VENETIAN CASINO RESORT, LLC, a Nevada Limited Liability Company; and LAS VEGAS SANDS, LLC, a Nevada Limited Liability Company, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE KATHLEEN E. DELANEY, District Judge, Respondents, and JOYCE SEKERA, an Individual, Real Party in Interest.

No. 79689-COA

May 14, 2020 467 P.3d 1

Original petition for a writ of mandamus or prohibition challenging a district court order requiring petitioners to produce unredacted prior incident reports in discovery and refusing to impose requested protections related to those reports.

Petition granted.

[Rehearing denied June 19, 2020]

Royal & Miles LLP and *Gregory A. Miles* and *Michael A. Royal*, Henderson, for Petitioners.

The Galliher Law Firm and *Keith E. Galliher, Jr.*, Las Vegas, for Real Party in Interest.

Before the Court of Appeals, Gibbons, C.J., and Tao, J.[1]

OPINION

By the Court, Gibbons, C.J.:

The Nevada Rules of Civil Procedure were recently amended, including significant portions of NRCP 26—the seminal rule governing discovery. These amendments have changed the analysis that district courts must conduct. In this writ proceeding, we discuss the proper process courts must use when determining the scope of discovery under NRCP 26(b)(1). We also provide a framework for courts to apply when determining whether a protective order should be issued for good cause under NRCP 26(c)(1). Because respon-

[1]The Honorable Bonnie A. Bulla, Judge, voluntarily recused herself from participation in the decision of this matter. In her place, The Honorable Michael L. Douglas, Senior Justice, was appointed to participate in the decision of this matter under an order of assignment entered on February 13, 2020. Nev. Const. art. 6, § 19(1)(c); SCR 10. Subsequently, that order was withdrawn.

dents did not engage in this process or use the framework we are providing, we grant the petition and direct further proceedings.

FACTS AND PROCEDURAL HISTORY

Real party in interest, Joyce Sekera, allegedly slipped and fell on the Venetian Casino Resort's marble flooring and was seriously injured. During discovery, Sekera requested that the Venetian produce incident reports relating to slip and falls on the marble flooring for the three years preceding her injury to the date of the request. In response, the Venetian provided 64 incident reports that disclosed the date, time, and circumstances of the various incidents. However, the Venetian redacted the personal information of injured parties from the reports, including names, addresses, phone numbers, medical information, and any social security numbers collected. Sekera insisted on receiving the unredacted reports in order to gather information to prove that it was foreseeable that future patrons could slip and fall on the marble flooring and that the Venetian was on notice of a dangerous condition.[2] Further, Sekera wanted to contact potential witnesses to gather information to show that she was not comparatively negligent, as the Venetian asserted. Sekera's counsel disseminated all 64 redacted reports to other plaintiffs' counsel in different cases, who also were engaged in litigation against the Venetian for slip and fall injuries.

Unable to resolve their differences regarding redaction, the Venetian moved for a protective order, which Sekera opposed. The discovery commissioner found that there was a legitimate privacy issue and recommended that the court grant the protective order, such that the reports remain redacted, and prevented Sekera from sharing the reports outside of the current litigation. The commissioner further recommended, however, that after Sekera reviewed the 64 redacted reports and identified substantially similar accidents that occurred in the same location as her fall, the parties could have a dispute resolution conference pursuant to EDCR 2.34. At that conference, the parties would have the opportunity to reach an agreement to allow disclosure of the persons involved in the previous similar accidents. If the parties failed to reach an agreement, Sekera could file an appropriate motion.

Sekera objected to the discovery commissioner's recommendation. The district court agreed with the objection and rejected the discovery commissioner's recommendation in its entirety, thereby denying the motion for a protective order. The district court concluded (1) there was no legal basis to preclude Sekera from knowing the identity of the persons involved in the prior incidents, as this information was relevant discovery material, and (2) there was

[2]Sekera agreed that any social security numbers should remain redacted.

no legal basis to prevent the disclosure of the unredacted reports to third parties not involved in the Sekera litigation. Nevertheless, the court strongly cautioned Sekera to be careful with how she shared and used the information.

The Venetian filed the instant petition for writ relief, which was transferred to this court pursuant to NRAP 17. We subsequently granted a stay of the district court's order pending resolution of this petition.

DISCUSSION

Writ consideration is appropriate

This court has original jurisdiction to issue writs of mandamus. Nev. Const. art. 6, § 4(1). But "[t]he decision to entertain a writ petition lies solely within the discretion of" the appellate courts. *Quinn v. Eighth Judicial Dist. Court*, 134 Nev. 25, 28, 410 P.3d 984, 987 (2018). "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013). Writ relief is not appropriate where a "plain, speedy, and adequate remedy" at law exists. *Id.* "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).

Here, if the discovery order by the district court remained in effect, a later appeal would not effectively remedy any improper disclosure of the Venetian's guests' private information. Because we conclude that the Venetian has no plain, speedy, and adequate remedy at law, we exercise our discretion to entertain the merits of this petition. NRS 34.170.

The district court should have considered proportionality under NRCP 26(b)(1)

The Venetian argues that the district court abused its discretion when it did not consider and apply proportionality under NRCP

[3]We recognize that writs of prohibition are typically more appropriate for the prevention of improper discovery. *See, e.g.*, *Club Vista Fin. Servs. v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228 n.6, 276 P.3d 246, 249 n.6 (2012). A writ of prohibition is the "proper remedy to restrain a district judge from exercising a judicial function without or in excess of its jurisdiction." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *see also* NRS 34.320. Here, we are not concluding that the district court's discovery order was outside its jurisdiction. Instead, we are (1) compelling the district court to perform the analysis that the law requires and (2) controlling an arbitrary exercise of discretion. Thus, mandamus relief is more appropriate, and we deny the Venetian's alternative request for a writ of prohibition.

26(b)(1) prior to allowing the discovery.[4] Sekera argues that other courts have found the information at stake here to be discoverable under rules similar to NRCP 26(b)(1).[5] We agree with the Venetian.

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*, 128 Nev. at 228, 276 P.3d at 249. NRCP 26(b)(1) defines and places limitations on the scope of discovery:

> Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party's claims or defenses and proportional to the needs of the case, considering the importance of the issues at stake in the action, the amount in controversy, the parties' relative access to relevant information, the parties' resources, the importance of the discovery in resolving the issues, and whether the burden or expense of the proposed discovery outweighs its likely benefit.

NRCP 26(b)(1). Further, "[i]nformation within this scope of discovery need not be admissible in evidence to be discoverable." *Id*.

Here, the district court identified only relevance at the hearing and in its order as the legal basis to deny the protective order. Specifically, the court stated at the hearing that the information was relevant to show notice and foreseeability.[6] Problematically, the district

---

[4]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *See In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, December 31, 2018) ("[T]his amendment to the [NRCP] shall be effective prospectively on March 1, 2019, as to all pending cases and cases initiated after that date."). Thus, we cite and apply the current version of Rule 26 because the motions and hearings before the district court judge, and the resulting orders at issue in this writ petition, all occurred after March 1, 2019.

[5]The authority cited by Sekera is unpersuasive, as the cases do not consider proportionality as required by the newly adopted amendments to NRCP 26(b)(1). However, we emphasize that our opinion does not stand for the proposition that the information at stake here is not proportional to the needs of the case and thus not discoverable. Rather, we hold that the district court must conduct the proper analysis under the current version of NRCP 26(b)(1) and consider both relevance *and* proportionality together as the plain language of the rule requires.

[6]The Venetian cites *Eldorado Club, Inc. v. Graff*, 78 Nev. 507, 511, 377 P.2d 174, 176 (1962), to demonstrate prior incidents are not relevant to establish notice when it relates to a temporary condition "unless . . . the conditions surrounding the prior occurrences have continued and persisted." Sekera appears to have abandoned the notice and foreseeability arguments proffered in the district court and now only argues in her answering brief that the unredacted reports are relevant to show a lack of comparative negligence.

court did not undertake any analysis of proportionality as required by the new rule. The rule amendments added a consideration of proportionality to

> redefine[ ] the scope of allowable discovery consistent with the proportionate discovery provision in FRCP 26(b). As amended, [NRCP] 26(b)(1) requires that discovery seek information "relevant to any party's claims or defenses and proportional needs of the case," departing from the past scope of "relevant to the subject matter involved in the pending action." This change allows the district court to eliminate redundant or disproportionate discovery and reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry.

NRCP 26 advisory committee's note to 2019 amendment; *see also* FRCP 26 advisory committee's note to 2015 amendment ("The objective is to guard against redundant or disproportionate discovery by giving the court authority to reduce the amount of discovery that may be directed to matters that are otherwise proper subjects of inquiry."). When FRCP 26(b)(1) was amended, federal district courts noted that relevance was no longer enough for allowing discovery. *In re Bard IVC Filters Prod. Liab. Litig.*, 317 F.R.D. 562, 564 (D. Ariz. 2016) ("Relevancy alone is no longer sufficient—discovery must also be proportional to the needs of the case."); *Samsung Elecs. Am., Inc. v. Yang Kun Chung*, 321 F.R.D. 250, 279 (N.D. Tex. 2017) ("[D]iscoverable matter must be both relevant and proportional to the needs of the case—which are related but distinct requirements.").[7]

As noted above, NRCP 26(b)(1) outlines several factors for district courts to consider regarding proportionality:

> [(1)] the importance of the issues at stake in the action; [(2)] the amount in controversy; [(3)] the parties' relative access to relevant information; [(4)] the parties' resources; [(5)] the importance of the discovery in resolving the issues; and [(6)] whether the burden or expense of the proposed discovery outweighs its likely benefit.[8]

---

[7]"[F]ederal decisions involving the Federal Rules of Civil Procedure provide persuasive authority" for Nevada appellate courts considering the Nevada Rules of Civil Procedure. *Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005). Furthermore, the current version of the NRCP is modeled after the federal rules. NRCP Preface, advisory committee's notes to 2019 amendment.

