CANNON COCHRAN MANAGEMENT SERVICES, INC.; AND LAS VEGAS METROPOLITAN POLICE DEPARTMENT, APPELLANTS, *v.* DAVID FIGUEROA, RESPONDENT.

No. 78926

July 30, 2020 468 P.3d 827

Appeal from a district court order granting a petition for judicial review in a workers' compensation action. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

Lewis Brisbois Bisgaard & Smith LLP and *Daniel L. Schwartz* and *Joel P. Reeves*, Las Vegas, for Appellants.

Jason D. Mills & Associates, Ltd., and *Jason D. Mills*, Las Vegas, for Respondent.

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

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider the scope of the law-enforcement exception to the "going and coming rule" in workers' compensation matters. In doing so, we adopt a totality-of-the-circumstances approach to determine whether an officer's injury qualifies for the exception. Applying that approach here, we conclude the appeals officer's decision was not supported by substantial evidence and was therefore arbitrary and capricious. Therefore, we affirm the district court's order granting judicial review and reversing the appeals officer's decision.

FACTS AND PROCEDURAL HISTORY

Respondent David Figueroa is a police officer with appellant, the Las Vegas Metropolitan Police Department (LVMPD). After previously being absent from work for an extended period of time due to injury, Figueroa was assigned to a re-acclimation program at LVMPD, where he performed his duties using a standard patrol car. Upon completion of the re-acclimation program, Figueroa was set to resume his duties as a traffic officer, which mandated his riding a motorcycle.

On March 7, 2015, Figueroa was scheduled to work until 12:30 a.m., when his sergeant informed him at 11:45 p.m. he could leave early for the day. Although he would still be paid for the remainder of his shift, Figueroa was allowed to start his commute home ear-

lier than normal. However, this was not a normal commute home. Figueroa rode his personal motorcycle to work that day, and his sergeant instructed him to get some "seat time" on his way home. "Seat time" in this context means to practice riding a motorcycle. Figueroa's sergeant wanted him to get re-acclimated to riding a motorcycle, as Figueroa would be transitioning back to his assignment as a traffic officer, which mandated his riding a motorcycle. Figueroa's sergeant also told him to stay close to his phone in case they tried to contact him. Additionally, although he was given an early out for the day, because Figueroa was still "on the clock" and getting paid, he was required to abide by LVMPD's employment policies, such as refraining from consuming alcohol.

During his drive home, Figueroa was wearing his personal clothing but was carrying certain service-related items such as his weapon, handcuffs, and police radio in a separate bag. Five minutes before Figueroa's shift was originally scheduled to end and when Figueroa was approximately a mile and a half from the police station, he was struck by another vehicle. Figueroa was placed in a medically induced coma for six days given the severity of his injuries. Following this accident, Figueroa was unable to work for approximately a year and a half.

Figueroa filed a workers' compensation claim for the injuries he sustained in the accident. Appellant Cannon Cochran Management Services, Inc., denied the claim, and Figueroa appealed the decision. The appeals officer likewise denied Figueroa's claim, concluding Figueroa's injury did not arise out of and in the course and scope of his employment. In reaching this decision, the appeals officer determined that at the time of the accident, Figueroa was not performing his job duties as a police officer, was on his commute home, and was riding his personal motorcycle, such that no exception to the general rule excluding compensation while going to or from work applied. Figueroa filed a petition for judicial review, and the district court granted the petition, concluding that Figueroa's accident indeed arose out of and in the course of his employment.

DISCUSSION

This court reviews an administrative agency's decision in the same manner a district court reviews an administrative agency's decision: by reviewing the record the agency considered "to determine whether the agency's decision is supported by substantial evidence." *Tighe v. Las Vegas Metro. Police Dep't*, 110 Nev. 632, 634, 877 P.2d 1032, 1034 (1994). "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *Id*. (internal quotations omitted). "A decision that lacks support in the form of substantial evidence is arbitrary or capricious, and thus an abuse of discretion that warrants reversal." *Id.*; NRS 233B.135(3).

Therefore, this court gives no deference to the district court when reviewing an order regarding a petition for judicial review. *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011).

NRS 616C.150(1) provides that an injured employee may receive compensation if he or she establishes "by a preponderance of the evidence that the employee's injury arose out of and in the course of his or her employment." "An injury occurs within the course of employment when there is a causal connection between the injury and the nature of the work or the workplace." *Fanders v. Riverside Resort & Casino, Inc.*, 126 Nev. 543, 546-47, 245 P.3d 1159, 1162 (2010).

This court has recognized a general rule, known as the "'going and coming' rule, [which] preclude[s] compensation for most employee injuries that occur during travel to or from work." *MGM Mirage v. Cotton*, 121 Nev. 396, 399, 116 P.3d 56, 58 (2005). However, the going-and-coming rule has exceptions. *Tighe*, 110 Nev. at 635-36, 877 P.2d at 1035. One exception, known as the distinct-benefit exception, provides that an employee may still be in the course of employment when going or coming if the employee's travel "confers a distinct benefit upon the employer." *Id*. at 635, 877 P.2d at 1035. For example, we have recognized that an on-call service technician who was injured while driving his employer's van home was conferring a distinct benefit on his employer because he was still under his employer's control and was furthering his employer's business by driving the van. *Evans v. Sw. Gas Corp.*, 108 Nev. 1002, 1006, 842 P.2d 719, 721-22 (1992), *overruled on other grounds by GES, Inc. v. Corbitt*, 117 Nev. 265, 268 n.6, 21 P.3d 11, 13 n.6 (2001). Another exception pertains specifically to law enforcement.[1] *Tighe*, 110 Nev. at 636, 877 P.2d at 1035. The law-enforcement exception recognizes that law-enforcement officers generally possess a responsibility to enforce the law while traveling on public roads, so the injuries they sustain while traveling may be compensated. *Id*. (citing *Hanstein v. City of Ft. Lauderdale*, 569 So. 2d 493, 494 (Fla. Dist. Ct. App. 1990)).

As a threshold matter, we acknowledge the similarities between the distinct-benefit exception and the law-enforcement exception. It is common for courts to consider whether a law-enforcement officer was conferring a benefit on his or her employer in determining whether the law-enforcement exception applies. However, because the distinct-benefit exception is separate from the law-enforcement exception, this overlap in analysis is not appropriate. As a result, we now clarify that the distinct-benefit exception applies only to non-law-enforcement employees, while the law-enforcement exception is reserved for law-enforcement officers. Whether a

[1]We recognize that other exceptions to the going-and-coming rule exist, but because they are not applicable to this case, we decline to address them.

law-enforcement officer conferred a benefit upon his employer is a circumstance we can take into account in considering whether the law-enforcement exception applies. However, whether or not a law-enforcement officer conferred such a benefit, it is not an exception unto its own. As we have previously recognized, law enforcement is a specialized industry and "policeman are 'on call' in a special sense." *Tighe*, 110 Nev. at 636, 877 P.2d at 1035 (quoting 1 Arthur Larson, *Larson's Workmen's Compensation Law* § 16.17 (1993)). Because we have recognized that law enforcement differs from traditional employment, it is only logical that the traditional exceptions would not apply to the law-enforcement profession. Accordingly, we conclude that the distinct-benefit exception to the going-and-coming rule is not applicable to law-enforcement officers.

Now, we turn to the application of the law-enforcement exception in this matter. In *Tighe*, we concluded the law-enforcement exception applied after we considered the specific facts surrounding the officer's injury. 110 Nev. at 636, 877 P.2d at 1035-36. Such facts included that the officer was on call, driving a police vehicle equipped with a police radio, and was prepared to respond to public emergencies should he encounter one. *Id*. However, these specific facts were not meant to serve as an exhaustive list of criteria for when the law-enforcement exception could be applied.

We therefore take this opportunity to clarify that a court must look to the totality of the circumstances on a case-by-case basis in determining whether the law-enforcement exception applies. *See Mineral Cty. v. Indus. Comm'n of Colo.*, 649 P.2d 728, 730 (Colo. App. 1982) (concluding "the Commission's determination whether an accident has occurred in the course of employment depends on an examination of the totality of the circumstances"); *City of Springfield v. Indus. Comm'n*, 614 N.E.2d 478, 480-81 (Ill. App. Ct. 1993) ("The principal issue, as we have indicated, was whether the employer, under all the circumstances, can be deemed to have retained authority over the employee."). Therefore, a court must take into account all of the circumstances surrounding a law-enforcement officer's injury to properly assess whether a connection can be established to his or her employment.[2]

[2]While some circumstances might not have the same weight if they were considered in regard to a different type of employment, this is precisely why the law-enforcement exception is applicable over the distinct-benefit exception. For example, in this case, Figueroa was precluded from consuming alcohol at the time of the accident. While this same policy might also be present in other professions such as sales, it would not affect a salesperson in the same way it would a law-enforcement officer. Because law-enforcement officers are on call in a special sense and have a general duty to enforce the law on public thoroughfares, this policy forbidding officers from consuming alcohol while still on the clock ensures officers remain vigilant and prepared to respond to emergencies they may encounter. Because a salesperson would not bear the same responsibility should he encounter a public emergency, a circumstance like this would not matter in that profession.

Applying the totality-of-the-circumstances test to Figueroa's accident, it is clear he qualifies for the law-enforcement exception. First, at the time of the accident, Figueroa was still on the clock, and thus being paid. While this fact alone does not render Figueroa's claim compensable, as the appeals officer correctly noted, it is certainly one relevant circumstance we must take into account. As mentioned previously, because Figueroa still had time remaining on his shift, he was unable to consume any alcohol pursuant to LVMPD's employment policies. This fact illustrates LVMPD was still exerting a certain degree of control over Figueroa at the time of his accident, supporting the conclusion that he was within the course and scope of his employment. Finally, at the time of the accident, Figueroa was fulfilling his sergeant's order to get "seat time." As a result, Figueroa was not fully discharged from all of his responsibilities for the day. Instead, this circumstance illustrates Figueroa was performing a work assignment and was still under the control of his employer.

