, *a Professional Corporation*, and *Monica T. Centeno*, Las Vegas, for Respondent.

1. Appeal and Error.
   The supreme court reviews issues of statutory interpretation de novo.
2. Bankruptcy.
   When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate subject to the debtor's right to reclaim certain property as exempt.
3. Corporations and Business Organizations.
   A creditor can get a charging order to attach a debtor's stream of income from the corporation, such as distributions and dividends, but the creditor cannot foreclose on the shares or take over management of the corporation. NRS 78.746(1), (3).
4. Corporations and Business Organizations.
   Creditors can obtain a charging order to charge a debtor shareholder's interest in a corporation, but creditors only have the rights of an assignee, who only has a right to the shareholder's economic interest in the corporation. NRS 78.746(1), (3).
5. Corporations and Business Organizations; Exemptions.
   Statute setting forth stock of a corporation as property exempt from execution does not provide for a complete exemption of stock in small corporations; exemption is limited by statute governing action against stockholder by judgment creditor, including its charging order remedy. NRS 21.090(1)(bb), 78.746.
6. Corporations and Business Organizations; Exemptions.
   Debtors may exempt stock in corporations, but the stock may still be subject to a charging order; if a charging order is issued, the creditors charge the debtor's economic interest in the corporation, but the debtor retains his noneconomic interest in the corporation. NRS 21.090(1)(bb), 78.746(1), (2).
7. Corporations and Business Organizations; Exemptions.
   Even though a creditor can charge a debtor's economic interest in a corporation, the debtor can still apply the wildcard exemption to retain up to $1,000 in distributions from the corporation. NRS 21.090(1)(z), 78.746(1), (2)(b).
8. Corporations and Business Organizations; Exemptions.
   Charging order remedy does not prohibit debtors from claiming other exemptions that apply to their economic interest in a corporation. NRS 78.746(1), (2)(b).

Before the Court En Banc.

OPINION

By the Court, Gibbons, J.:

In response to a certified question submitted by the United States Bankruptcy Court for the District of Nevada, we consider whether NRS 21.090(1)(bb) allows a debtor to exempt his entire interest in a closely held corporation, or whether the exemption is limited to

the debtor's noneconomic interest in the corporation. We conclude that under NRS 21.090(1)(bb), a debtor can exempt his stock in the corporations described in NRS 78.746(2), but his economic interest in that stock can still be subject to the charging order remedy in NRS 78.746(1).

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Ernest A. Becker (debtor) filed a voluntary Chapter 7 bankruptcy petition. On his personal property schedule, debtor listed "Ensworth Corporate Stock" with a value of $1,362,000, and "Eagle Rock Gaming, Inc.," stock with a value of $219,000. On his claimed exemption schedule, debtor asserted that, pursuant to NRS 21.090(1)(bb), his entire interest in both corporations' stock was exempt from the bankruptcy estate.

Several creditors, interested parties, and the bankruptcy trustee (collectively, the objecting parties) filed objections. The objecting parties argued that under NRS 21.090(1)(bb), debtor can only exempt his noneconomic interest in the corporate stock and that debtor's economic interests, including all distributions and dividends, are part of the bankruptcy estate. The bankruptcy court held a hearing on the matter and decided to certify a question to this court.

In its certified question, the bankruptcy court asks whether NRS 21.090(1)(bb) allows a debtor to exempt his entire interest in a closely held corporation[1] or whether the exemption is limited to the debtor's noneconomic interest in the corporation.

DISCUSSION

"Under NRAP 5(a), this court may answer questions of law certified to it by federal courts when the 'answers may "be determinative" of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law.'" *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) (quoting *Volvo Cars of N. Am. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006)). In the present case, (1) answering the question presented by the bankruptcy court will determine part of an ongoing bankruptcy case, (2) it appears that there is no Nevada prece-

[1]Although the bankruptcy court described the corporations as "closely held" corporations, it did not specify how many persons are stockholders of record of the corporations, whether the corporations are publicly traded, or whether the corporations were incorporated under NRS Chapter 78 (private corporations) or 78A (close corporations) or another NRS chapter. The parties have not addressed these questions or raised them as issues and thus, for purposes of this opinion, we assume that the corporations are not publicly traded and interpret "closely held" to mean that the corporations have less than 100 shareholders. *See* NRS 78.746(2)(c)(1)-(2). Because NRS 78.746 is applicable to close corporations under NRS 78A.010, we also assume that the corporations are incorporated under either NRS Chapter 78 or 78A.

dent on the question presented in this case, and (3) the answer will settle an important question of law regarding the scope of NRS 21.090(1)(bb). Accordingly, we will address the question presented to this court.

Standard of review

[Headnote 1]

This case raises issues of statutory interpretation that this court reviews de novo. *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 226-27, 209 P.3d 766, 768 (2009). "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *Id.* at 228, 209 P.3d at 769. "Thus, when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not construe that statute otherwise." *Id.* at 228-29, 209 P.3d at 769.