[8]Per the amendments to the Federal Rules of Civil Procedure, these factors specifically apply to proportionality. *See* FRCP 26 advisory committee's note to 2015 amendment ("The present amendment restores the *proportionality factors* to their original place in defining the scope of discovery." (emphasis added)).

See also In re Bard, 317 F.R.D. at 563. Upon consideration of these factors, "a court can—and must—limit proposed discovery that it determines is not proportional to the needs of the case . . . ." *Vallejo v. Amgen, Inc.*, 903 F.3d 733, 742 (8th Cir. 2018) (quoting *Carr v. State Farm Mut. Auto. Ins. Co.*, 312 F.R.D. 459, 468 (N.D. Tex. 2015)).

The district court abused its discretion when it failed to analyze proportionality in light of the revisions to NRCP 26(b)(1) and make findings related to proportionality. Because discovery decisions are "highly fact-intensive," *In re Anonymous Online Speakers*, 661 F.3d 1168, 1176 (9th Cir. 2011), and this court is not positioned to make factual determinations in the first instance, we decline to do so; instead, we direct the district court to engage in this analysis.[9] *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines*, 128 Nev. 289, 299, 279 P.3d 166, 172-73 (2012).

The district court should have determined whether the Venetian demonstrated good cause for a protective order under NRCP 26(c)(1)

The Venetian sought a protective order under NRCP 26(c)(1), arguing that it had good cause to obtain one. The district court determined that there was no legal basis for a protective order. We disagree and conclude the district court abused its discretion when it determined that it had no legal basis to protect the Venetian's guests' information without first considering whether the Venetian demonstrated good cause for a protective order based on the individual circumstances before it. As stated above, discovery matters are generally reviewed for an abuse of discretion. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249. A district court abuses its discretion when it "ma[kes] neither factual findings nor legal arguments" to support its decision regarding a protective order. *In re Nat'l Prescription Opiate Litig.*, 927 F.3d 919, 929 (6th Cir. 2019) (quoting *Gulf Oil Co. v. Bernard*, 452 U.S. 89, 102 (1981)).

NRCP 26(c)(1) articulates the standard for protective orders, stating that "[t]he court may, for good cause, issue an order to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense . . . ."[10] The United States Supreme Court has

[9]While the district court abused its discretion by not considering proportionality whatsoever in its order or at the hearing, the parties are also responsible for determining if their discovery requests are proportional. "[T]he proportionality calculation to [FRCP] 26(b)(1)" is the responsibility of the court and the parties, and "does not place on the party seeking discovery the burden of addressing all proportionality considerations." FRCP 26, advisory committee's notes to 2015 amendment.

[10]Although NRCP 26(c), like its federal counterpart, applies to all forms of discovery (including written discovery), the Nevada Supreme Court has defined what constitutes good cause under the rule only in the context of depositions. *See Okada v. Eighth Judicial Dist. Court*, 131 Nev. 834, 842-43, 359 P.3d 1106, 1112

interpreted the similar language of FRCP 26(c) as conferring "broad discretion on the trial court to decide when a protective order is appropriate and what degree of protection is required." *Seattle Times Co. v. Rhinehart*, 467 U.S. 20, 36 (1984). The Court continued by noting that the "trial court is in the best position to weigh fairly the competing needs and interests of the parties affected by discovery." *Id*. "The unique character of the discovery process requires that the trial court have substantial latitude to fashion protective orders." *Id.*

The United States Court of Appeals for the Ninth Circuit has articulated a three-part test for conducting a good-cause analysis under FRCP 26(c). *In re Roman Catholic Archbishop of Portland in Or.*, 661 F.3d 417, 424 (9th Cir. 2011). First, the district court must determine if particularized harm would occur due to public disclosure of the information. *Id.* at 424. ("As we have explained, '[b]road allegations of harm, unsubstantiated by specific examples or articulated reasoning, do not satisfy the Rule 26(c) test.'" (quoting *Beckman Indus., Inc. v. Int'l Ins. Co.*, 966 F.2d 470, 476 (9th Cir. 1992))).

Second, if the district court concludes that particularized harm would result, then it must "balance the public and private interests to decide whether . . . a protective order is necessary." *Id.* (internal quotation marks and citation omitted). The Ninth Circuit has directed federal district courts to utilize the factors set forth in a Third Circuit Court of Appeals case, *Glenmede Trust Co. v. Thompson*, 56 F.3d 476, 483 (3d Cir. 1995), to help them balance the private and public interests. *Roman Catholic*, 661 F.3d at 424; *see also Phillips v. Gen. Motors*, 307 F.3d 1206, 1212 (9th Cir. 2002). *Glenmede* sets forth the following nonmandatory and nonexhaustive list of factors for courts to consider when determining if good cause exists:

> (1) whether disclosure will violate any privacy interests; (2) whether the information is being sought for a legitimate purpose or for an improper purpose; (3) whether disclosure of the information will cause a party embarrassment; (4) whether confidentiality is being sought over information important to public health and safety; (5) whether the sharing of information among litigants will promote fairness and efficiency; (6) whether a party benefiting from the order of confidentiality is a public entity or official; and (7) whether the case involves issues important to the public.

56 F.3d at 483. The *Glenmede* court further recognized that the district court is in the best position to determine what factors are relevant to balancing the private and public interests in a given dispute. *Id.*

(2015) (articulating factors for courts to consider when determining good cause for a protective order designating the time and place of a deposition). Therefore, Nevada courts do not have firm guidelines to assist their determination of good cause when it comes to written discovery.

Third, even if the factors balance in favor of protecting the discovery material, "a court must still consider whether redacting portions of the discovery material will nevertheless allow disclosure." *Roman Catholic*, 661 F.3d at 425.

The Venetian sought a protective order pursuant to NRCP 26(c)(1), but the district court summarily concluded that there was no legal basis for issuing the protective order. It did so without analyzing whether the Venetian had shown good cause pursuant to NRCP 26(c)(1).[11] The district court's outright conclusion that there was no legal basis for a protective order and failure to conduct a good-cause analysis resulted in an arbitrary exercise of discretion. NRCP 26(c)(1) grants the district court authority to craft a protective order that meets the factual demands of each case if a litigant demonstrates good cause. Thus, since the court did have the legal authority to enter a protective order if the Venetian had shown good cause under NRCP 26(c)(1), it should have determined whether good cause existed based on the facts before it.

To determine good cause, we now approve of the framework established by the Ninth Circuit in *Roman Catholic* and the factors listed by the Third Circuit in *Glenmede*. District courts should use that framework and applicable factors, and any other relevant factors, to consider whether parties have shown good cause under NRCP 26(c)(1).[12] If the party seeking the protective order has shown good cause, a district court may issue a remedial protective order as circumstances require. *See* NRCP 26(c)(1). However, we do not determine whether the Venetian has established good cause for a protective order; instead, we conclude that is a matter for the district court to decide in the first instance. *See Ryan's Express*, 128 Nev. at 299, 279 P.3d at 172.

---

[11]Sekera argues that the district court did not abuse its discretion by determining the Venetian did not show good cause. We are not convinced. The fact that the district court failed to mention good cause, either in its order or at the hearing, undermines Sekera's argument.

[12]Writ relief is discretionary, and in light of our disposition, we decline to address the other issues argued by the parties in this original proceeding. However, we note that *Glenmede* factors one, three, and five authorize the district court to consider the ramifications of information being disseminated to third parties (i.e., "whether disclosure will violate any privacy interests," "whether disclosure of the information will cause a party embarrassment," and "whether the sharing of information among litigants will promote fairness and efficiency"). 56 F.3d at 483. Importantly, the Nevada Supreme Court has recently stated that disclosing medical information implicates a nontrivial privacy interest in the context of public records requests. *Cf. Clark Cty. Coroner v. Las Vegas Review-Journal*, 136 Nev. 44, 56-58, 458 P.3d 1048, 1058-59 (2020) (explaining that juvenile autopsy reports implicate "nontrivial privacy interest[s]" due to the social and medical information they reveal, which may require redaction before their release).

CONCLUSION

In denying the Venetian's motion for a protective order, the district court abused its discretion in two ways. First, it focused solely on relevancy and did not consider proportionality as required under the amendments to NRCP 26(b)(1). Second, it did not conduct a good-cause analysis as required by NRCP 26(c)(1). Because the district court failed to conduct a full analysis, its decision was arbitrarily rendered.

Thus, we grant the Venetian's petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying the Venetian's motion for a protective order. The district court shall conduct further proceedings consistent with this opinion to determine whether disclosure of the unredacted reports is relevant and proportional under NRCP 26(b)(1). If disclosure is proper, the district court must conduct a good-cause analysis under NRCP 26(c)(1), applying the framework provided herein to determine whether the Venetian has shown good cause for a protective order. If the Venetian demonstrates good cause, the district court may issue a protective order as dictated by the circumstances of this case.

Tao, J., concurs.

EMILIA GARCIA, Appellant, *v.*
ANDREA AWERBACH, Respondent.

No. 71348

May 21, 2020 463 P.3d 461

Appeal from a district court judgment, certified as final under NRCP 54(b), in a tort action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Vacated and remanded.

Weinberg, Wheeler, Hudgins, Gunn & Dial, LLC, and *D. Lee Roberts, Jr., Ryan T. Gormley*, and *Timothy A. Mott*, Las Vegas; *Glen J. Lerner & Associates* and *Corey M. Eschweiler*, Las Vegas, for Appellant.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas; *Mazzeo Law LLC* and *Peter A. Mazzeo*, Las Vegas, for Respondent.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Hardesty, J.:

The original district court judge assigned to this case entered a discovery sanction against respondent establishing as a matter of law that respondent permitted her son to drive the vehicle involved in an accident that injured appellant. When a new district court judge was assigned to the matter, that judge *sua sponte* determined that establishing permissive use as a matter of law was unfair because it would prevent respondent from defending against appellant's punitive damages claim. We now clarify that permissive use, established as a matter of law, does not prevent a defendant from defending against a claim for punitive damages. We further conclude that the timing of the district court's modification of the discovery sanction was prejudicial, as trial had begun. We therefore reverse the district court's order modifying the discovery sanction and remand for a new trial.