Accordingly, after applying a totality-of-the-circumstances approach, we conclude the appeals officer erred in denying Figueroa's workers' compensation claim, as the determination that Figueroa's injury did not arise out of and in the course of his employment is not supported by substantial evidence and is therefore arbitrary and capricious in light of the evidence in the record as a whole. *See* NRS 233B.135(3) (providing a court may set aside an agency's decision if it is: (1) "[c]learly erroneous in view of the reliable, probative and substantial evidence on the whole record[,]" or (2) "[a]rbitrary or capricious or characterized by abuse of discretion").

CONCLUSION

Because the appeals officer's decision is arbitrary and capricious in light of the totality of the circumstances surrounding Figueroa's accident as shown in the whole record, we affirm the district court's order granting Figueroa's petition for judicial review and reversing the appeals officer's decision.

Stiglich and Silver, JJ., concur.

CHARLES SCHUELER, Appellant, *v.*
AD ART, INC., a Foreign Corporation, Respondent.

No. 75688-COA

July 30, 2020 472 P.3d 686

Appeal from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; Michael Villani, Judge.

Reversed and remanded.

Brenske & Andreevski and *William R. Brenske, Jennifer Andreevski*, and *Ryan D. Krametbauer*, Las Vegas, for Appellant.

Ray Lego & Associates and *Timothy F. Hunter*, Las Vegas, for Respondent.

Kravitz Schnitzer Johnson, a Professional Corporation, and *Alexandra B. McLeod, M. Bradley Johnson*, and *Bianca Gonzalez*, Las Vegas, for Amicus Curiae Las Vegas Defense Lawyers.

Robison, Sharp, Sullivan & Brust and *Therese M. Shanks*, Reno, for Amicus Curiae Nevada Justice Association.

Before the Court of Appeals, Gibbons, C.J., Tao and Bulla, JJ.

OPINION

By the Court, Bulla, J.:

This appeal arises from a tort action sounding in strict products liability. Appellant Charles Schueler was seriously injured while servicing a large MGM Grand sign located atop a 150-foot tall steel pylon.[1] Schueler asserts that respondent Ad Art, Inc., designed, manufactured, and sold the allegedly defective sign to MGM and, therefore, should be strictly liable for his injuries. The district court granted summary judgment in Ad Art's favor, concluding that the sign was not a product for purposes of applying strict products liability.

In this opinion, we address what constitutes a "product" within the context of the doctrine of strict products liability and, specifi-

[1]The sign is situated in front of the MGM Grand Resort and Casino on the east side of Las Vegas Boulevard, facing north and south, and features displays on both sides. Specifically, the sign incorporates the MGM's lion logo, large lighted MGM letters, and multiple LED screens that feature various attractions. Although this type of sign is often referred to as a pylon sign, only the display portion of the MGM sign, which is located at the top of the pylon tower, is at issue in this case.

cally, the doctrine's applicability to large fixtures such as the MGM sign. Preliminarily, we discuss the pertinent history of strict products liability and whether a limiting definition of "product" should be adopted in Nevada. We next examine whether large signs, like the MGM sign, are products within the contemplation of section 402A of the Second Restatement of Torts, where, as here, the party allegedly engaged in producing and designing the sign was in the business of making such signs. In doing so, we address the relevance of *Calloway v. City of Reno*,[2] on which both parties rely. Finally, we address the relevant arguments raised in this appeal, including whether custom-made products are exempt from the doctrine of strict liability and whether the policy considerations underlying the doctrine of strict products liability provide the appropriate basis for determining whether the MGM pylon sign falls within the ambit of strict products liability.

Applying the principles set forth in section 402A of the Second Restatement of Torts, as well as relevant jurisprudence, we hold that the MGM sign is a product for purposes of strict liability, and therefore, the district court erred when it concluded that the sign was not a product within the contemplation of the doctrine of strict products liability. Consequently, we reverse and remand.

I.

Ad Art is a commercial sign manufacturer that has existed in various corporate iterations since at least 1968.[3] In 1993, MGM commissioned Ad Art to design, manufacture, and install its sign. Between 1993 and 1994, Ad Art and local Las Vegas construction subcontractors installed a 150-foot tall steel pylon embedded in a concrete foundation on MGM's property, and then Ad Art mounted and installed its large sign on top of the steel pylon. Ad Art employees designed, engineered, and managed the production and installation of the sign. Ad Art fabricated the sign in sections at its manufacturing facility in Stockton, California, and then shipped the sign by way of truck to Las Vegas, where it was subsequently attached to the pylon. According to Terry Long, Ad Art's president at the time, "the

[2]116 Nev. 250, 993 P.2d 1259 (2000).

[3]We recognize that Ad Art raised the issue of successor liability in the district court and that this issue is indeed a contentious one, involving unresolved factual disputes. The district court, however, did not reach the successor liability issue in its order granting summary judgment, and therefore, the matter is not before this court. *See N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 111 n.3, 807 P.2d 728, 730 n.3 (1991) (declining to address an issue the district court did not rule on in the first instance). Accordingly, we express no opinion as to whether successor liability should adhere to Ad Art in the instant case, and nothing in this opinion should be construed as a resolution of that issue. With that said, for purposes of our analysis herein, in general terms, we treat Ad Art as the manufacturer of the MGM pylon sign that was produced in the early 1990s.

installation of the MGM pylon was done by [Ad Art's] people" with the assistance of some necessary third-party contractors, and after the installation was completed as intended, "Ad Art didn't do any changing of the sign." In 2013, MGM hired Schueler to service the pylon sign's LED display. While Schueler was walking on the sign's interior platform, a panel of Alucobond, which was affixed to the floor as part of the sign's original design, allegedly failed, causing Schueler to fall 150 feet to the ground below. As a result, Schueler suffered serious bodily injury.

Schueler filed a complaint against Ad Art, alleging, among others, a cause of action sounding in strict products liability. Ad Art filed a motion for summary judgment, arguing that it was not a successor corporation; that the MGM sign was not a product for purposes of strict liability; and that the statute of repose was applicable. The district court initially denied the motion, concluding that Ad Art was in the business of manufacturing signs, that the sign was a product subject to strict liability claims, and that one-of-a-kind products are not precluded from strict liability claims. Ad Art moved for reconsideration and argued that it was not subject to successor liability and that the sign was not a product for purposes of strict liability. Upon reconsideration, the district court reversed course and granted Ad Art's motion for summary judgment. Specifically, the district court concluded that the sign was not a product that is subject to the doctrine of strict liability. The district court, however, did not reach the issue of successor liability. Schueler now appeals.

II.

We review a district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that no genuine issue of material fact exists and that the moving party is entitled to judgment as a matter of law. *Id.* All evidence must be viewed in the light most favorable to the nonmoving party. *Id.* On appeal from a summary judgment, this court may be required "to determine whether the law has been correctly perceived and applied by the district court." *Evans v. Samuels*, 119 Nev. 378, 380, 75 P.3d 361, 363 (2003) (internal quotation marks omitted).

III.

Before addressing the specifics of Schueler's appeal, a discussion regarding the history of strict products liability and its policy objectives is appropriate. The doctrine of strict products liability finds its genesis in the nineteenth-century English case, *Winterbottom v. Wright*.[4] 2 Dan B. Dobbs, Paul T. Hayden, and Ellen M. Bublick,

[4](1842) 10 M. & W. 109; 152 Eng. Rep. 402 (Exch. Pl.).

The Law of Torts § 450 (2d ed. 2017) (hereinafter, *Law of Torts*). There, the court fashioned the privity rule, holding that a negligent manufacturer is generally not liable for injuries caused by its defective products *unless* the victim is the person who actually purchased the product. *Id.* Courts in the United States adopted the holding in *Winterbottom*, and the privity rule survived into the twentieth century. *Id.* In *MacPherson v. Buick Motor Co.*, 111 N.E. 1050 (N.Y. 1916), an opinion authored by Judge Benjamin Cardozo, the New York Court of Appeals effectively abolished the privity requirement in negligence cases, and subsequently, *MacPherson* was adopted and applied in numerous jurisdictions. *Law of Torts, supra*, § 450, at 893.

Although plaintiffs who lacked privity could now theoretically recover from manufacturers in negligence, this was an onerous process and often bore no fruit because negligence was quite difficult to prove in this type of case. *Id.* This is so because plaintiffs were required "to prove that a particular party in the product-supply chain had failed to exercise due care." Kyle Graham, *Strict Products Liability at 50: Four Histories*, 98 Marq. L. Rev. 555, 568-69 (2014). As a result, plaintiffs began bringing defective product claims under contract theories, rather than in tort, specifically claims for breach of express or implied warranty; thus, if the plaintiff proved such a breach, the manufacturer would be liable in contract, and the plaintiff need not prove fault. *Law of Torts*, *supra*, § 450, at 893-94.

Because warranty theories of recovery reintroduced the privity problem, courts again began crafting exceptions to the rule. *Id.* And in 1960, the New Jersey Supreme Court eliminated the privity rule in warranty cases altogether, holding that an implied-warranty claim could survive absent privity and despite manufacturers' disclaimers. *Henningsen v. Bloomfield Motors, Inc.*, 161 A.2d 69, 80-84, 99-101 (N.J. 1960). But, three years later, the *Henningsen* holding was surpassed by the California Supreme Court's decision in *Greenman v. Yuba Power Products, Inc.*, 377 P.2d 897 (Cal. 1963), "which shifted the focus of products-liability reform from warranty protections to 'pure' tort law." Graham, *Strict Products Liability*, *supra*, at 576.