NRS 21.090(1)(bb) does not provide for a complete exemption of corporate stock

[Headnote 2]

"When a debtor files a Chapter 7 bankruptcy petition, all of the debtor's assets become property of the bankruptcy estate . . . subject to the debtor's right to reclaim certain property as 'exempt.'" *Schwab v. Reilly*, 560 U.S. 770, 774 (2010). Under 11 U.S.C § 522(b) (2013), debtors may choose the exemptions afforded by state law. Thus, bankruptcy debtors in Nevada may claim the exemptions listed in NRS Chapter 21.

In the present case, debtor seeks to exempt his stock in two closely held corporations pursuant to NRS 21.090(1)(bb). Debtor argues that NRS 21.090(1)(bb) allows him to exempt both his economic and noneconomic interests in the closely held corporations. In contrast, the objecting parties argue that NRS 21.090(1)(bb) only allows debtor to exempt his noneconomic interests in the closely held corporations.

NRS 21.090(1)(bb) states:

> 1. The following property is exempt from execution, except as otherwise specifically provided in this section or required by federal law:
>
> . . .
>
> (bb) Stock of a corporation described in *subsection 2 of NRS 78.746 except as set forth in that section*.

(Emphasis added.) Thus, understanding what NRS 21.090(1)(bb) exempts requires examining NRS 78.746.

Background and effect of NRS 78.746

NRS 78.746 allows creditors to obtain charging orders against a debtor's interest in small, nonpublic corporations. NRS 78.746(1). NRS 78.746 states:

> 1. On application to a court of competent jurisdiction by any judgment creditor of a stockholder, the court may charge the stockholder's stock with payment of the unsatisfied amount of the judgment with interest. To the extent so charged, *the judgment creditor has only the rights of an assignee of the stockholder's stock.*
>
> 2. Subject to the provisions of NRS 78.747, *this section*:
>
> (a) Provides the exclusive remedy by which a judgment creditor of a stockholder or an assignee of a stockholder may satisfy a judgment out of the stock of the judgment debtor. No other remedy, including, without limitation, foreclosure on the stockholder's stock or a court order for directions, accounts and inquiries that the debtor or stockholder might have made, is available to the judgment creditor attempting to satisfy the judgment out of the judgment debtor's interest in the corporation, and no other remedy may be ordered by a court.
>
> (b) Does not deprive any stockholder of the benefit of any exemption applicable to the stockholder's stock.
>
> (c) *Applies only to a corporation that*:
>
> (1) Has fewer than 100 stockholders of record at any time.
>
> (2) Is not a publicly traded corporation or a subsidiary of a publicly traded corporation, either in whole or in part.
>
> (3) Is not a professional corporation as defined in NRS 89.020.
>
> (d) Does not apply to any liability of a stockholder that exists as the result of an action filed before July 1, 2007.
>
> (e) Does not supersede any written agreement between a stockholder and a creditor if the written agreement does not conflict with the corporation's articles of incorporation, by laws or any shareholder agreement to which the stockholder is a party.
>
> 3. As used in this section, *"rights of an assignee" means* the rights to receive the share of the distributions or dividends paid by the corporation to which the judgment debtor would otherwise be entitled. The term does not include the rights to participate in the management of the business or affairs of the corporation or to become a director of the corporation.

(Emphases added.)

[Headnotes 3, 4]

A charging order is "[a] statutory procedure whereby an individual [shareholder's] creditor can satisfy its claim from the [shareholder's] interest in the [corporation]." *Black's Law Dictionary* 283 (10th ed. 2014). NRS 78.746 limits the creditor's attachment, however, to the debtor's *economic* interest in the corporations. NRS 78.746(1), (3). In other words, a creditor can get a charging order to attach a debtor's stream of income from the corporation, such as distributions and dividends, but the creditor cannot foreclose on the shares or take over management of the corporation. *Id.* NRS 78.746 prohibits creditors from attaching debtors' *noneconomic* interests in small corporations because "most . . . closely-held corporations are family-owned and they would . . . be disrupted" if creditors could take over management. Hearing on S.B. 317 Before the Assembly Comm. on Judiciary, 74th Leg. (Nev., May 7, 2007). Accordingly, NRS 78.746 strikes a balance by allowing creditors to satisfy their judgments from the debtor's *economic* interest in the corporation, without disturbing the corporation's management. *See id.*

Thus, creditors can obtain a charging order to charge a debtor shareholder's interest in a corporation, but creditors only have the rights of an assignee, NRS 78.746(1), who only has a right to the shareholder's *economic* interest in the corporation. NRS 78.746(3). And, the charging order remedy in NRS 78.746(1) only applies to small, nonpublic corporations. NRS 78.746(2)(c); *see also* NRS 86.401; *Weddell v. H2O, Inc.*, 128 Nev. 94, 271 P.3d 743 (2012) (limiting a charging order to a debtor's economic interest in a limited liability company); *but see* NRS 87.280; *Tupper v. Kroc*, 88 Nev. 146, 494 P.2d 1275 (1972) (permitting foreclosure of a charging order against a partnership interest).