FACTS AND PROCEDURAL HISTORY

Jared Awerbach was driving respondent Andrea Awerbach's car when he and appellant Emilia Garcia were involved in a collision. Emilia filed an amended complaint against Jared for negligence and driving under the influence, against Andrea for negligent entrustment and liability under NRS 41.440, and against both parties for punitive damages. Andrea's answer to Emilia's original complaint admitted that she had entrusted her car to Jared. Additionally, in Andrea's response to Emilia's request for admissions, Andrea admitted that Jared was operating her car with her permission on the day of the collision. However, Andrea denied giving Jared permission to drive her car (1) in her answer to the amended complaint, (2) in her response to Emilia's interrogatories, (3) in two depositions, and (4) at trial.

During discovery, Emilia sought production of Andrea's insurance claims file regarding the collision. Andrea produced the file but redacted a claims note pertinent to the permissive-use issue in this case. Emilia obtained the unredacted version of the claims note after she subpoenaed the file from Andrea's insurer. The redacted portion of the note stated that Andrea had let Jared use her car in the past to practice for his driver's permit; Andrea let Jared take her keys earlier that day to get something from her car; and Andrea usually kept her keys on the mantle, where Jared would have had access to them. The note also stated, however, that Andrea did not give Jared permission to, or know that he would, drive her car on the day of the accident.

Emilia filed a motion to strike Andrea's answer to the amended complaint as a discovery sanction for withholding the claims note. District Court Judge Nancy Allf, the original judge presiding over the case, entered an order denying Emilia's motion to strike Andrea's answer but granted a discovery sanction against Andrea that established permissive use as a matter of law. Specifically, Judge Allf found that "Andrea gave [Jared] permission to use the car and a finding of permissive use is appropriate because the claims note was concealed improperly, was relevant, and was willfully withheld by [ ] Andrea." Andrea filed a motion seeking relief from this order, which was denied. The order denying Andrea's motion for relief stated that the

> finding of permissive use does not prevent adjudication on the merits because [Emilia] still maintains the burden of showing causation and damages. The withholding of the note and the misleading privilege log was willful, and sanctions are necessary . . . . The sanction was crafted to provide a fair result to both parties, given the severity of the issue.[1]

In August 2015, Judge Allf recused herself from the case due to a conflict with Jared's new counsel. The matter was assigned to District Court Judge Jerry Wiese. In February 2016, on the first day of trial, Judge Wiese informed the parties of his intent to modify the discovery sanction. Although Judge Wiese acknowledged that Judge Allf found permissive use as a matter of law, he stated that he would move forward with the order based on Judge Allf's intention. Judge Wiese stated that he had spoken with Judge Allf and her intention was for the parties to present contradictory statements regarding permissive use at trial. Additionally, Judge Wiese stated that Judge Allf also intended for the sanction to be a rebuttable presumption of permissive use. Judge Wiese further informed the parties that Emilia was not obligated to introduce evidence of permissive use, but that Andrea could introduce evidence that rebutted the presumption. On the fifth day of trial, Judge Wiese *sua sponte* entered an order modifying Judge Allf's discovery sanction so that permissive use was established as a rebuttable presumption, instead of as a matter of law. The modification order stated that regardless of whether Judge Wiese had contacted Judge Allf, and regardless of her intention, he believed it "more 'fair' to all involved parties[ ] to modify" the order. Judge Wiese's order modifying the sanction provided:

---

[1]Andrea filed a petition for a writ of mandamus or prohibition with this court seeking to vacate Judge Allf's sanction, which we denied. *Awerbach v. Eighth Judicial Dist. Court*, Docket No. 68602 (Order Denying Petition for Writ of Mandamus or Prohibition, Sept. 11, 2015).

> The Court was not inclined to disturb the prior findings and orders of Judge Allf, but the Court was faced with the dilemma that Judge Allf's prior [o]rder not only established "permission" by Andrea Awerbach to Jared Awerbach, but *it also essentially established an element of [Emilia's] claim for punitive damages* against Andrea Awerbach, without allowing Ms. Awerbach the opportunity to explain herself. This Court was not comfortable with such a finding, especially as it applied to the punitive damages claim. . . . [A]nd instead of "permissive use" being established as a matter of law, this Court will impose a [r]ebuttable [p]resumption that "permissive use" is established against Andrea Awerbach. The presumption still serves the purpose of sanctioning [Andrea] for the discovery improprieties, . . . and allows [Andrea] the opportunity to defend against [Emilia's] claim for punitive damages.

(Emphasis added.)

At trial, Andrea introduced evidence rebutting the permissive use presumption. The jury ultimately found in favor of Andrea on the ground that she "did not give express or implied permission to Jared" to use her car on the collision date and "did not negligently entrust her [car] to an inexperienced or incompetent person" on that date.[2] The district court entered judgment in favor of Andrea. Emilia now appeals, arguing that Judge Wiese erred in modifying Judge Allf's finding of permissive use as a matter of law.

DISCUSSION

The district court erred in finding that permissive use, established as a matter of law, prevented Andrea from defending against the punitive damages claim

Emilia claimed that Andrea was liable for Jared's actions because she negligently entrusted her vehicle to him. To establish a prima facie case of negligent entrustment, a plaintiff must show two key elements: (1) that an entrustment occurred, and (2) that the entrustment was negligent. *Zugel v. Miller*, 100 Nev. 525, 528, 688 P.2d 310, 313 (1984).

Emilia also sought punitive damages against Andrea for her negligent entrustment. "A plaintiff is not automatically entitled to punitive damages." *Bongiovi v. Sullivan*, 122 Nev. 556, 581, 138 P.3d 433, 450 (2006). "[P]unitive damages may be awarded when the plaintiff proves by clear and convincing evidence that the defendant

[2]The jury also found in favor of Emilia against Jared, but because this appeal from a judgment certified as final under NRCP 54(b) only concerns claims against Andrea, we do not address any issue concerning claims against Jared.

is guilty of oppression, fraud or malice, express or implied." *Id.* at 581, 138 P.3d at 450-51 (internal quotations omitted); *see also* NRS 42.005(1). " 'Oppression' means despicable conduct that subjects a person to cruel and unjust hardship with conscious disregard of the rights of the person." NRS 42.001(4). " 'Fraud' means an intentional misrepresentation, deception or concealment of a material fact known to the person with the intent to deprive another person of his or her rights or property or to otherwise injure another person." NRS 42.001(2). Express malice is conduct intended to injure a person, while implied malice is despicable conduct that a person engages in with conscious disregard of another's rights. *Bongiovi*, 122 Nev. at 581, 138 P.3d at 451; *see also* NRS 42.001(3). A defendant acts with conscious disregard when he or she has "knowledge of the probable harmful consequences of a wrongful act and . . . willful[ly] and deliberate[ly] fail[s] to act to avoid those consequences." NRS 42.001(1). "In other words, under NRS 42.001(1), to justify punitive damages, the defendant's conduct must have *exceeded* mere recklessness or gross negligence." *Wyeth v. Rowatt*, 126 Nev. 446, 473, 244 P.3d 765, 783 (2010) (emphasis added) (internal quotation omitted).

Emilia asserts that permissive use, established as a matter of law, could not affect the punitive damages claim because permissive use establishes only one element of negligent entrustment, not the entire claim. We agree. A finding of permissive use establishes that an entrustment occurred. It does not, however, establish the second element of negligent entrustment—that the entrustment was negligent. Accordingly, even if the district court found permissive use as a matter of law, Emilia still had to prove that Andrea's entrustment was negligent to succeed on her claim of negligent entrustment.

Additionally, the permissive use finding could not have prevented Andrea from defending against the punitive damages claim, even if Emilia had proven her underlying claim of negligent entrustment. Because the tort of negligent entrustment does not require proof of a culpable state of mind, a finding of negligent entrustment is not by itself sufficient to justify punitive damages. Negligent entrustment requires a showing that the entrustment was negligent, but a punitive damages award requires a showing that the defendant's conduct exceeded mere recklessness or gross negligence. Thus, we conclude that the district court's finding of permissive use established as a matter of law, without more, does not establish oppression, fraud, or malice for purposes of punitive damages.

In the instant case, the original sanction establishing permissive use as a matter of law did not necessarily establish the culpable state of mind required to prove a punitive damages claim. Accordingly, the sanction could not, as a matter of law, affect Andrea's ability

to defend against the punitive damages claim.[3] Therefore, the district court committed legal error by modifying the sanction on this ground.

The timing of the district court's sua sponte modification of the discovery sanction was prejudicial

The district court informed the parties of its intent to modify the discovery sanction on the first day of trial and entered its order on the fifth day of trial, approximately one year after Judge Allf granted the discovery sanction. Emilia argues the timing of the modification unfairly prejudiced her ability to present her case at trial. We agree.

In its order modifying the sanction, the district court acknowledged that such modification "may result in the parties needing to modify how they planned to present this case to the jury." During the district court proceedings below, Emilia raised concerns about the timing of the modification. Although the district court offered expedited discovery and alternative accommodations, we are not convinced that the district court's timing in modifying the sanction was not unduly prejudicial given the circumstances of the underlying case.[4]

The original sanction guided Emilia's discovery strategy and trial preparation. Prior to the district court's modification of the sanction, Emilia did not have to present any evidence regarding permissive use because Judge Allf's order had established it as a matter of law. Following the modification, if Andrea presented evidence rebutting the presumption, Emilia would need evidence to support the presumption. Given that the parties were explicitly informed of the district court's intent to modify the sanction on the first day of trial, we conclude Emilia was prejudiced in presenting evidence on the issue of permissive use. *See Meyers v. Garmire*, 324 So. 2d 134, 135 (Fla. Dist. Ct. App. 1975) (finding that, although the trial court was permitted to modify a pretrial order that limited the issues to be pre-

[3]We acknowledge that Andrea admitted to other facts, which combined with a permissive use finding as a matter of law may have affected her ability to defend against the punitive damages claim. Andrea's concession to these other facts, however, does not warrant the modification of the discovery sanction when permissive use, alone, cannot affect her ability to defend against the punitive damages claim.