In *Greenman*, a case involving a defective power tool, the court held, "[a] manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being." 377 P.2d at 900. The *Greenman* court went on to explain why tort, rather than contract, was the more appropriate vehicle for strict liability claims. *Id.* at 901. The court noted specifically that abandonment of the privity rule "make[s] clear that the liability is not one governed by the law of contract warranties but by the law of strict liability in tort." *Id.* Moreover, the court concluded, "[t]he purpose of such liability is to insure that the costs of injuries re-

sulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." *Id.* In sum, "the *Greenman* court regarded warranty as still too closely tethered to the law of sales to provide an adequate basis for an obligation imposed for public-policy reasons." Graham, *Strict Products Liability*, *supra*, at 577.

Building on *Greenman*, Dean William Prosser incorporated and advanced the ideas expressed therein in the Restatement (Second) of Torts section 402A. *Law of Torts*, *supra*, § 450, at 894 (discussing Dean Prosser's involvement in the drafting of the Second Restatement). Section 402A provides that if a product is defective and that defect causes harm to person or property, liability will be imposed upon the manufacturer or distributors, notwithstanding the manufacturer's or distributors' lack of fault and whether or not they were in privity with the plaintiff.[5] Thus, Prosser concisely formulated and promulgated the holding in *Greenman*, and soon after, courts "widely adopted section 402A." *Law of Torts*, *supra*, § 450, at 894 (noting that some jurisdictions retained implied-warranty theories of recovery).

Although policy rationales underpinning the doctrine vary to one degree or another, they are generally consistent and always have the consumer's or ultimate user's ability to recover in mind. *See, e.g.*, *Law of Torts*, *supra*, § 450, at 895-96 (citing compensation, loss spreading, deterrence, and representation as policy objectives); *see also* Restatement (Second) of Torts § 402A cmt. c (same). Likewise, in *Calloway v. City of Reno*, the Nevada Supreme Court identified three policy rationales supporting the doctrine of strict liability: (1) "promot[ing] safety by eliminating the negligence requirement" (deterrence); (2) "spread[ing] the costs of damage from dangerously defective products to the consumer by imposing them on the manu-

[5]Section 402A provides:

> (1) One who sells any product in a defective condition unreasonably dangerous to the *user* or consumer or to his property is subject to liability for physical harm thereby caused to the *ultimate user* or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Restatement (Second) of Torts § 402A (Am. Law Inst. 1965) (emphases added).

facturer or seller" (loss spreading); and (3) "concerns about a plaintiff's ability to prove a remote manufacturer's or seller's negligence" (representation and deterrence). 116 Nev. 250, 268, 993 P.2d 1259, 1271 (2000), *overruled on other grounds by Olson v. Richard*, 120 Nev. 240, 241, 89 P.3d 31, 31-32 (2004). Consequently, the rationales are generally well defined, consistent, and aimed at protecting users and consumers by providing an avenue of recovery for losses sustained as a result of defective products.

Importantly, the Nevada Supreme Court has traditionally embraced these principles and long recognized that the doctrine of strict products liability in tort is governed by the Restatement (Second) of Torts section 402A. *See, e.g.*, *Rivera v. Philip Morris, Inc.*, 125 Nev. 185, 192-93, 209 P.3d 271, 276 (2009) (stating that "[t]he Restatement (Second) of Torts section 402A governs strict product liability"); *Calloway*, 116 Nev. at 268, 993 P.2d at 1270-71 (referencing and quoting section 402A); *see also Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 441-42, 420 P.2d 855, 857 (1966) (recognizing the doctrine of strict products liability, citing Dean Prosser).

IV.

A.

With this historical understanding in mind, we now focus our discussion on the proper method for determining whether an item or good is a "product" for the singular purpose of applying the doctrine of strict products liability. The determination of whether something constitutes a product for purposes of strict liability is a question of law, which is to be settled by the court. *Brooks v. Eugene Burger Mgmt. Corp.*, 264 Cal. Rptr. 756, 764 (Ct. App. 1989) ("[W]hether or not the subject object or instrumentality is a 'product' is a question of law for the trial court and subject to de novo review by [the reviewing court] upon appeal."); *see also* Restatement (Third) of Torts: Prod. Liab. § 19 cmt. a (Am. Law Inst. 1998) ("[I]n every instance it is for the court to determine as a matter of law whether something is, or is not, a product.").

Although courts must determine as a matter of law whether a particular item or instrumentality is a product for purposes of strict liability, doing so is not necessarily an elementary undertaking. This is so, in part, because the Second Restatement does not provide a standard definition of what constitutes a product. Instead, it employs the policy objectives referenced above, along with examples of items that ordinarily would be considered products. Specifically, comment d of section 402A provides a nonexhaustive list of tangible items to which the doctrine applies, including "an automobile, a tire, an airplane, a grinding wheel, a water heater, a gas stove, a power tool, a riveting machine, a chair, and an insecticide," whereas com-

ment c articulates the policy rationales underpinning the doctrine.[6] Thus, it appears that the drafters assumed that courts would develop the doctrine of strict liability via the common law by applying the policy objectives to the facts of the case presented, while simultaneously using the nonexhaustive list of items and goods in comment d as guideposts to ensure adherence to the doctrine's stated purpose. In other words, section 402A purposely did not provide a precise definition of product and instead supplied the framework for a case-by-case methodology for determining whether an item is or is not a product for purposes of strict liability.

B.

Notably, the parties fundamentally disagree about what bestows product status upon an item or instrumentality for purposes of imposing strict products liability. Neither the Nevada Legislature nor the Nevada Supreme Court have adopted a fixed or limited definition of "product" in this context, but the supreme court has recognized the policy objectives articulated in section 402A. *Calloway*, 116 Nev. at 268, 993 P.2d at 1270-71. Nonetheless, our corpus of law contains no clear method for determining whether an item or good is a product as it relates to strict products liability.

In the interest of resolving this unanswered question, this court issued an order directing supplemental briefing and inviting participation by amicus curiae on the following question: "What is the proper definition of a product under Nevada products liability law for purposes of strict liability?" *Schueler v. Ad Art, Inc.*, Docket No. 75688-COA (Order Directing Supplemental Briefing and Inviting Participation by Amicus Curiae, August 22, 2019).

In Schueler's supplemental brief, he argues that this court should not adopt a standard definition of product and, instead, recommends a case-by-case approach, focusing on the public policy objectives that underpin the doctrine of strict liability. The Nevada Justice Association filed an amicus brief in support of Schueler, wherein it argues for the adoption of the definition set forth in the Restatement (Third) of Torts. Ad Art, on the other hand, does not address the question directly—but appears to argue for a case-by-case inquiry. Additionally, Las Vegas Defense Lawyers filed an amicus brief

[6]Those policy rationales include (1) "that the seller . . . has undertaken and assumed a special responsibility toward . . . the consuming public who may be injured by [its products]"; (2) "that the public has the right to and does expect . . . that reputable sellers will stand behind their goods"; (3) "that public policy demands that the burden of accidental injuries caused by products or consumption be placed upon those who market them, and be treated as cost of production"; and (4) "that the consumer [or user] of such products is entitled to the maximum of protection . . . and the proper persons to afford it are those who market the products." Restatement (Second) of Torts § 402A cmt. c (Am. Law Inst. 1965).

and proffered the following definition of a product: "a manufactured good capable of traveling through interstate commerce."

After careful consideration, we conclude that adopting a fixed definition of product for purposes of strict liability, such as the Third Restatement's, is not necessary for two reasons. First, applying the policy objectives articulated in section 402A, including judicial interpretations and expansions thereof, is sufficient to resolve the question presented, and therefore, adopting a limited definition of product is unwarranted at this time.

Second, and more important, we conclude that utilizing a case-by-case methodology is the more prudent approach. Although some state legislatures have adopted statutory definitions defining what constitutes a product for purposes of strict liability, e.g., Indiana and Washington,[7] courts have largely shied away from concentrating on dictionary definitions and instead focused on the doctrine's policy objectives. *See, e.g.*, *Fluor Corp. v. Jeppesen & Co*., 216 Cal. Rptr. 68, 71 (Ct. App. 1985) (explaining "that the policy reasons underlying the strict products liability concept should be considered in determining whether something is a product" (internal quotation marks omitted)); *Lowrie v. City of Evanston*, 365 N.E.2d 923, 928 (Ill. App. Ct. 1977) ("[W]e are of the belief that the policy reasons underlying the strict products liability concept should be considered in determining whether something is a product within the meaning of . . . the Restatement."). Thus, as a general rule, the doctrine's application should be avoided where its policy objectives are not implicated. This is true even in cases where the allegedly defective product is one that would typically fall within the ambit of strict liability, but, for fact-specific reasons, does not. *See, e.g.*, *Queen City Terminals, Inc. v. Gen. Am. Transp. Corp.*, 653 N.E.2d 661, 671-73 (Ohio 1995) (concluding that because the plaintiff was heavily involved in the design and production of the defective product, the imposition of strict liability did not further the doctrine's policy objectives).

The case-by-case approach also allows the doctrine to adapt to technological advances, *see, e.g.*, *Kaneko v. Hilo Coast Processing*, 654 P.2d 343, 349 (Haw. 1982) ("In order to cope with technological advances, we decline to establish a firm definition of 'product' to which the doctrine of strict liability applies."), which is particularly beneficial in the current climate where advances in technology occur frequently. Moreover, as mentioned above, the case-by-case approach is consistent with the text and spirit of section 402A of the Second Restatement. Further, the case-by-case approach finds support in our jurisprudence, which focuses on public policy considerations in applying the doctrine of strict liability. *See Calloway v.*

[7]*See* Ind. Stat. Ann. § 34-6-2-114 (LexisNexis 2019); Wash. Rev. Code Ann. § 7.72.010 (West 2017).