Stock that is exempt under NRS 21.090(1)(bb) can still be subject to a charging order pursuant to NRS 78.746(1)

Although NRS 78.746 permits a creditor to charge a debtor's stock, debtor argues that NRS 21.090(1)(bb)'s language exempting "[s]tock of a corporation described in subsection 2 of NRS 78.746 *except as set forth in that section*" (emphasis added) means that he gets a complete exemption of his corporate stock—both his economic and noneconomic interests—as long as his corporations meet the criteria for closely held corporations in NRS 78.746(2)(c). Debtor contends that the only reason NRS 78.746 is referenced in NRS 21.090(1)(bb) is to explain what type of stock is completely exempt—i.e., stock in closely held corporations.

In contrast, the objecting parties argue that NRS 21.090(1)(bb)'s language permits debtors to exempt stock in corporations—as de-

scribed in NRS 78.746(2)—but only to the extent allowed by the rest of NRS 78.746. In other words, a debtor may exempt his *noneconomic* interest in small corporations, but creditors may still obtain a charging order against his *economic* interests pursuant to NRS 78.746(1).

[Headnotes 5, 6]

We hold that NRS 21.090(1)(bb) does not provide for a complete exemption of stock in small corporations. We conclude that use of the word "section" in "except as set forth in that section" in NRS 21.090(1)(bb) shows that the exemption is limited by all of NRS 78.746, including NRS 78.746(1)'s charging order remedy. *See Perry v. First Nat'l Bank*, 459 F.3d 816, 820 (7th Cir. 2006) ("[T]he phrase 'this section' [in a statute] unambiguously refers to [the] section . . . as a whole."). Thus, based on a plain reading of NRS 21.090(1)(bb), debtors can exempt stock in corporations that meet the criteria in NRS 78.746(2), but the stock can still be subject to a charging order pursuant to NRS 78.746(1). If a charging order is issued, the creditors charge the debtor's *economic* interest in the corporation, but the debtor retains his *noneconomic* interest in the corporation. NRS 78.746(3).

NRS 78.746(2)(b) does not prohibit charging orders on shares of stock

Debtor argues, however, that NRS 78.746(2)(b)'s provision that "this section[d]oes not deprive any stockholder of the benefit of any exemption applicable to the stockholder's stock" means that his corporate stock exemption cannot be limited in any way, such as limiting it to his noneconomic interest in the stock. We disagree.

[Headnotes 7, 8]

We conclude that NRS 78.746(2)(b) simply clarifies that NRS 78.746(1)'s charging order remedy does not prohibit debtors from claiming other exemptions that apply to their economic interest in the corporation. For example, NRS 21.090(1)(z)—the so-called wildcard exemption—allows a debtor to exempt up to $1,000 in any personal property, including stock. Thus, NRS 78.746(2)(b) simply clarifies that even though a creditor can charge a debtor's economic interest in a corporation, the debtor can still apply the wildcard exemption to retain up to $1,000 in distributions from the corporation.[2] *See In re Foos*, 405 B.R. 604, 609 (Bankr. N.D. Ohio 2009) (con-

[2]There are several other exemptions that could possibly apply to a debtor's economic interest in a closely held corporation, for example, if the debtor received the stock as payment for criminal restitution, NRS 21.090(1)(x), or as compensation for a personal injury, NRS 21.090(1)(u).

cluding that a statute similar to NRS 78.746(2)(b) simply clarifies that although creditors can attach a debtor's economic interest in a partnership, the debtor can still claim other exemptions that apply to his economic interest).

Further, debtor's interpretation of NRS 21.090(1)(bb) and NRS 78.746(2)(b)—that they provide for a complete exemption of stock in small corporations—would render NRS 78.746(1) meaningless. *See Carson-Tahoe Hosp. v. Bldg. & Constr. Trades Council of N. Nev.*, 122 Nev. 218, 220, 128 P.3d 1065, 1067 (2006) (stating that "[n]o part of a statute should be rendered meaningless"). NRS 78.746(1) allows for charging orders so that judgment creditors can attach shareholders' economic interest in small corporations. If NRS 21.090(1)(bb) and NRS 78.746(2)(b) then allowed for a complete exemption of stock, judgment creditors could never get the charging order remedy in NRS 78.746(1). Such an interpretation is impermissible.

CONCLUSION

We conclude that based on a plain reading, NRS 21.090(1)(bb)'s language exempting "[s]tock of a corporation described in subsection 2 of NRS 78.746 *except as set forth in that section*" (emphasis added) means that a debtor can exempt stock in the corporations described in NRS 78.746(2), but his economic interest in that stock can still be subject to the charging order remedy in NRS 78.746(1).[3]

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

---

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