[4]Emilia's counsel suggested that she would need more time to depose witnesses and gather evidence to prove an additional element of her negligent entrustment claim. However, any additional delays regarding the trial date risked running afoul of the five-year rule. *See* NRCP 41(e)(2)(B) ("The court must dismiss an action for want of prosecution if a plaintiff fails to bring the action to trial within 5 years after the action was filed."). Although Emilia was willing to waive the five-year rule and seek a continuance to adequately prepare for the issue of permissive use, Andrea was not. Accordingly, the district court moved forward with the original trial date.

sented at trial, permitting the addition of matters outside the scope of the pretrial order at the time of trial was prejudicial to petitioners, who were not prepared to present evidence on those issues). Therefore, we conclude the district erred in the timing of its *sua sponte* modification of the discovery sanction.

Accordingly, we vacate the underlying judgment, reverse the district court's order modifying the discovery sanction, and remand this matter to the district court for a new trial.[5]

Stiglich and Silver, JJ., concur.

ROCK SPRINGS MESQUITE II OWNERS' ASSOCIATION, a Nevada Domestic Nonprofit Corporation, Appellant, *v.* STEPHEN J. RARIDAN and JUDITH A. RARIDAN, Husband and Wife, Respondents.

No. 77085

May 28, 2020 464 P.3d 104

Appeal from a district court order granting a motion to dismiss in a declaratory relief action. Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge.

Reversed and remanded.

Silver, J., dissented.

Boyack Orme & Anthony and *Edward D. Boyack*, Las Vegas, for Appellant.

Bingham Snow & Caldwell and *Jedediah Bo Bingham* and *Clifford D. Gravett*, Mesquite, for Respondents.

---

[5]Although not raised at the district court proceedings below, Emilia argues on appeal that Judge Wiese improperly modified the sanction based on his communication with Judge Allf in violation of District Court Rule (DCR) 18(1) because Judge Allf did not provide Judge Wiese with a written request that he modify the sanction. *See* DCR 18(1) (providing that "[w]hen any district judge shall have entered upon the trial or hearing of any cause, proceeding or motion, or made any ruling, order or decision therein, no other judge shall do any act or thing in or about such cause, proceeding or motion, unless upon the written request of the judge who shall have first entered upon the trial or hearing of such cause, proceeding or motion"). Emilia additionally argues that Judge Wiese's decision to modify the sanction based on his communication with Judge Allf was improper because a judge should have no influence or involvement in a case once they have been recused. Given our disposition, however, it is not necessary to reach these issues.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

OPINION

By the Court, STIGLICH, J.:

Claim preclusion prevents a party from suing based on a claim that was or could have been brought in a prior lawsuit against the same party or its privies. In this appeal, appellant Rock Springs Mesquite II Owners' Association challenges a district court order granting respondents Stephen and Judith Raridan's motion to dismiss on the basis of claim preclusion. Rock Springs claimed in a prior lawsuit that its neighbor wrongfully damaged its retaining wall (Case 1). Rock Springs seeks in this lawsuit a judicial declaration that it can remove its retaining wall even though doing so may cause the Raridans' adjacent masonry wall to collapse (Case 2). Because Rock Springs did not raise a declaratory relief action in Case 1 simply by proposing a jury instruction clarifying lateral support obligations, we hold that Rock Springs' declaratory relief action in Case 2 was not brought in Case 1. Because Rock Springs' action in Case 2 is not based on the same facts or alleged wrongful conduct as its claims in Case 1, we conclude that Rock Springs' action in Case 2 could not have been brought in Case 1. We therefore hold that Rock Springs' action in Case 2 is not precluded and accordingly reverse the district court order.

BACKGROUND

Rock Springs shared a property border with Floyd and Gayle Olsen. The Olsens' property was significantly higher in elevation than Rock Springs' property. There are two walls involved in this action. One is a complex retaining wall along the border of the two properties that is owned exclusively by Rock Springs. The other is an adjacent masonry wall owned by the Olsens.

Case 1

In Case 1, Rock Springs sued the Olsens for trespass, nuisance, encroachment, and negligence, claiming that the Olsens' masonry wall and other property improvements such as palm trees and a swimming pool were compromising Rock Springs' retaining wall. Rock Springs sought only monetary damages.

During a hearing on a motion for summary judgment, Rock Springs explained that it could not repair its retaining wall without causing the Olsens' masonry wall to collapse. Prior to trial, Rock Springs submitted a proposed jury instruction regarding the duty of lateral support: "[Rock Springs] is under no duty or obligation to provide lateral support for Defendants' wall or property to counter-

act the force resulting from Defendants' actions." The district court rejected this proposed jury instruction, although its basis for that decision is unknown. At trial, the jury rendered a verdict in favor of the Olsens, finding them not liable for damages to Rock Springs' retaining wall.

Case 2

The Olsens subsequently sold their property to respondents Stephen and Judith Raridan. As Rock Springs' retaining wall continued to deteriorate, Rock Springs alleged that it might collapse. Accordingly, Rock Springs sought to repair or remove its retaining wall, but determined that doing so might cause the Raridans' masonry wall to collapse.

Rock Springs filed a declaratory relief action seeking a judicial declaration that it had the right to remove its own retaining wall, even if doing so would impact the structural integrity of the Raridans' masonry wall. The Raridans moved to dismiss on the basis of claim preclusion, arguing that Rock Springs' action regarding its retaining wall was or could have been brought in Case 1. In the alternative, the Raridans moved for summary judgment on the merits.

The district court granted the Raridans' motion to dismiss. It found that the Raridans are the Olsens' privies and that the judgment in Case 1 is a final judgment. It then found that when Rock Springs submitted its proposed jury instruction about the duty of lateral support in Case 1, it raised "essentially the same claim it is raising now, i.e. an assertion that it has no obligation to provide support to Defendants' property." The district court also found that the issue of lateral support could have been raised in Case 1, as demonstrated by Rock Springs' proposed jury instruction. The district court therefore concluded that Rock Springs' declaratory relief action was barred by claim preclusion. This appeal followed.

DISCUSSION

In this appeal, we consider whether the district court erred in dismissing Rock Springs' declaratory relief action in Case 2 on the basis of claim preclusion. In doing so, we evaluate whether Rock Springs' declaratory relief action in Case 2 was or could have been brought in Case 1. We review conclusions of law in an order granting a motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). "Whether claim preclusion is available is a question of law reviewed de novo." *G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 705, 262 P.3d 1135, 1137 (2011).

"Claim preclusion makes a valid final judgment conclusive on the parties and ordinarily bars a later action based on the claims that were or could have been asserted in the first case." *Boca Park*

Marketplace Syndications Grp., LLC v. Higco, Inc., 133 Nev. 923, 924-25, 407 P.3d 761, 763 (2017). A policy-driven doctrine, claim preclusion is "designed to promote finality of judgments and judicial efficiency by requiring a party to bring all related claims against its adversary in a single suit, on penalty of forfeiture." *Id.* at 925, 407 P.3d at 763. We have adopted a three-part test for determining whether claim preclusion applies: "(1) the parties or their privies are the same, (2) the final judgment is valid, and (3) the subsequent action is based on the same claims or any part of them that were or could have been brought in the first case." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1054, 194 P.3d 709, 713 (2008) (internal footnote omitted).

In this case, the parties do not dispute that the Raridans are the Olsens' privies and there is a final valid judgment in Case 1. We must therefore only evaluate whether Rock Springs' action in Case 2 is based on the same claims or any part of them that (1) were brought or (2) could have been brought in Case 1.

Rock Springs' declaratory relief action in Case 2 was not brought in Case 1

We first determine whether Rock Springs' declaratory relief action in Case 2 was previously brought in Case 1. The district court concluded that by proposing a jury instruction on the duty of lateral support in Case 1, Rock Springs already raised essentially the same claim as it asserted in Case 2. We disagree.

Jury instructions are used only to instruct the jury on the law of the case. *See* NRS 16.110(1); *see also* Nevada Jury Instructions—Civil, 2011 Edition Disclaimer and Information, at iii ("These recommended jury instructions are intended to summarize the contours of the law that a jury will apply to the facts."). They are not used to obtain actions for declaratory relief. *See* NRS 16.110(1); *see also* NRS 30.030 (providing the scope of declaratory relief when "*a declaratory judgment or decree is prayed for*" (emphasis added)).

Rock Springs' proposed jury instruction explaining that it had no lateral support obligation did not add a cause of action to its lawsuit for trespass, nuisance, encroachment, and negligence. Had the district court given Rock Springs' proposed jury instruction, the instruction would have presented the relevant law and enabled the jury to make a finding on these claims under these facts. For example, as Rock Springs argued, the instruction might have helped ensure that the jury reached its conclusions using the elements of the alleged torts and not based on a theory of lateral support. The instruction would not, however, have become a binding judicial declaration on the parties' lateral support obligations. There is little in the record indicating the extent to which the parties litigated the jury instruction, and we do not know why the district court rejected it. Regard-

less, Rock Springs did not raise a declaratory relief action in Case 1 simply by proposing a jury instruction. We therefore conclude that Rock Springs' action in Case 2 was not brought in Case 1.

Rock Springs' declaratory relief action in Case 2 could not have been brought in Case 1

We next determine whether Rock Springs' declaratory relief action in Case 2 could have been brought in Case 1. The district court found that Rock Springs' proposed jury instruction and the district court's rejection of it in Case 1 demonstrate that the issue of lateral support could have been raised in Case 1. We disagree.