City of Reno, 116 Nev. 250, 268, 993 P.2d 1259, 1271 (2000) (citing Prosser and Keeton and discussing policy rationales).

Accordingly, we conclude that the case-by-case approach is the superior methodology because it is versatile, permitting courts to analyze each case individually and adjust to changes in technology, and because it is consistent with the text and purpose of section 402A. Therefore, when determining whether an item or instrumentality is a product that falls within the scope of strict products liability, courts *must* apply section 402A of the Second Restatement, including the public policy objectives of the doctrine as well as the relevant precedents interpreting section 402A.

This is not to say, of course, that courts are never permitted to use appropriate definitions as guidance when determining whether an item is indeed a product for purposes of strict liability. A court, for example, may find useful the definition of product found in the Restatement (Third) of Torts, which states that "[a] product is tangible personal property distributed commercially for use or consumption. Other items, such as real property and electricity, are products when the context of their distribution and use is sufficiently analogous to [that] of tangible personal property." Restatement (Third) of Torts: Prod. Liab. § 19 (Am. Law Inst. 1998). Nevertheless, while this or a similar definition may be beneficial to a court when utilizing the case-by-case approach, it is not a shortcut for avoiding consideration of the policy objectives discussed above. Accordingly, if a court chooses to employ such a definition to assist it in determining whether an item or good is a product for purposes of strict liability, that court must still apply the relevant policy objectives of section 402A to establish whether the item is or is not a product within the meaning of the doctrine of strict products liability.

V.

Having concluded that the case-by-case approach in accordance with section 402A is the best method for determining whether the MGM pylon sign constitutes a product within the meaning of the doctrine of strict products liability, we now turn to the merits of the dispute. On appeal, Schueler argues that the district court erred when it granted Ad Art's motion for summary judgment. Specifically, Schueler contends that the district court incorrectly determined that the MGM pylon sign is not a product for purposes of strict product liability. Relying on *Calloway*, as well as various extrajurisdictional cases, Ad Art asserts that the district court correctly found that the MGM sign is not a product for purposes of strict liability, and therefore, the district court properly granted summary judgment in its favor.

In analyzing Ad Art's motion for reconsideration on its motion for summary judgment, the district court accepted Ad Art's reasoning

that the sign was not a product and concluded that "[t]he question of whether the MGM Pylon is a product" for purposes of strict liability turned on the supreme court's holding in *Calloway*. The district court went on to find that the *Calloway* court "held that townhomes 'were not products for purposes of strict products liability,'" and that "[t]he *Calloway* court specifically overruled [*Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971)] with respect to its application of strict products liability." The district court also concluded, relying on *Martens v. MCL Construction Corp.*, 807 N.E.2d 480 (Ill. App. Ct. 2004) (component parts), and *Dayberry v. City of East Helena*, 80 P.3d 1218 (Mont. 2003) (municipal swimming pool), that indivisible component parts, "such as bricks, supporting beams, and railings," are exempt from the doctrine of strict liability, and because "the MGM Pylon sign is [a] one of a kind object and not mass produced," it is not in the stream of commerce and thus "not a product for strict liability purposes."

A.

We conclude that the district court misinterpreted and misapplied *Calloway*'s holding. In *Calloway*, a group of homeowners filed a class action suit against the project developer, general contractor, various subcontractors, and the City of Reno, alleging construction defect claims in warranty, negligence, and strict products liability. 116 Nev. at 254, 993 P.2d at 1261-62. The subcontractors and the City moved for summary judgment on the claims against them. *Id.* at 255, 271, 993 P.2d at 1262, 1272. The district court granted the motion as to the negligence claims, reasoning that the economic loss doctrine barred the claims sounding in negligence "and that [the homeowners] had to rely on their contractual remedies to recover for economic losses." *Id.* The district court also summarily dismissed the homeowners' strict liability claims against the subcontractors and the City on the basis that "a townhouse is not a product." *Id.* at 255, 268, 993 P.2d at 1262, 1270.

Thereafter, the homeowners settled their claims against the developer and general contractor but appealed the district court's ruling as to the subcontractors and the City. *Id.* at 255, 993 P.2d at 1262-63. On appeal, the supreme court affirmed the district court, explaining that since the homeowners' losses were purely economic, the doctrine of strict liability was unavailable because "its application is limited to personal injury and property damage." *Id.* at 268, 993 P.2d at 1270 (quoting *Culinary Workers Union, Local No. 226 v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982)). Furthermore, the court concluded, "we agree with the district court's conclusion, *in this instance*, that the townhouses are not 'products' for purposes of strict products liability." *Id.* (emphasis added). As evidenced by the court's qualifying language, "in this instance," the holding in *Calloway* is narrow and confined to the specific facts of that case,

and does not, as the district court concluded here, stand for the broad proposition that townhouses are never products for purposes of strict liability.

In reasoning that *Calloway* excludes buildings from the doctrine of strict liability, both the district court and Ad Art appear to rely on the court's discussion of buildings as products (or non-products) and its overruling of *Worrell*. This reliance, however, is misplaced. To be sure, the *Calloway* court did explain that "[s]ome courts have concluded that a building can constitute a 'product' under strict products liability," whereas others "have concluded that strict products liability does not apply to buildings." *Id.* at 268-69, 993 P.2d at 1271. And although the court cited authorities regarding both legal theories, it did not opine on which method is better, nor did it expressly incorporate either approach into Nevada law. Instead, the court immediately segued into its discussion of *Worrell v. Barnes*, 87 Nev. 204, 484 P.2d 573 (1971)—a case involving a contractor who, during a remodeling project, installed a leaky gas line fitting in the plaintiff's home that failed and caused fire damage.[8]

Ultimately, the *Calloway* court overruled *Worrell*, holding that "[t]he contractor who installed the gas line fitting [there] should not have been subject to the doctrine of strict products liability" because he was "not engaged in the business of 'manufacturing' or selling" the defective product—i.e., the gas line fitting—which section 402A of the Restatement requires. *Calloway*, 116 Nev. at 270-71, 993 P.2d at 1272. Thus, the fact that *Worrell* involved a building was collateral to the court's holding, as the issue turned on whether the contractor was a seller or manufacturer of the faulty product, and the *Calloway* court concluded he was not, hence the overruling. In other words, the court overruled *Worrell* not strictly because the case involved a building, but because the contractor, who simply installed the gas line fitting, was not a seller or manufacturer and should have never been subjected to a strict products liability claim.

In addition, the *Calloway* court's primary ground for affirming the district court's refusal to apply the doctrine of strict products liability was based on the economic loss doctrine, not the nature of the product itself (i.e., townhomes). As the court noted, "[t]he

[8]In *Worrell*, a homeowner hired a contractor to do some remodeling, which "consisted of some carpentry work and the connection of various appliances in the house to an already existing liquefied petroleum gas system." 87 Nev. at 205, 484 P.2d at 574. The contractor did not supply the appliances, but the project required him to install a gas line for a new water heater. *Id.* As it turned out, however, the gas line had a leaky fitting, and the leak eventually caused a fire that damaged the house and personal property therein. *Id.* at 206, 484 P.2d at 574-75. The homeowner sued the contractor for negligence, strict liability, and breach of warranty. *Id.* at 206, 484 P.2d at 575. The district court dismissed the strict liability and warranty claims, and the jury returned a verdict for the defendant on the negligence claim. *Id*. On appeal, the supreme court reversed. *Id.* at 208-09, 484 P.2d at 576.

doctrine of strict products liability was developed to assist plaintiffs who could not prove that products which caused physical injury at the point of use had been manufactured negligently." *Calloway*, 116 Nev. at 268, 993 P.2d at 1270 (alteration in original) (quoting *Local Joint Exec. Bd. v. Stern*, 98 Nev. 409, 411, 651 P.2d 637, 638 (1982)). But, where a plaintiff seeks to recover purely economic losses, the doctrine of strict liability is unavailable because "its application is limited to personal injury and property damage [other than the product itself]." *Id.* Therefore, the court reasoned that because the "appellants seek to recover purely economic loss with respect to the defective townhouses," the district court correctly dismissed their strict liability claims pursuant to the economic loss doctrine. *Id.* Only after reaching this conclusion did the court conclude that "[m]oreover, we agree with the district court's conclusion, *in this instance*, that the townhouses are not 'products' for purposes of strict products liability." *Id.* (emphasis added). *Calloway*'s holding therefore can be reduced to three components: (1) parties alleging only economic loss cannot invoke the doctrine of strict products liability and instead must rely on warranty claims, 116 Nev. at 268, 993 P.2d at 1270; (2) strict products liability claims are viable *only* against those who are engaged in the business of selling or manufacturing the defective product in question; and (3) "the structures at issue in [that] case [were] not 'products' for purposes of strict products liability," *id.* at 254, 993 P.2d at 1261.

Accordingly, there is no language in *Calloway* that unequivocally and categorically removes buildings, or manufacturers thereof, from the ambit of strict products liability, and there certainly is no language that addresses large commercial fixtures such as the sign at issue here. However, even if *Calloway* did stand for the proposition that buildings are not products in the context of strict liability, it would be inapposite here because this case involves a sign (albeit a large one), and not a building designed for human occupancy like the townhouses in *Calloway*. As Schueler noted during oral argument, although the 150-foot tall pylon is permanently affixed to a concrete foundation, the sign itself can be removed from the top of the pylon and transported elsewhere, something generally not true of buildings or residential homes. Thus, to the extent that *Calloway* precludes buildings from the application of strict products liability, we decline to expand its holding, as the district court did, to conclude that the MGM pylon sign is akin to a commercial or residential building, thereby precluding the application of strict products liability.

B.

Applying this understanding of *Calloway* to the instant case, we hold that the district court's conclusion that the MGM pylon sign is not a product for purposes of strict products liability fails as a matter

of law. First, the district court's conclusion that the MGM pylon sign is not a product is predicated on the premise that, under *Calloway*, buildings (e.g., townhomes) are exempt from the doctrine of strict liability. As explained, *Calloway* does not demand such a conclusion. Even if *Calloway* did permit such an inference, however, the district court's conclusion would still be erroneous because the MGM pylon sign is a commercial sign, not a building intended or designed for human occupancy. And neither Ad Art nor the district court cited to any relevant or persuasive authority supporting the supposition that commercial pylon signs are significantly analogous to buildings so as to remove them from the sphere of strict liability. In fact, Ad Art failed to cite any authority which states that large commercial signs or the like ought to be treated as buildings for purposes of strict liability. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (rejecting arguments that are not supported by relevant authority). Nor is this court aware of any authority that has reached that or a similar conclusion. Moreover, unlike a building or home, the sign itself can be detached from the steel pylon on which it rests, moved somewhere else, and replaced with a different sign mounted on top of the same pylon.

Second, Schueler is not claiming only economic loss. Indeed, his complaint alleges that he fell 150 feet while servicing the pylon sign, resulting in *serious bodily injury*. Third, Ad Art built and sold the pylon sign to MGM, and Ad Art was in the business of selling and manufacturing commercial signs. Unlike the defendants in *Calloway* or *Worrell*, Ad Art was not simply a subcontractor or installer of component parts. On the contrary, the 1993 work permit lists Ad Art as the general contractor, and the record further indicates that Ad Art built, sold, and designed the MGM pylon sign. Therefore, the district court misapplied *Calloway* when it granted summary judgment for Ad Art.

C.

The district court also committed legal error when it concluded that because "the MGM Pylon sign is [a] one of a kind object and not mass produced," it is not in the stream of commerce and thus "not a product for strict liability purposes."[9] Contrary to the district court's conclusion, a product need not be mass-produced to be in the stream of commerce, nor are unique products excluded from the realm of strict liability. The term "stream of commerce" does not

[9]Insofar as Ad Art or the district court suggest that the pylon sign has been integrated into the hotel or casino, we reject this argument. *See Calloway*, 116 Nev. at 271 n.5, 993 P.2d at 1272 n.5; *Keck v. Dryvit Sys., Inc.*, 830 So. 2d 1, 7 (Ala. 2002); *see also Martens*, 807 N.E.2d at 493-94. Moreover, because we conclude the sign is not a building, the Alucobond flooring of the sign is not an indivisible component part of a building that works to exempt the pylon sign from the doctrine of strict liability.

appear in the Restatement Second, and generally, "the phrase has been used by courts to make the distinction between the one time or casual seller to whom strict products liability does not apply and a defendant engaged in the business of selling products." *Boddie v. Litton Unit Handling Sys.*, 455 N.E.2d 142, 149 (Ill. App. Ct. 1983); *see also* 63 Am. Jur. 2d *Products Liability* § 658 (1997). In this case, Ad Art was engaged in the business of making and selling commercial signs; therefore, its products are inescapably in the stream of commerce.

Furthermore, the great weight of authority rejects the notion that unique or custom-made items or goods are not products for purposes of strict liability, especially where, as here, the defendant builds and sells such products in the ordinary course of its business. *See, e.g.*, *Wirth v. Clark Equip. Co.*, 457 F.2d 1262, 1267 (9th Cir. 1972) ("We think that the custom-built concept need not be fatal to the plaintiff's case . . . , [as] the basic structure of the machine here concerned was . . . developed and advertised by the defendant."); *Munhoven v. Northwind Marine, Inc.*, 353 F. Supp. 2d 1072, 1074 (D. Alaska 2005) (relying on section 402A, the court rejected defendant's argument that a skiff was not a product for purposes of strict liability because it was custom and not mass produced, holding "[t]here is nothing in Alaskan law, nor the Restatement, imposing such a requirement"); *Boddie*, 455 N.E.2d at 149 (concluding that a custom conveyor system was a product for purposes of strict liability because the defendant was engaged in the business of selling such products and marketed them to buyers); *Sprung v. MTR Ravensburg, Inc.*, 788 N.E.2d 620, 623-24 (N.Y. 2003) (holding that the defendant was not a casual seller because "the product was built for market sale in the regular course of the manufacturer's business," despite the fact that it was one-time, custom fabrication); *see also* 63 Am. Jur. 2d *Products Liability* § 658 (1997) (explaining there is no requirement that the product "be mass-produced or widely marketed, and it is sufficient if a seller is engaged in the business of selling a product, and markets it to a buyer for the buyer's use").

Here, Ad Art was engaged in the business of selling and producing commercial signs, it marketed those signs to buyers, and, as shown *supra*, a product's classification as unique, custom, or one-of-a-kind will not by itself remove it from the doctrine of strict liability. Further, accepting such an argument in this context would potentially lead to absurd results. This is so because, to one degree or another, most commercial signs are inherently unique since they are designed to conform to the specifications of a particular building or piece of real estate and adorned with a business's precise (and perhaps unique) font and logo. Thus, this proposition, if taken to its logical conclusion, would largely insulate commercial sign manufacturers from claims sounding in strict liability, which surely is

inconsistent with the doctrine's intent; nor is it a proposition that this court is willing to endorse.

Therefore, we hold that large commercial signs, such as the MGM pylon sign, are products for purposes of strict liability, when, as here, the sign was designed, manufactured, and sold by a party engaged in the business of selling and manufacturing such signs. Furthermore, that a product is custom-made is not sufficient on its own to remove it from the province of strict liability.[10]

Accordingly, Schueler's cause of action sounding in strict products liability is, on its face, viable as against Ad Art because the pylon sign qualifies as a product pursuant to the application of section 402A. Simply stated, Ad Art, as the manufacturer and seller of the MGM pylon sign, cannot avoid the imposition of strict liability by arguing the sign is not a "product" when it was in the business of manufacturing and selling commercial signs.

VI.

Ad Art nevertheless urges this court to affirm the district court's summary judgment order, positing that the policy objectives of strict liability would *not* be furthered by concluding that the MGM pylon sign is a product for purposes of strict liability, and that because the pylon sign is an immovable real estate fixture, it is exempt from strict products liability. We disagree.

In *Calloway*, the Supreme Court of Nevada identified three policy objectives and rationales underpinning the doctrine of strict liability: (1) "promot[ing] safety by eliminating the negligence requirement," (2) "spread[ing] the costs of damage from dangerously defective products to the consumer by imposing them on the manufacturer or seller," and (3) removing "concerns about a plaintiff's ability to prove a remote manufacturer's or seller's negligence." *Calloway*, 116 Nev. at 268, 993 P.2d at 1271; *see also* Restatement (Second) of Torts § 402A (Am. Law Inst. 1965). Applying these public policy objectives to this case, we conclude that the MGM sign qualifies as a product for purposes of applying strict liability, contrary to Ad Art's position, as explained more fully below.

A.

Ad Art first contends, and the district court agreed, that the application of strict liability would not promote safety in this instance because "MGM was involved in every aspect of the [sign's] design, and it was not simply the creation of [Ad Art]." This assertion,

[10]We recognize, however, that not all large, commercial signs are automatically products for purposes of applying strict liability, and we can imagine scenarios involving different facts and circumstances where a sign similar to the one at issue in this case may not be considered a product for purposes of strict liability.

however, is unsupported by the record, and therefore, this finding is clearly erroneous. *Allyn v. McDonald*, 112 Nev. 68, 72, 910 P.2d 263, 266 (1996) (rejecting a district court's findings of fact in a summary judgment order where the findings were clearly erroneous).

At the time the MGM pylon sign was originally designed and constructed, Terry Long was Ad Art's president. During Long's deposition, he testified that he recalled discussing the sign's development and design with MGM's point man on the project, Fred Benninger. Although Benninger was the point man, nothing in the record suggests that he was involved in the sign's design. In fact, Long testified that it was Ad Art's employees, not MGM's, who oversaw the project's development, including structural integrity and design. While other contractors laid the concrete foundation and assisted in erecting the steel pylon, Ad Art manufactured the sign itself and was responsible for mounting it on top of the pylon. More specifically, Long testified that Gordon Kitto was the project manager, Paul Brengle was the engineer, and Jack Dubois was the designer, all of whom were employed by Ad Art. Long testified further that the sign was fabricated in sections at Ad Art's facility in Stockton, California, and then shipped by truck to Las Vegas and assembled on MGM's property, which Long stated "was done by our people."[11] Long clarified this point later noting that "we sold the sign to MGM. They paid us. We erected the sign. They paid us for the sign in full." Thus, the record does not support the finding that "MGM was involved in every aspect of the [sign's] design."

With this in mind, permitting Ad Art to be sued under a theory of strict products liability does in fact further the doctrine's safety objective. In *Greenman v. Yuba Power Products, Inc.*, the California Supreme Court stated that "[t]he purpose of such liability is to insure that the costs of injuries resulting from defective products are borne by the manufacturers that put such products on the market rather than by the injured persons who are powerless to protect themselves." 377 P.2d 897, 901 (Cal. 1963). Imposing this cost on manufacturers creates an incentive to produce safer products. This imposition is justified because "the seller . . . has undertaken and assumed a special responsibility toward . . . the consuming public who may be injured by [its products]." Restatement (Second) of Torts § 402A cmt. c.

Here, Ad Art was in the business of manufacturing and designing commercial signs. The record demonstrates that Ad Art manufactured, designed, and sold a commercial sign to MGM, releasing its product into the stream of commerce and thus assuming a duty toward the ultimate user. The ultimate user in this case, Schueler, suffered bodily injury from Ad Art's allegedly defective product while he was servicing the sign for MGM. *See, e.g.*, Restatement Second

[11]During his deposition, Long stated that the sign was fabricated in sections, although he could not recall how many.