"[A]ll claims *based on the same facts and alleged wrongful conduct* that were or could have been brought in the first proceeding are subject to claim preclusion." *G.C. Wallace*, 127 Nev. at 707, 262 P.3d at 1139 (emphasis added) (internal quotation marks omitted); *see also TechnoMarine SA v. Giftports, Inc.*, 758 F.3d 493, 499 (2d Cir. 2014) ("Whether a claim that was not raised in the previous action could have been raised therein depends in part on whether the same transaction or connected series of transactions is at issue, whether the same evidence is needed to support both claims, and whether the facts essential to the second were present in the first." (internal quotation marks omitted)); *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1078 (9th Cir. 2003) ("[I]dentity of claims exists when two suits arise from the same transactional nucleus of facts." (internal quotation marks omitted)). For example, in *G.C. Wallace*, we held that a tenant's default gave rise to both a landlord's summary eviction action as well as the landlord's later damages action for breaching the lease because the two actions were "based upon an identical set of facts and could have been brought simultaneously." 127 Nev. at 707, 262 P.3d at 1139. Claim preclusion generally applies to all grounds of recovery, regardless of the nature or category of damages requested.[1] *See Five Star*, 124 Nev. at 1058, 194 P.3d at 715.

We determine that Rock Springs' declaratory relief action in Case 2 could not have been brought in Case 1. First, the action in Case 2 is based on different facts than the claims in Case 1. In Case 1, the alleged facts involved whether the Olsens' masonry wall and other

[1]While we held in *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*, that a declaratory relief action *brought first* categorically does not preclude later related claims for damages, 133 Nev. at 928-29, 407 P.3d at 765-66, we have not evaluated whether a declaratory relief action brought after a claim for damages is exempt from claim preclusion and decline to do so here. In this appeal, we apply only ordinary claim-preclusion analysis to determine that Rock Springs' declaratory relief action in Case 2 is not precluded because it was not and could not have been brought in Case 1. *See Five Star*, 124 Nev. at 1054, 194 P.3d at 713.

property improvements damaged Rock Springs' retaining wall. In Case 2, the alleged facts involve a damaged retaining wall located along the property border that must be repaired or removed, but doing so may negatively impact the Raridans' masonry wall. It is true that the retaining wall's damage contributed to Rock Springs' decision to repair or remove the wall and to seek a judicial determination on its lateral support obligation in the process. We determine, however, that Rock Springs' declaratory relief action arising after its tort claims is not precluded just because it is premised on some facts representing a continuance of the same course of conduct as Case 1. *See TechnoMarine*, 758 F.3d at 499 (reasoning that a subsequent action "premised on facts representing a continuance of the same course of conduct" as the initial case need not necessarily be precluded (internal quotation marks omitted)). The essential facts are different.

Second, unlike in Case 1 where the alleged wrongful conduct was trespass, nuisance, encroachment, and negligence, in Case 2 there is no alleged wrongful conduct. We remain steadfast in our precedent that claim preclusion applies to all grounds of recovery, regardless of the nature or category of damages requested. *See Five Star*, 124 Nev. at 1058, 194 P.3d at 715. However, because Case 2 does not allege wrongdoing, it cannot be based on the same alleged wrongful conduct as in Case 1.

Additionally, Rock Springs' declaratory relief action in Case 2 could not have been brought simultaneously with the claims in Case 1. At the time of Case 1, there was no need to determine lateral support obligations. Despite Rock Springs arguing in Case 1 that it could not repair its retaining wall without causing the Olsens' masonry wall to collapse, Rock Springs was not seeking to resolve how to adequately repair or remove its wall in Case 1, nor had it then determined that it needed to repair or remove the wall. Furthermore, had Case 1 been decided in Rock Springs' favor, the issue of lateral support obligations would have changed or even become irrelevant because the Olsens would have been responsible for the wall's repair. Moreover, Rock Springs alleged that the wall continued to degrade since the conclusion of Case 1, further illustrating that the circumstances that led to Rock Springs' declaratory relief action arose after Case 1 concluded. We are unwilling to extend claim preclusion to an action that a party was aware might arise in the future, when such an action was based on different facts than those of the initial case.

We also note that precluding Rock Springs' action in Case 2 would be inconsistent with the policy of claim preclusion. *See Higco*, 133 Nev. at 925, 407 P.3d at 763 (reasoning that claim preclusion promotes the finality of judgments and judicial efficiency). A judicial declaration in Case 2 will not undermine the finality of the jury's verdict in Claim 1, that the Olsens were not liable for damages

to Rock Springs' retaining wall. Moreover, without a judicial declaration, Rock Springs will be unable to ascertain the risk involved in repairing or removing its wall, and there would be an increased likelihood of additional expense and litigation later.

The district court erred in concluding that Rock Springs' proposed jury instruction and the district court's rejection of such instruction demonstrated that Rock Springs' declaratory relief action could have been brought in Case 1. Rock Springs had a legitimate reason to propose that instruction in Case 1: to ensure the jury reached its conclusions using elements of the alleged torts. It had no need, however, to seek a judicial declaration on lateral support rights. We are unwilling to suppress parties from proposing jury instructions that may help clarify the law for the jury out of fear that doing so would preclude future claims. The legal determination sought in Case 2 is different from the question of whether the Olsens committed torts in Case 1, and it arises from a different set of facts. We therefore determine that Rock Springs' declaratory relief action could not have been brought in Case 1.

CONCLUSION

Having concluded that Rock Springs did not raise a declaratory relief action in Case 1 simply by proposing a jury instruction, we hold that Rock Springs' declaratory relief action in Case 2 was not brought in Case 1. Furthermore, having concluded that Rock Springs' declaratory relief action in Case 2 is not based on the same facts or alleged wrongful conduct as its claims in Case 1, we determine that Rock Springs' action in Case 2 could not have been brought in Case 1. Accordingly, we hold that Rock Springs' action in Case 2 is not precluded and reverse the district court order granting the Raridans' motion to dismiss. The case is remanded for further proceedings.

GIBBONS, J., concurs.

SILVER, J., dissenting:

I would affirm the district court's grant of the Raridans' motion to dismiss pursuant to *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 194 P.3d 709 (2008), because Rock Springs could have requested a declaration that it did not owe a duty of support to the adjacent property in the same action that it sought money damages for its failing retaining wall. Therefore, I respectfully dissent.

Rock Springs' complaint in Case 1 alleged that the Olsens' wall, adjacent to Rock Springs' retaining wall, was "moving towards and causing damage" to its retaining wall because of earth movement and other factors. Further, Rock Springs alleged *the cost to repair* its retaining wall was $94,000. And, in its encroachment claim, Rock

Springs alleged that it was "*entitled to an order* requiring [the Olsens] to cease the encroachment and *remove the encroaching materials, to wit: the [Olsens'] wall*." (Emphases added.) Next, in its prayer for relief, Rock Springs requested not only monetary damages in excess of $10,000, but also "an *order directing* [the Olsens] to cease trespassing upon [Rock Springs'] property and *to remove all items, including the [Olsens'] wall*, which are trespassing upon [Rock Springs'] property." (Emphases added.)

It is clear that, whether Rock Springs won or lost at the first trial, Rock Springs acknowledged that its failing retaining wall *had* to be repaired and removed. Rock Springs literally stated as much when it filed its complaint against the Olsens. Even the majority concedes that the Olsens' property (now the Raridans') was significantly higher in elevation in relation to the retaining wall owned by Rock Springs, and the photos attached to the summary judgment motion, including the photos below, show that any attempt by Rock Springs to repair its retaining wall would likely cause damage to the Raridans' wall (formerly the Olsens').

Based on the foregoing, I believe that when Rock Springs initiated Case 1, it understood that when it "repaired" or "removed" its retaining wall there would be an adverse effect on the adjacent property by mere virtue of the nature of the retaining wall holding up the higher elevated property. This is obvious from the record when Rock Springs recognized during summary judgment that it could not repair its retaining wall *without causing damage to the Olsens' wall*. Why? Because that is the nature of a *retaining* wall. Despite its argument to the district court, Rock Springs never sought to add a claim for declaratory relief in Case 1 that it had no obligation to provide lateral support for the adjacent wall or property in order to protect itself from liability for the possible damages resulting from the repairs Rock Springs asserted it needed to make. It was not until after the close of the evidence that Rock Springs proposed its own declaration in the form of a jury instruction stating, "[Rock Springs] is under no duty or obligation to provide lateral support for [the Olsens'] wall or property to counteract the force resulting from [the Olsens'] actions." Although I would not view the requested jury instruction as Rock Springs requesting declaratory relief in Case 1, this proposed jury instruction is significant: it reflects that Rock Springs was aware of its potential liability by repairing the retaining wall in Case 1.[1]

[1]And Rock Springs' appeal in Case 1 further demonstrates that it could have raised the declaratory relief issue in that case, as it asserted that the district court's rejection of its jury instruction regarding the duty of lateral support warranted reversal. *See Rock Springs Mesquite 2 Owners' Ass'n v. Olsen*, Docket No. 64227 (Notice of Appeal, Oct. 15, 2013); *Mack v. Estate of Mack*, 125 Nev. 80, 91-92, 206 P.3d 98, 106 (2009) (recognizing that this court can take judicial notice of court records in related cases).

After the jury returned a verdict in favor of the Olsens, Rock Springs filed a second action requesting what it should have requested during litigation in Case 1—a declaration that it owes no duty of lateral support—because it knew that repairing the retaining wall would cause damage to the adjoining property, now owned by the Raridans. Stated another way, Rock Springs sought a judicial declaration that when it repaired its failing wall, it would not be liable for any resulting damages. This would necessarily include damage to the adjacent wall Rock Springs acknowledged would be damaged in Case 1.

I agree with respondents that filing Case 2 is just a second attempt by Rock Springs to avoid paying the costs involved in repairing its retaining wall. Simply put, this "declaration" could have been sought in Case 1 because the record shows that Rock Springs was aware of this issue because of the nature of retaining walls and what is involved in repairing and removing them. It is disingenuous to say that this could not be brought in Case 1. *See G.C. Wallace, Inc. v. Eighth Judicial Dist. Court*, 127 Nev. 701, 707, 262 P.3d 1135, 1139 (2011) ("[A]ll claims based on the same facts and alleged wrongful conduct that were or could have been brought in the first proceeding are subject to claim preclusion." (internal quotation marks omitted)); *see also Baker v. Gen. Motors Corp.*, 522 U.S. 222, 234 (1998) (seeing "no reason" why claim preclusion would not apply in cases merely because the type of relief sought in the second case differs from that sought in the first case, so long as the other claim preclusion factors are met); *Boca Park Marketplace Syndications Grp., LLC v. Higco, Inc.*, 133 Nev. 923, 923, 407 P.3d 761, 762 (2017) ("[A] party may join claims for declaratory relief and damages in a single suit . . . ."). Case 2's request for a declaration negating liability for Rock Springs' repair or removal of its retaining wall was based on the same facts and alleged wrongful conduct raised in Case 1. *See G.C. Wallace*, 127 Nev. at 707, 262 P.3d at 1139. Accordingly, I would affirm the district court's order of dismissal under these particular facts.


APP163


APP161

LAWRENCE D. CANARELLI; HEIDI CANARELLI; AND FRANK MARTIN, SPECIAL ADMINISTRATOR FOR THE ESTATE OF EDWARD C. LUBBERS, FORMER TRUSTEES, PETITIONERS, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE GLORIA STURMAN, DISTRICT JUDGE, RESPONDENTS, AND SCOTT CANARELLI, BENEFICIARY OF THE SCOTT LYLE GRAVES CANARELLI IRREVOCABLE TRUST DATED FEBRUARY 24, 1998, REAL PARTY IN INTEREST.

No. 78883

May 28, 2020 464 P.3d 114

Original petition for a writ of prohibition or mandamus challenging a district court order compelling the production of documents in a trust matter.

Petition granted.

Campbell & Williams and *J. Colby Williams, Donald J. Campbell*, and *Philip R. Erwin*, Las Vegas, for Petitioners.

Marquis Aurbach Coffing and *Liane K. Wakayama*, Las Vegas, for Petitioner Frank Martin, Special Administrator for the Estate of Edward C. Lubbers.

Solomon Dwiggins & Freer, Ltd., and *Dana A. Dwiggins* and *Tess E. Johnson*, Las Vegas, for Real Party in Interest.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This court has not had the opportunity to address whether there is a fiduciary exception to the attorney-client privilege, whereby a fiduciary such as a trustee is prohibited from asserting the attorney-client privilege against a beneficiary on matters of trust administration. Because the Legislature created five specific exceptions to the attorney-client privilege, none of which are the fiduciary exception, we expressly decline to recognize the fiduciary exception in Nevada.

Petitioners are former trustees challenging a district court order compelling the production of allegedly privileged documents in a trust dispute with a beneficiary. The first group of documents at issue contains a former trustee's notes related to a phone call with counsel, and the second group of documents contains the former

trustee's notes taken during a meeting with the other trustees, counsel, the opposing party, and an independent appraiser. Because the former trustee communicated the content of the first group of documents to counsel, we determine that these documents are protected by the attorney-client privilege and are therefore undiscoverable. Because the former trustee created the second group of documents in anticipation of litigation and the substantial-need exception to the work-product doctrine does not apply, we determine that these documents are protected by the work-product doctrine and are therefore undiscoverable. Accordingly, the district court acted in excess of its jurisdiction in compelling the partial production of the disputed documents, and we therefore grant a writ of prohibition.

BACKGROUND

Underlying trust dispute

Real party in interest Scott Canarelli is the beneficiary of the Scott Lyle Graves Canarelli Irrevocable Trust, dated February 24, 1998 (the Trust). Scott's parents, petitioners Lawrence and Heidi Canarelli, conveyed minority interests in their various business entities to Scott, which Scott in turn contributed to the Trust. Lawrence and Heidi served as the Trust's family trustees and, as such, made discretionary payments from the Trust to Scott for his health, education, support, and maintenance. In addition to the two family trustees, the Trust had one independent trustee, Edward Lubbers. Lubbers also served as Lawrence and Heidi's personal attorney; in this litigation, his interests are represented by petitioner Frank Martin as Special Administrator of the Estate of Edward C. Lubbers.

Scott alleges that the trustees unlawfully withheld Trust distributions. In 2012, Scott's attorney sent a letter to Lubbers stating that the trustees were demanding receipts from Scott's purchases in a manner that was per se bad faith. The letter also threatened a lawsuit to redress the trustees' discretionary payment decisions and remove them from their roles as trustees. After receiving the letter, Lubbers listed "Scott—lawsuit threatened" as a line item on one of Lawrence and Heidi's business entities' meeting agendas.

In May 2013, Lawrence and Heidi resigned from their roles as family trustees, and Lubbers became successor family trustee. A week after Lawrence and Heidi resigned, Lubbers entered into a purchase agreement exceeding $25 million on behalf of the Trust to sell off the Trust's ownership in Lawrence and Heidi's business entities.

Scott subsequently filed a petition asking the district court to compel Lubbers to provide all information related to the purchase agreement and an inventory and accounting for the Trust. Less than two weeks later, Lubbers retained attorneys David Lee and Carlene

Renwick. According to billing records, Lee and Renwick spoke on the phone with Lubbers for approximately half an hour on October 14, 2013, about Lubbers' "responses to petition." Lee and Renwick continued to correspond with Lubbers via phone and email over the next two days, and Lubbers filed a response to Scott's petition on October 16, 2013. Scott filed a supplemental petition asserting new claims of breach of fiduciary duty against Lawrence, Heidi, and Lubbers. Lubbers resigned from his role as trustee in 2017 and died six months later.

Disputed documents

During discovery, Lawrence, Heidi, and Lubbers inadvertently disclosed documents containing Lubbers' notes. They attempted to claw back the documents, citing the attorney-client privilege and work-product doctrine.

The first group of disputed documents (Group 1 documents) contains Lubbers' notes related to his phone call with Lee and Renwick on October 14, 2013. One document contains Lubbers' typed notes composed in preparation of this conversation. The other documents contain Lubbers' handwritten notes contemporaneously memorializing the call. Lee and Renwick confirmed in declarations that on their October 14, 2013, call with Lubbers, Lubbers asked about his potential response to Scott's petitions, of which there were three pending. They also verified that Lubbers stated "his views about several matters related to the petitions and potential strategies for defending against certain of the allegations contained therein."

The second group of disputed documents (Group 2 documents) contains Lubbers' notes contemporaneously memorializing an in-person meeting he attended on December 19, 2013, with the other trustees, counsel, Scott, and an independent trust appraiser.

Procedural history

Scott moved for a determination of privilege. The discovery commissioner found that each of the disputed documents appeared to contain Lubbers' notes. The commissioner then concluded that a portion of the Group 1 documents were protected by the attorney-client privilege and the work-product doctrine, but that other portions were discoverable. For the discoverable portions, the commissioner found that Lubbers' notes contained factual statements or information unrelated to the Trust. Alternatively, to the extent the factual statements intertwined with attorney-client privileged communications or work product, discovery was nonetheless permitted because of the fiduciary and common-interest exceptions to the attorney-client privilege and the substantial-need exception to the work-product doctrine. The commissioner concluded that the

Group 2 documents were discoverable because, even if they constituted work product and contained primarily factual information, the substantial-need exception to the work-product doctrine applied.

The district court generally adopted the commissioner's findings.[1] However, the district court concluded that the commissioner's findings as to the Group 1 document containing Lubbers' typed notes were based upon assumptions that the notes were communicated to counsel and therefore protected by the attorney-client privilege. Nevertheless, the district court agreed with the commissioner's conclusion that a portion of the document was discoverable.

Lawrence, Heidi, and Lubbers petition this court for a writ of prohibition preventing the district court from compelling production of the disputed documents and a writ of mandamus directing the district court to find the disputed documents undiscoverable and order their return or destruction.

DISCUSSION

This original proceeding asks us to determine whether the district court acted in excess of its jurisdiction in compelling the production of allegedly privileged material. Because the disclosure of privileged information is immediately harmful and this petition provides an opportunity to address a novel issue of law, we consider the petition. In doing so, we first consider whether the Group 1 documents are protected by the attorney-client privilege, thereby evaluating whether petitioners proved that the documents were communicated to counsel, whether the fiduciary exception to the attorney-client privilege exists in Nevada, and whether the common-interest exception to the attorney-client privilege applies. We then decide whether the Group 2 documents are protected by the work-product doctrine and assess whether the substantial-need exception to the work-product doctrine is applicable.

Writ relief

"When the district court acts without or in excess of its jurisdiction, a writ of prohibition may issue to curb the extrajurisdictional act." *Toll v. Wilson*, 135 Nev. 430, 432, 453 P.3d 1215, 1217 (2019) (internal quotation marks omitted). "Therefore, even though discovery issues are traditionally subject to the district court's discretion and unreviewable by a writ petition, this court will intervene when the district court issues an order requiring disclosure of privileged information." *Id.* Writ relief is also appropriate when "an import-

[1]The commissioner and the district court disagreed as to one portion of one Group 1 document containing Lubbers' memorialization notes. Whereas the commissioner found that the document was discoverable in its entirety, the district court concluded that only a portion was discoverable because the other portions did not involve matters of trust administration.

ant issue of law needs clarification" and this court's invocation of its original jurisdiction serves public policy. *Diaz v. Eighth Judicial Dist. Court*, 116 Nev. 88, 93, 993 P.2d 50, 54 (2000) (internal quotation marks omitted). "One such instance is when a writ petition offers this court a unique opportunity to define the precise parameters of [a] privilege conferred by a statute that this court has never interpreted." *Id.* (alteration in original) (internal quotation marks omitted).

Because the district court order compels the disclosure of allegedly privileged information, we elect to entertain this petition for a writ of prohibition.[2] *See Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014) (establishing that a writ of prohibition, rather than a writ of mandamus, is the appropriate mechanism to correct an order that compels disclosure of privileged information). Our intervention will also clarify whether Nevada recognizes the fiduciary exception to the attorney-client privilege and will serve public policy by helping trustees and attorneys understand the extent to which their communications are confidential.

Standard of review

"Discovery 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). Findings of fact are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdivision*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). Conclusions of law, including the meaning and scope of statutes, are reviewed de novo. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93-94, 64 P.3d 1070, 1075 (2003).