§ 402A cmt. l (providing that strict liability extends to agents or employees of the purchaser of a defective product). Furthermore, Schueler was entitled to assume that the product was fit for its ordinary use, and Ad Art should have known that the sign would be used without inspection for defects. *Greenman*, 377 P.2d at 900 ("A manufacturer is strictly liable in tort when an article he places on the market, knowing that it is to be used without inspection for defects, proves to have a defect that causes injury to a human being."). Therefore, the imposition of strict liability as to Ad Art does further the doctrine's safety objective.

B.

Ad Art also contends that because of the pylon sign's unique nature, it had no opportunity to spread costs. In support of this argument, Ad Art cites to *Queen City Terminals, Inc. v. General American Transport Corp.*, 653 N.E.2d 661, 673 (Ohio 1995), contending that, similar to the defendant in *Queen City*, it was in no better a position to assume the costs associated with injury than MGM because the pylon sign was not a mass-scale enterprise. We conclude, however, that *Queen City* is distinguishable.

In *Queen City*, the defendant (Trinity, Inc.), which manufactured the allegedly defective products (train cars), had only limited involvement in the product's design. 653 N.E.2d at 665, 672. In fact, the train cars were developed by a company called GATX, which "own[ed] the design and [retained the] sole right to manufacture" the cars. *Id.* at 672. GATX commissioned Trinity to manufacture the train cars as part of a one-time commission. *Id.* Thus, Trinity had never previously built the GATX train cars, nor is it clear that it had ever built anything comparable. *Id.* Therefore, Trinity was not engaged in the business of making or selling the particular product in question, and indeed only manufactured the train cars as part of a one-time commission. As a result, Trinity had no opportunity to spread costs. The *Queen City* court also noted that the plaintiff's "experts were *heavily* involved in the manufacturing process." *Id.* (emphasis added). Specifically, plaintiff's experts "requested and received plans for the [train cars]," and subsequently "subjected [those plans] to . . . scrutiny," which involved examination by hundreds of engineers and outside consultants. *Id.* at 672-73.

By contrast, the record in this case indicates that Ad Art fabricated the pylon sign, transported it to Las Vegas in sections, and installed it, which "was done by [Ad Art's] people." The record also shows that Ad Art, not MGM, was heavily involved in the sign's design. And unlike the *Queen City* defendant, it is beyond doubt that Ad Art was in the business of making, selling, and designing commercial signs that were similar to the one in question. As a result, Ad Art had the opportunity and the incentive to design and develop safe products, as well as the occasion to spread costs.

Furthermore, Ad Art's reliance on *Queen City* stretches the case beyond its logical bounds, as the court's holding is fact specific. In particular, the court stated that "[t]his holding is not meant to be a panacea for all manufacturers of defective products, but is instead intended to address the *rare factual circumstance where the purchaser and lessee of a product are heavily involved in the manufacturing process of the defective item*." *Id.* at 673 (emphasis added). Here, the record does not support the proposition that MGM was "heavily involved in the manufacturing process" of the pylon sign. Therefore, we conclude that the analogy to *Queen City* is inapposite.

C.

Ad Art further contends that because the sign was custom-built, it was in no better position than MGM to know of the manufacturer's negligence. As already articulated, this argument is unsupported by the record and relevant authorities. Under *Calloway*, the third policy objective of strict products liability focuses on "concerns about a plaintiff's ability to prove a remote manufacturer's or seller's negligence." 116 Nev. at 268, 993 P.2d at 1271. Here, Ad Art's employees designed and engineered the MGM pylon sign. The sign was then fabricated in sections at Ad Art's facility in Stockton, California, and then shipped by truck to Las Vegas where it was assembled "by [Ad Art's] people."

Furthermore, there is nothing in the record indicating that MGM or its employees were heavily involved in the sign's manufacturing or design. Indeed, the record supports a contrary conclusion by demonstrating that Ad Art was significantly involved in every step of the process, including design, production, delivery, and installation. Thus, neither Schueler nor MGM were in a position "to prove that a particular party in the product-supply chain . . . failed to exercise due care." Graham, *Strict Products Liability*, *supra*, at 568-69. Therefore, we are unpersuaded by Ad Art's arguments and conclude that the application of strict products liability in this instance does further the policy objectives of the doctrine.

VII.

Finally, at oral argument, Ad Art theorized that the pylon sign is more akin to an immovable real estate fixture and therefore exempt from strict products liability. We also find this argument unpersuasive. First, fixtures are not exempt from the doctrine of strict liability. *See, e.g.*, *In re Eighth Judicial Dist. Asbestos Litig*., 129 N.E.3d 891, 901 (N.Y. 2019) ("[T]he fact that something is taxable as real property *does not render it outside the realm of strict liability*. In fact, other affixed taxable real property under the Real Property Tax Law, such as *elevators and large turbines*, have nevertheless been subject to strict products liability claims . . . ." (emphasis added)); *Keck*, 830 So. 2d at 6 (explaining that items that are *not* "part of

the structural integrity of the house or building" are products for purposes of strict liability); *Boddie*, 455 N.E.2d at 149 (concluding that a custom conveyor system housed in a factory was a product for purposes of strict liability).

Second, there is no evidence demonstrating that the sign is now suddenly immovable. Indeed, the record clearly establishes that Ad Art manufactured the pylon sign in California and then transported it to Las Vegas in sections, where it was fully assembled and installed at Ad Art's direction atop the pylon. And, at oral argument, Ad Art acknowledged that the sign could indeed be moved. It stands to reason, therefore, that even though it may be difficult and expensive, the sign could be dismantled from the pylon and moved once again. In fact, if MGM ever sold its hotel casino to another owner to operate under another name, one can imagine that the new operator would do exactly that: remove MGM's sign and mount its own sign on top of the existing pylon.

And last, whether or not the sign is movable is not dispositive of the ultimate legal question. By focusing on transportability, Ad Art appears to imply that strict liability applies only to personal chattels, as contrasted with real chattels (i.e., fixtures).[12] But the Second Restatement does not limit the application of strict liability to personal chattels, nor can such a restraint be inferred from the text. Notably, comment a of section 402A states that this section deals with "suppliers of chattels," making no distinction between personal and real chattels, and comment d strongly indicates that fixtures (i.e., real chattels) are squarely within the contemplation of section 402A.[13] Thus, we reject the notion that fixtures are necessarily immune from claims sounding in strict products liability.[14]

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[12]*Chattel*, *Black's Law Dictionary* (4th ed. 1951) (defining chattel as "[a]n article of personal property; any species of property not amounting to a freehold or fee in land," and distinguishing personal chattels from real chattels); *see also Real Chattels*, *Black's Law Dictionary* (5th ed. 1979) ("An interest in real estate less than a freehold or fee. See also Fixtures.").

[13]Comment d states, "the rule stated [herein] applies to . . . a water heater [and] a gas stove." *Cf. Fixture*, *Black's Law Dictionary* (5th ed. 1979) ("Goods are fixtures when they become so related to particular real estate that an interest in them arises under real estate law; *e.g.,* a furnace affixed to a house or other building.").

[14]We also reject Ad Art's reliance on *Dayberry v. City of East Helena*, 80 P.3d 1218 (Mont. 2003), which held that a municipal swimming pool was not a product for purposes of strict products liability, and conclude that *Dayberry* is distinguishable from the instant case on the facts and the law. In particular, the Montana Supreme Court affirmed the trial court, concluding that the municipal swimming pool was not a product for purposes of strict liability because it was "not in the stream of commerce and [was] neither mass-produced [n]or prefabricated." *Id.* at 1221. But, as already discussed, mass production is not a requirement of section 402A, and moreover, the plaintiff in *Dayberry* sued the City of East Helena, not the pool's manufacturer. 80 P.3d at 1219. Thus, consistent with the requirements of section 402A, the claim in *Dayberry* was not viable against the city because the city was not engaged in the business of making or selling

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Accordingly, we conclude that the MGM pylon sign is a product within the meaning of strict products liability, as the pylon sign falls directly within the contemplation of section 402A of the Second Restatement of Torts.[15] More specifically, large commercial signs, such as the MGM pylon sign, are products for purposes of strict liability, where, as here, they are designed, manufactured, and sold by a party engaged in the business of selling and manufacturing such signs. Further, to the extent that the pylon sign was custom-made for MGM, this alone is insufficient to remove it from the sphere of strict liability, especially because the public policy considerations for applying the doctrine of strict products liability in this case have been satisfied. Therefore, we reverse the district court's summary judgment in Ad Art's favor and remand for further proceedings consistent with this opinion.[16]

Gibbons, C.J., and Tao, J., concur.

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swimming pools. Finally, there is no general consensus among courts that pools are not products for purposes of strict liability. *See, e.g.*, *Duggan v. Hallmark Pool Mfg. Co.*, 398 N.W.2d 175, 178 (Iowa 1986) (concluding that the trial court did not err when it submitted to the jury plaintiff's strict liability claim against a pool manufacturer), *superseded by statute on other grounds as recognized in Reed v. Chrysler Corp.*, 494 N.W.2d 224, 230 (Iowa 1992); *see also DeCrosta v. A. Reynolds Constr. & Supply Corp.*, 375 N.Y.S.2d 655, 657 (App. Div. 1975) (providing that the swimming-pool contractor came within the class of persons who could be held responsible on a theory of strict products liability). However, even if we were inclined to accept the proposition that an in-ground swimming pool, like the one in *Dayberry*, is not subject to the doctrine of strict liability, Ad Art has not adequately explained how *Dayberry* analogizes to the facts of this case—which involves a pylon sign, not a near-permanent in-ground pool. Accordingly, we conclude that any reliance on *Dayberry* is misplaced.