The Group 1 documents are protected by the attorney-client privilege

Petitioners contend that the Group 1 documents are protected by the attorney-client privilege because the content of the documents was communicated to counsel. "The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017). The purpose of the attorney-client privilege "is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice." *Id.*

[2]Therefore, the petition is denied insofar as it seeks a writ of mandamus.

The Legislature has codified the attorney-client privilege:

> A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential *communications*:
>
> 1. Between the client or the client's representative and the client's lawyer or the representative of the client's lawyer.
>
> . . . .
>
> 3. Made for the purpose of facilitating the rendition of professional legal services to the client, by the client or the client's lawyer to a lawyer representing another in a matter of common interest.

NRS 49.095 (emphasis added). "Mere facts are not privileged, but communications about facts in order to obtain legal advice are." *Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341. The party asserting the privilege has the burden to prove that the material is in fact privileged. *Ralls v. United States*, 52 F.3d 223, 225 (9th Cir. 1995).

"It is well settled that privileges, whether creatures of statute or the common law, should be interpreted and applied narrowly." *See Clark Cty. Sch. Dist. v. Las Vegas Review-Journal*, 134 Nev. 700, 705, 429 P.3d 313, 318 (2018) (internal quotation marks omitted). However, "if the purpose of the attorney-client privilege is to be served, the attorney and client must be able to predict with some degree of certainty whether particular discussions will be protected." *Upjohn Co. v. United States*, 449 U.S. 383, 393 (1981).

We have not yet determined the extent to which an individual must deliver his or her notes to an attorney for the notes to constitute "communications" under NRS 49.095. Federal courts, however, have concluded that physical delivery is unnecessary for common-law attorney-client privilege to attach. *See United States v. DeFonte*, 441 F.3d 92, 96 (2d Cir. 2006) (reasoning that "[c]ertainly, an outline of what a client wishes to discuss with counsel—and which is subsequently discussed with one's counsel—would seem to fit squarely within our understanding of the scope of the privilege"); *see also United States v. Jimenez*, 265 F. Supp. 3d 1348, 1351-53 (S.D. Ala. 2017) (determining that an individual's emails that served as an outline for future attorney-client conversations but were never delivered to his attorney were nonetheless privileged); *Cencast Servs., L.P. v. United States*, 91 Fed. Cl. 496, 505-06 (Fed. Cl. 2010) (reasoning that it should be sufficient to find an attorney-client privilege if a party created the notes to aid in a meeting with an attorney).

We agree and conclude that, under NRS 49.095, the physical delivery of notes is not required. NRS 49.095 clearly protects communications. *See* NRS 49.095 ("A client has a privilege to refuse to disclose, and to prevent any other person from disclosing, confidential *communications* . . . ." (emphasis added)). Thus, so long as the content of the notes was previously or is subsequently communicated

between a client and counsel, the notes constitute communications subject to the attorney-client privilege. Holding otherwise would discourage a client from diligently preparing for a conversation with counsel and undermine a client's ability to confidently memorialize any legal advice received. *See Upjohn Co.*, 449 U.S. at 392 (construing the privilege to avoid discouraging a client from conveying relevant information to counsel). As a result, an attorney would be unable to provide fully informed advocacy. *See Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341 (holding that the purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys to promote fully informed advocacy). In order to give full force to the attorney-client privilege, notes that were communicated between a client and counsel must therefore be protected.

After reviewing the Group 1 documents, we determine that the district court clearly abused its discretion in finding that petitioners did not prove that the notes were communicated to counsel. Petitioners presented Lee and Renwick's billing records, which indicated that Lee and Renwick spoke by phone with Lubbers on October 14, 2013, about Lubbers' response to Scott's petitions, one of which Scott filed just two weeks prior. Furthermore, Lee and Renwick attested that on the call, Lubbers stated his views about several matters related to Scott's petitions and potential strategies for defending against them. Based on the date and content of the Group 1 documents, it is clear that the content of both the preparation notes and the memorialization notes was communicated between Lubbers and counsel.

In so recognizing, we emphasize that the party asserting the privilege does not have to prove that the client spoke each and every word written in his or her notes to counsel verbatim. Such a requirement would lead to the unreasonable result of permitting the disclosure of confidential information that was not orally conveyed exactly as it was recorded on paper, or vice versa. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 121, 251 P.3d 718, 722-23 (2011) ("[T]his court will not read statutory language in a manner that produces absurd or unreasonable results." (internal quotation marks omitted)). Lee and Renwick's billing records, along with their declarations, are sufficient proof of communication.

We also hold that the district court clearly abused its discretion to the extent it found that the factual information contained in the Group 1 documents was not subject to the attorney-client privilege. Although we agree that the Group 1 documents contain factual information, facts communicated in order to obtain legal advice do not fall outside the privilege's protections. *See Wynn Resorts*, 133 Nev. at 374, 399 P.3d at 341 (holding that while facts are not privileged, communications about facts in order to obtain legal advice are).

Here, the factual information was relayed in order to obtain advice about how to respond to Scott's petitions. The Group 1 documents are therefore protected by the attorney-client privilege.

There is no applicable exception to the attorney-client privilege

Scott argues that even if the Group 1 documents are subject to the attorney-client privilege, they are nonetheless discoverable due to (1) the fiduciary exception and (2) the common-interest exception.

1.

Scott contends that this court should recognize the fiduciary exception to the attorney-client privilege and apply it to the Group 1 documents. The fiduciary exception, as adopted in other states, "provides that a fiduciary, such as a trustee of a trust, is disabled from asserting the attorney-client privilege against beneficiaries on matters of trust administration." *Murphy v. Gorman*, 271 F.R.D. 296, 305 (D.N.M. 2010). NRS 49.015 provides that privileges in Nevada are recognized only as "required by the Constitution of the United States or of the State of Nevada" or by a specific statute. NRS 49.115 expressly lists five exceptions to the attorney-client privilege, none of which are the fiduciary exception.

This court has recognized "the legislature's demonstrated ability to draft privilege statutes with very precise parameters." *Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 670, 856 P.2d 244, 249 (1993). "The maxim 'EXPRESSIO UNIUS EST EXCLUSIO ALTERIUS', the expression of one thing is the exclusion of another, has been repeatedly confirmed in this State." *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967); *see also Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 102, 392 P.3d 614, 619 (2017); *Thomas v. Nev. Yellow Cab Corp.*, 130 Nev. 484, 488, 327 P.3d 518, 521 (2014). Jurisdictions with statutory attorney-client privileges like Nevada have overwhelmingly refused to adopt a fiduciary exception by judicial decree. *See, e.g.*, *Wells Fargo Bank v. Super. Court*, 990 P.2d 591, 596 (Cal. 2000); *Crimson Trace Corp. v. Davis Wright Tremaine LLP*, 326 P.3d 1181, 1195 (Or. 2014); *Huie v. DeShazo*, 922 S.W.2d 920, 924-25 (Tex. 1996).

Because the Legislature adopted five specifically defined exceptions to the attorney-client privilege in NRS 49.115, we decline to create a sixth by judicial fiat. We therefore refuse to recognize the fiduciary exception.

2.

Scott also argues that the common-interest exception to the attorney-client privilege applies to the Group 1 documents. The

common-interest exception is statutory in Nevada and provides that there is no attorney-client privilege "[a]s to a communication relevant to a matter of common interest between two or more clients if the communication was made by any of them to a lawyer retained or consulted in common, when offered in an action between any of the clients." NRS 49.115(5).

We hold that the common-interest exception does not apply to the Group 1 documents. NRS 49.115(5) limits the common-interest exception to situations where (1) an attorney is retained or consulted in common and (2) the communication is relevant to a matter of common interest. *See Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010) (holding that where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language without turning to other rules of construction).

First, Lee and Renwick were not retained or consulted in common. The Legislature has made clear that an attorney representing a trustee as a fiduciary does not result in an attorney-client relationship between the attorney and the beneficiary. *See* NRS 162.310(1)[3] ("An attorney who represents a fiduciary does not, solely as a result of such attorney-client relationship, assume a corresponding duty of care or other fiduciary duty to a principal.").

Second, Lubbers' communication with Lee and Renwick was not relevant to a matter of common interest. Rather, Lubbers was adverse to Scott at the time he communicated with counsel. Scott's counsel sent Lubbers a letter alleging that the trustees acted in bad faith. Scott's petition, asking Lubbers to provide information about the purchase agreement he entered into on behalf of the Trust, contained adversarial allegations as a result of the falling out between Scott and his parents and led to Scott's eventual claims that Lubbers breached his fiduciary duties. It is therefore apparent that Lubbers consulted with Lee and Renwick for his own protection, not for a matter of common interest.

While a beneficiary is ordinarily able to inspect a trust's books and records, allowing a beneficiary to view communications between a trustee and his or her attorney when the trustee is adverse to the beneficiary would discourage trustees from seeking legal advice. *See Huie*, 922 S.W.2d at 924-25 (reasoning that a trustee "must be able to consult freely with his or her attorney to obtain the best possible legal guidance"); 3 Austin Wakeman Scott, William Franklin Fratcher & Mark L. Ascher, *Scott and Ascher on Trusts* § 17.5 (4th

[3]To the extent that the parties relied on *Charleson v. Hardesty*, 108 Nev. 878, 882-83, 839 P.2d 1303, 1306-07 (1992), for the proposition that an attorney for a trustee owes a fiduciary duty to the beneficiary, we note that this decision was superseded by NRS 162.310(1). *See* 2011 Nev. Stat., ch. 270, § 175, at 1465 (enacting NRS 162.310(1) in 2022, after *Charleson* was published).

ed. 2007) ("[W]hen there is a conflict of interest between the trustee and the beneficiaries and the trustee procures an opinion of counsel for the trustee's own protection, the beneficiaries are generally not entitled to inspect it."). Moreover, individuals may be unwilling to serve as trustees if they fear that their communications with counsel will be used against them, and attorneys representing trustees may be reluctant to provide transparent advice. Therefore, we conclude that NRS 49.115(5), the common-interest exception, does not apply to the Group 1 documents. Because the Group 1 documents are protected by the attorney-client privilege and no exception applies, the district court clearly exceeded its authority when it allowed Scott to retain those documents.

The Group 2 documents are protected by the work-product doctrine

Petitioners argue that the Group 2 documents containing Lubbers' notes memorializing a meeting with the other trustees, counsel, Scott, and an independent appraiser are protected by the work-product doctrine. As codified in NRCP 26(b)(3)(A), the work-product doctrine prevents a party from discovering documents "that are prepared in anticipation of litigation . . . by or for another party. . . ." "[D]ocuments are prepared in anticipation of litigation when in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained because of the prospect of litigation." *Wynn Resorts*, 133 Nev. at 384, 399 P.3d at 348 (internal quotation marks and citation omitted). The court must consider the totality of the circumstances. *Id.* at 384-85, 399 P.3d at 348.

For protected work product to become discoverable, a party must show "that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means." NRCP 26(b)(3)(A)(ii). The party seeking discovery bears the burden, and "[a] mere assertion of the need will not suffice." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 358, 891 P.2d 1180, 1188 (1995).

We determine that the district court clearly abused its discretion in finding that the Group 2 documents were not protected by the work-product doctrine. First, considering the totality of the circumstances, we conclude that the Group 2 documents were prepared by Lubbers in anticipation of litigation. Scott's counsel sent Lubbers a letter alleging that the trustees acted in bad faith, upon which Lubbers added the line item "Scott—lawsuit threatened" to Lawrence and Heidi's business entities' meeting agenda. Additionally, Scott's petition asking Lubbers to provide information about the purchase agreement he entered into on behalf of the Trust contained adversarial allegations and required a response with legal implications.

At the time Lubbers wrote the notes contained in the Group 2 documents, he anticipated adversarial litigation.

Second, we determine that the district court abused its discretion to the extent it found that the substantial-need exception applied. Our review of the Group 2 documents confirms that Lubbers' notes memorialized his meeting with the other trustees, counsel, Scott, and an independent appraiser. Although Lubbers has since died, Scott was at the meeting and therefore does not have a substantial need for the Group 2 documents. Moreover, Scott can access any pertinent information he may have missed without undue hardship by deposing one of the other attendees. Because the Group 2 documents are protected by the work-product doctrine and the substantial-need exception does not apply, the district court lacked authority to allow Scott to retain the Group 2 documents.

CONCLUSION

Because petitioners showed that Lubbers communicated the content of the Group 1 documents to counsel, we determine that these documents are protected by the attorney-client privilege and are therefore undiscoverable. In doing so, we explicitly refuse to recognize by judicial decree the fiduciary exception to the attorney-client privilege and conclude that the common-interest exception to the attorney-client privilege does not apply to this case. Because Lubbers took the notes contained in the Group 2 documents in anticipation of litigation and the substantial-need exception to the work-product doctrine is inapplicable, we determine that the Group 2 documents are protected by the work-product doctrine and are therefore undiscoverable. Accordingly, the district court acted in excess of its jurisdiction in compelling the partial production of the disputed documents. We therefore grant this petition and direct the clerk of this court to issue a writ of prohibition prohibiting the district court from compelling or allowing the production of the disputed documents.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

LYNN R. SHOEN, Petitioner, *v.*
STATE BAR OF NEVADA, Respondent.

No. 79288

May 28, 2020 464 P.3d 402

Original petition for a writ of mandamus challenging a Nevada State Bar disciplinary board hearing panel chair's order striking a petition for reinstatement.

Petition granted.

Marquis Aurbach Coffing and *Phillip S. Aurbach*, Las Vegas, for Petitioner.

Daniel M. Hooge, Bar Counsel, and *Phillip J. Pattee*, Assistant Bar Counsel, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

Effective in January 2018, this court amended the rule governing the reinstatement of suspended attorneys to the practice of law. *See In re Amendments to Supreme Court Rule 116*, ADKT 525 (Order Amending Supreme Court Rule 116, Dec. 11, 2017) (noting that the amendments became effective 30 days after the date the order was filed). The amended rule provides that an attorney may be reinstated if he or she demonstrates certain criteria, including "[f]ull compliance with the terms and conditions of all prior disciplinary orders," by clear and convincing evidence. SCR 116(2)(a). Unlike before the amendment, an attorney who cannot demonstrate the criteria still may be reinstated if the attorney "presents good and sufficient reason why the attorney should nevertheless be reinstated." SCR 116(2). This case asks whether the amended rule applies to a petition for reinstatement that was filed after the amendment but arises from a suspension imposed before the amendment. We conclude that the amended rule applies to any petition filed after the amendment's effective date regardless of when the suspension was imposed. As a result, a suspended attorney may apply for reinstatement under the amended rule even if she has not yet satisfied requirements that this court imposed in the disciplinary order as conditions precedent to applying for reinstatement, but she will have to present "good and sufficient reason" under SCR 116(2) to be reinstated despite that failure.

FACTS AND PROCEDURAL HISTORY

On April 22, 2016, this court suspended petitioner, attorney Lynn R. Shoen, from the practice of law for four years and six months, beginning retroactively on April 24, 2014. *In re Discipline of Shoen*, Docket No. 69697 (Order Approving Conditional Guilty Plea Agreement, Apr. 22, 2016). As pertinent to the petition, we ordered that "Shoen shall pay $25,100 in restitution as outlined in the plea agreement, to be made in monthly payments and paid in full within one year of the date of this order." *Id.* The payment of restitution was "a condition precedent to the submittal of an application for reinstatement." *Id.* We also required that Shoen pay the costs of the disciplinary proceeding. *Id.*

In 2019, after her suspension period ended but before she had paid all of the restitution, Shoen petitioned for reinstatement. The State Bar moved to strike her petition because the suspension order required that Shoen pay restitution as a condition precedent to submittal of a reinstatement petition. The Southern Nevada Disciplinary Board hearing panel chair (the Board) granted the motion to strike, stating that it did "not have the authority to hear an application of reinstatement until the restitution is paid." Shoen now petitions this court for a writ of mandamus directing the Board to vacate its order striking her petition for reinstatement and to hear it on the merits under amended SCR 116(2). Shoen contends the amended rule allows for reinstatement without full compliance with prior disciplinary orders.

We elect to consider the petition for a writ of mandamus

This court may issue a writ of mandamus "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," NRS 34.160, when "there is not a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170. But whether to do so in a particular case is entirely within this court's discretion. *Okada v. Eighth Judicial Dist. Court*, 134 Nev. 6, 8, 408 P.3d 566, 569 (2018).

Here, Shoen has no other remedy in the ordinary course of law. While SCR 105(3)(a) provides, generally, for "an appeal from a decision of a hearing panel," and SCR 116(1)-(2) provides that a hearing panel's findings and recommendation on reinstatement petitions are reviewable by this court, both rules contemplate review of decisions on the merits, not orders striking filings. We conclude that an order striking a petition for reinstatement is not directly appealable or automatically reviewed under the Supreme Court Rules, and thus Shoen lacks a plain, adequate, and speedy remedy to chal-

lenge the order. Further, the petition presents a question of law that could otherwise evade our review and affects any attorney who was suspended before the 2018 amendments to SCR 116. We therefore exercise our discretion to entertain Shoen's writ petition.

A reinstatement petition is governed by the rules in effect when the petition is filed

The primary concern in applying amended SCR 116(2) to Shoen's petition for reinstatement is whether doing so violates the general rule that statutes and other rules should not be applied retroactively: "In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively . . . ." *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008). Shoen, however, did not seek reinstatement until after SCR 116(2) was amended. And while Shoen was disciplined before the amendments to SCR 116, the disciplinary action and the reinstatement action are two different proceedings.[1] Thus, because SCR 116 is specific to reinstatement proceedings and Shoen filed her reinstatement petition after the amendments to SCR 116 took effect, the amended rule applies to her reinstatement petition without implicating the general rule against retroactivity.

Given the amendment to SCR 116(2), Shoen may file a petition for reinstatement regardless of the condition precedent to reinstatement imposed in the prior disciplinary order

Our 2016 disciplinary order required that Shoen pay restitution as a condition precedent to her applying for reinstatement to the practice of law. At that time, SCR 116 did not address specific criteria that a suspended attorney had to demonstrate in order to be reinstated. Instead, it provided more generally that an attorney had to demonstrate the moral qualifications, competency, and learning in the law to be reinstated and that the attorney's resumption of the practice of law would not be detrimental to the public, the bar, or the administration of justice. SCR 116(2) (2016). Accordingly, this court sometimes included conditions in its disciplinary orders that the attorney had to satisfy either before applying for reinstatement or before being approved for reinstatement. In doing so, the court tried to fill gaps in the reinstatement rule on a case-by-case basis. That ad hoc approach is no longer necessary in light of the amended reinstatement rule. And enforcing those ad hoc conditions without exception undermines the reasons for the amendments. *See* SCR

[1]Indeed, when the record of a reinstatement proceeding is filed with this court for its review of the hearing panel's findings and recommendation, the matter is docketed as a separate matter from any previous disciplinary proceeding regarding the attorney seeking reinstatement.

116(2) (2018) (allowing an attorney to be reinstated despite failing to fully comply with the terms of a previous disciplinary order).

CONCLUSION

Accordingly, we conclude that an attorney who has not completed conditions precedent to reinstatement that were included in a disciplinary order may nonetheless petition for reinstatement but will have to "present[ ] good and sufficient reason why the attorney should nevertheless be reinstated." *Id.* Because Shoen's petition for reinstatement was not considered under this standard and because she has no other avenue for relief, writ relief is appropriate. *See* NRS 34.170. We therefore grant Shoen's petition for a writ of mandamus and direct the clerk of this court to issue a writ of mandamus directing the hearing panel chair to vacate the order striking Shoen's reinstatement petition.[2]

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Cadish, and Silver, JJ., concur.

---

[2]Nothing in this opinion should be construed as commenting on the merits of Shoen's reinstatement petition.