[15]In so doing, we express no opinion regarding the viability of Schueler's claim generally. Instead, we conclude only that the MGM sign is a product for purposes of strict liability, and therefore, as a matter of law, Schueler's claim cannot be defeated on this basis.

[16]Insofar as the parties raised arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

LARRY J. WILLARD, Individually and as Trustee of the LARRY JAMES WILLARD TRUST FUND; and OVERLAND DEVELOPMENT CORPORATION, a California Corporation, Appellants, *v.* BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; and JERRY HERBST, an Individual, Respondents.

No. 77780

August 6, 2020 469 P.3d 176

Appeal from a district court order denying an NRCP 60(b) motion for relief from a final order dismissing an action as a sanction for discovery abuses. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Reversed and remanded with instructions.

[Rehearing denied November 3, 2020]

[En banc reconsideration denied February 23, 2021]

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Robertson, Johnson, Miller & Williamson* and *Richard D. Williamson* and *Jonathan Joel Tew*, Reno, for Appellants.

Dickinson Wright, PLLC, and *John P. Desmond, Brian R. Irvine*, and *Anjali D. Webster*, Reno, for Respondents.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Hardesty, J.:

NRCP 60(b)(1) provides that a district court may grant relief "from a final judgment, order, or proceeding" based on a showing of "mistake, inadvertence, surprise, or excusable neglect."[1] In this appeal, we examine the district court's denial of appellants' NRCP 60(b)(1) motion to set aside a sanctions order based on excusable neglect. Therein, the district court reasoned that it need not consider the factors announced in *Yochum v. Davis*, 98 Nev. 484, 486, 653

[1]The Nevada Rules of Civil Procedure were amended effective March 1, 2019. *In re Creating a Comm. to Update & Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). While this case predates the applicability of the amendments to the NRCP, the amendments made to NRCP 60(b) do not materially affect the analysis or outcome of the issue presently before us. For this reason, and because the parties do not argue otherwise, we cite to the current version of NRCP 60(b) throughout this opinion.

P.2d 1215, 1216 (1982), *overruled in part by Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997), to determine if appellants established excusable neglect because *Yochum* concerned relief from a default judgment, as opposed to relief from an order. We disagree and conclude that the district court abused its discretion by failing to address the *Yochum* factors when deciding the NRCP 60(b)(1) motion. We further reiterate that we review a district court's NRCP 60(b)(1) determination for an abuse of discretion. As we review for abuse of discretion, we now clarify that district courts must issue express factual findings, preferably in writing, pursuant to each *Yochum* factor to facilitate our appellate review. Accordingly, we reverse the district court's order denying the NRCP 60(b)(1) motion and remand to the district court for further consideration.

FACTS AND PROCEDURAL HISTORY

Appellants Larry J. Willard, individually and as trustee of the Larry James Willard Trust Fund, and Overland Development Corporation (collectively, Willard) brought suit against respondents Berry-Hinckley Industries and Jerry Herbst (collectively, Respondents).[2] In the operative complaint, Willard alleged several causes of action arising out of the breach of a lease agreement for a commercial property in Reno.

Willard's counsel included Brian Moquin, a California-licensed attorney appearing pro hac vice, and David O'Mara, who served as local counsel. Moquin, on behalf of Willard, failed to comply with NRCP 16.1 disclosure requirements, discovery requests, and court orders.[3] Based on these discovery violations, Respondents filed an unopposed motion for sanctions in which they requested that the district court dismiss the case with prejudice. The district court granted Respondents' motion for sanctions and dismissed Willard's claims with prejudice. Thereafter, Willard retained new counsel and filed the NRCP 60(b)(1) motion, requesting that the district court set aside its sanctions order. Specifically, Willard maintained that Moquin's alleged psychological disorder resulted in his abandonment of Willard, which justified NRCP 60(b)(1) relief based on excusable neglect.

The district court heard arguments on Willard's motion. At the outset of Willard's argument, the district court requested that Wil-

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[2]The lawsuit also included as plaintiffs Edward C. and Judith A. Wooley, individually and as trustees of the Edward C. Wooley and Judith A. Wooley Intervivos Revocable Trust 2000. These parties are not included in this appeal, as they and Respondents settled their dispute and stipulated to dismissal with prejudice, which dismissal the district court granted.

[3]We note that Moquin's conduct in this case resulted in disciplinary action. *See In re Discipline of Moquin*, Docket No. 78946 (Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law in Nevada, Oct. 21, 2019).

lard "stick really, really, really close to the NRCP 60(b) standards," and Willard proceeded to structure his argument within the framework of the factors announced in *Yochum*, 98 Nev. at 486, 653 P.2d at 1216. At the conclusion of counsels' arguments, the district court granted the parties additional time to supplement their proposed orders and did not otherwise rule from the bench.

Thereafter, the district court issued its order denying the NRCP 60(b) motion. Therein, the district court stated the following:

> Plaintiffs assert this Court must address the additional factors set forth in *Yochum v. Davis*, 98 Nev. 484, 486, 653 P.2d 1215, 1216 (1982). *Yochum* involves relief from a default judgment and not an order, as here, where judgment has not been entered. *Yochum* does not preclude denial of the motion.

After declining to consider the *Yochum* factors, the district court found that Willard failed to prove excusable neglect by a preponderance of the evidence.[4] Following the district court's denial of Willard's NRCP 60(b)(1) motion, the district court issued a judgment in favor of Respondents. Willard appeals the NRCP 60(b) order.

DISCUSSION

On appeal, Willard argues that the district court abused its discretion by refusing to address the *Yochum* factors when ruling on his NRCP 60(b)(1) motion. We review the denial of an NRCP 60(b)(1) motion for an abuse of discretion. *Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 656, 428 P.3d 255, 257 (2018). While we generally afford the district court wide discretion in ruling on an NRCP 60(b)(1) motion, *see id*., a district court nevertheless abuses that discretion when it disregards established legal principles, *McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 617, 310 P.3d 555, 559 (2013).

NRCP 60(b)(1) operates as a remedial rule that gives due consideration to our court system's preference to adjudicate cases on the merits, without compromising the dignity of the court process. *See Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 285, 720 P.2d 1221, 1223 (1986); *see also Britz v. Consol. Casinos Corp.*, 87 Nev. 441, 446, 488 P.2d 911, 915 (1971) ("Litigants and their counsel may not properly be allowed to disregard process or procedural rules

[4]In its NRCP 60(b) order, the district court also addressed O'Mara's role in the case and found that "O'Mara's involvement precludes a conclusion of excusable neglect here." The district court reasoned that while O'Mara could contractually limit the scope of his representation, he nevertheless consented to adhere to the responsibilities of local counsel as outlined in SCR 42(14). The district court continued that O'Mara attended all court hearings in the case and signed various pleadings. And O'Mara alone signed Willard's deficient initial discovery disclosures, "the uncured deficiencies of which were a basis for [the] sanction of dismissal."

with impunity." (internal quotation marks omitted)). NRCP 60(b)(1) provides that a district "court may relieve a party or its legal representative from a *final judgment, order, or proceeding*" based on a finding of "mistake, inadvertence, surprise, or excusable neglect." (Emphasis added.) In *Yochum*, this court held that, to determine whether such grounds for NRCP 60(b)(1) relief exist, the district court must apply four factors: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith."[5] 98 Nev. at 486, 653 P.2d at 1216. The district court must also consider this state's bedrock policy to decide cases on their merits whenever feasible when evaluating an NRCP 60(b)(1) motion. *Id*. at 487, 653 P.2d at 1217.

Here, the district court appeared to reason that it need not apply the *Yochum* factors when determining the existence of sufficient grounds for NRCP 60(b)(1) relief from an order, as opposed to a judgment. We disagree. First, the plain language of NRCP 60(b) does not distinguish between relief from a "final judgment, order, or proceeding." *See Toll v. Wilson*, 135 Nev. 430, 433, 453 P.3d 1215, 1218 (2019) (explaining that we give effect to a statute's plain meaning when interpreting an unambiguous statute). Furthermore, our caselaw reviewing a district court's NRCP 60(b)(1) determination likewise does not distinguish between relief from "a final judgment, order, or proceeding" for the purposes of applying the *Yochum* factors. *See Kahn v. Orme*, 108 Nev. 510, 513, 835 P.2d 790, 792 (1992) ("Before granting a[n] NRCP 60(b)(1) motion, the district court must consider several factors, as provided in *Yochum* . . . ."), *overruled on other grounds by Epstein*, 113 Nev. at 1405, 950 P.2d at 773. Accordingly, while our jurisprudence has already stated as much, we now explicitly hold that a district court must address the *Yochum* factors when determining if the NRCP 60(b)(1) movant established, by a preponderance of the evidence, that sufficient grounds exist to set aside "a final judgment, order, or proceeding." *See Britz*, 87 Nev. at 446, 488 P.2d at 915 (detailing that the movant bears the burden of establishing grounds for NRCP 60(b)(1) relief by a preponderance of the evidence). Because the district court here failed to apply the *Yochum* factors in denying Willard's NRCP 60(b)(1) motion, we conclude that the district court abused its discretion. *See McKnight*, 129 Nev. at 617, 310 P.3d at 559 ("A trial court may abuse its discretion when it acts in clear disregard of the guiding legal principles." (internal quotation marks omitted)).

Finally, we take this opportunity to reiterate that our ability to review a district court's NRCP 60(b)(1) determination for an abuse of discretion necessarily requires district courts to issue findings pursu-

[5]*Yochum* also required the moving party to establish a meritorious defense to the complaint. 98 Nev. at 487, 653 P.2d at 1216. However, we overruled that requirement in *Epstein v. Epstein*, 113 Nev. 1401, 1405, 950 P.2d 771, 773 (1997).

ant to the pertinent factors in the first instance.[6] *See Jitnan v. Oliver*, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) ("Without an explanation of the reasons or bases for a district court's decision, meaningful appellate review, even a deferential one, is hampered because we are left to mere speculation."). As a result, we now expressly hold, as we have in other contexts, that district courts must issue explicit and detailed findings, preferably in writing, with respect to the four *Yochum* factors to facilitate this court's appellate review of NRCP 60(b)(1) determinations for an abuse of discretion. *Cf. Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88, 93, 787 P.2d 777, 780 (1990) (requiring "every order of dismissal with prejudice as a discovery sanction [to] be supported by an express, careful and preferably written explanation of the court's analysis of the pertinent factors"). With the benefit of such findings, we will affirm a district court's NRCP 60(b)(1) determination where substantial evidence in the record supports the same. *See Keife v. Logan*, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003) ("[T]his court will not disturb a district court's findings of fact if they are supported by substantial evidence."). And where the record contains conflicting evidence, we will affirm the district court's factual findings as long as sufficient evidence supports those findings. *Britz*, 87 Nev. at 444-45, 488 P.2d at 914.

CONCLUSION

Having concluded that the district court abused its discretion by failing to address the *Yochum* factors, we reverse the district court's order denying Willard's NRCP 60(b)(1) motion and remand for further proceedings consistent with this opinion.[7]

Parraguirre and Cadish, JJ., concur.

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[6]We recognize that our dispositions may have implied that the district court need only demonstrate that it considered the *Yochum* factors—as opposed to issuing factual findings for each factor. *See, e.g.*, *Rodriguez*, 134 Nev. at 659, 428 P.3d at 259 (declining to review the fourth *Yochum* factor because the district court made no finding as to that factor, but affirming the district court's denial of the NRCP 60(b)(1) motion based on the first three *Yochum* factors); *Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 271-75, 849 P.2d 305, 308-10 (1993) (concluding that appellant established excusable neglect under NRCP 60(b)(1) after effectively making our own determinations in consideration of the *Yochum* factors). However, we now clarify that we require district courts to issue explicit factual findings in the first instance on all four *Yochum* factors.

[7]Because the district court's failure to address the *Yochum* factors requires remand for further proceedings, we decline to consider Willard's additional arguments challenging the merits of the district court's excusable neglect determination. We likewise decline to address Willard's arguments concerning the propriety of the underlying sanctions order, as Willard voluntarily dismissed his appeal of the same. *See Willard v. Berry-Hinckley Indus.*, Docket No. 77780 (Order Partially Dismissing Appeal and Reinstating Briefing, Aug. 23, 2019).

MARIELA EDITH LOPEZ, Appellant, *v.* MANUEL de JESUS SERBELLON PORTILLO, Respondent.

No. 79549

August 6, 2020 469 P.3d 181

Appeal from a district court order in a child custody matter. Eighth Judicial District Court, Family Court Division, Clark County; Rebecca Burton, Judge.

Affirmed in part, reversed in part, and remanded.

Hamilton Law and *Ryan A. Hamilton*, Las Vegas, for Appellant.

Manuel de Jesus Serbellon Portillo, La Paz, El Salvador, Pro Se.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Hardesty, J.:

Through a custody proceeding, appellant Mariela Edith Lopez asked the district court to make the predicate findings necessary to petition the federal government for Special Immigrant Juvenile (SIJ) status. The district court refused to find that the minor child's reunification with respondent Manuel de Jesus Serbellon Portillo was not viable. We take this opportunity to address what the court should consider in determining whether reunification is viable for purposes of SIJ findings. Because the district court properly awarded Lopez custody but did not properly construe the controlling statute in determining whether reunification was not viable, we affirm in part, reverse in part, and remand for further adjudication consistent with this opinion.[1]

BACKGROUND

Lopez gave birth to K.M.L. in El Salvador in 2007. She had informed K.M.L.'s father, Serbellon Portillo, of her pregnancy. She also specifically informed Serbellon Portillo via phone of K.M.L.'s birth when K.M.L. was three months old. Serbellon Portillo has had no communication with K.M.L., has not sought any contact with K.M.L., and has provided no support for K.M.L. Serbellon Portillo resides in El Salvador and has Lopez's contact information or could contact her through her family there, but he has not done so.

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted in this appeal.

K.M.L. resided in El Salvador with Lopez's mother until 2017. At that point, Lopez's mother was no longer able to care for him. Lopez also feared for K.M.L.'s safety because of increased gang activity in his Salvadoran neighborhood. In particular, K.M.L.'s neighbors were killed by gang members. K.M.L. thus relocated to the United States to live with Lopez.

Lopez filed the underlying custody action seeking primary physical and legal custody of K.M.L. and requesting the district court make the predicate findings necessary for K.M.L. to seek Special Immigrant Juvenile (SIJ) status from the federal government. Serbellon Portillo was personally served with a copy of the custody complaint in both English and Spanish. He did not file a responsive pleading. The district court heard testimony from Lopez and awarded her primary physical and legal custody. In its order, the district court found that it was in K.M.L.'s best interest to remain with Lopez but stated it was "unable to find that reunification is not viable due to abandonment because this Court is unable to predict whether the father will seek to reunify with the child some time in the future." Lopez appeals.

DISCUSSION

As we have previously recognized, the federal government "provides a pathway for undocumented juveniles residing in the United States to acquire lawful permanent residency by obtaining SIJ status under 8 U.S.C. § 1101(a)(27)(J)." *Amaya v. Guerrero Rivera*, 135 Nev. 208, 209, 444 P.3d 450, 451 (2019). Before an applicant may file a petition with the federal government for SIJ status, the applicant must obtain a state juvenile court order with three findings:

> (1) the juvenile is dependent on a juvenile court, [or] the juvenile has been placed under the custody of . . . an individual appointed by the court (dependency or custody prong); (2) due to abandonment, abuse, neglect, or some comparable basis under state law, the juvenile's reunification with one or both parents is not viable (reunification prong); and (3) it is not in the juvenile's best interest to be returned to the country of the juvenile's origin (best interest prong).

Id. at 210, 444 P.3d at 452. NRS 3.2203 provides district courts with jurisdiction to make the SIJ findings when requested in certain proceedings, such as custody proceedings. Here, the first SIJ finding was established by the order awarding Lopez custody of K.M.L. *Amaya*, 135 Nev. at 211, 444 P.3d at 452. We turn then to the second SIJ finding—the reunification prong.

Lopez argues that the district court erred in interpreting the reunification prong as requiring a finding that reunification was not possible, instead of not viable. Reviewing that decision de novo,

we agree with Lopez. *See Amaya*, 135 Nev. at 210, 444 P.3d at 452 (providing that this court reviews interpretation of statutes de novo).

To satisfy the second SIJ predicate, the court must find that "reunification of the child with one or both of his or her parents [is not] viable because of abandonment, abuse or neglect or a similar basis under the laws of this State." NRS 3.2203(3)(b). In the termination-of-parental-rights context, abandonment of a child is established when the parent's conduct "evinces a settled purpose on the part of one or both parents to forego all parental custody and relinquish all claims to the child." NRS 128.012(1). Additionally, a presumption that the parent has abandoned the child applies in that same context when the parent has not supported the child or communicated with the child for six months. NRS 128.012(2). While the district court may look to this definition and presumption of abandonment for guidance in determining the reunification prong of the SIJ findings, the SIJ findings do not require as high a burden of abandonment because the reunification prong only requires that reunification is *not viable*, instead of *not possible*. 8 U.S.C. § 1101(a)(27)(J)(i) (Supp. I 2014);[2] NRS 3.2203(3)(b).

In addressing whether the trial court erred in refusing to make the predicate finding that reunification is not viable with a parent who allegedly abandoned a child, the District of Columbia Court of Appeals observed that a court should take "a realistic look at the facts on the ground in the country of origin and a consideration of the entire history of the relationship between the minor and the parent in the foreign country." *J.U. v. J.C.P.C.*, 176 A.3d 136, 140 (D.C. 2018). Further, the *J.U.* court observed that the definition of "viable" calls for a court to consider whether reunification is practicable or workable. *Id.* at 140 (citing *Merriam-Webster New International Dictionary* (3d ed. 2002) (defining viable as "capable of being put into practice: workable"), *American Heritage Dictionary of the English Language* (3d ed. 1992) (defining viable as "capable of success or continuing effectiveness; practicable"), and *Random House Dictionary of the English Language* (21st ed. 1987) (providing that viable means "practicable; workable")). Addressing the abandonment part of the inquiry, the *J.U.* court also reasoned that because the concept of abandonment for the purpose of SIJ findings is not one that leads to the termination of a parent's parental rights, a court need only "assess the impact of the history of the parent's past conduct on the viability, *i.e.*, the workability or practicability of

[2]We acknowledge that a definition included in 8 U.S.C. § 1101(a)(43)(F) has been held unconstitutionally vague by other courts. *See, e.g.*, *Golicov v. Lynch*, 837 F.3d 1065 (10th Cir. 2016); *Shuti v. Lynch*, 828 F.3d 440 (6th Cir. 2016); *Dimaya v. Lynch*, 803 F.3d 1110 (9th Cir. 2015). Because this matter concerns a definition from another subsection of that statute, we conclude those opinions have no bearing on our decision in this matter.

a forced reunification of parent with minor, if the minor were to be returned to the home country." *Id.* at 141.

In *J.U.*, the father had visited the child regularly in El Salvador when the child was young. *Id.* at 142. When the child's mother relocated to the U.S., however, the child resided in El Salvador with his paternal grandfather, who the child thought of as his father. *Id.* The father never provided financial support for the child, never showed the child affection or cared for the child, and never assumed any parental responsibility for the child other than signing the documents for the child to obtain a passport to travel to the U.S. *Id.* at 142. After the paternal grandfather died, leaving the child with no place to live in El Salvador, the father did not invite the child to live with him, and the father did not communicate with the child after the child then relocated to the U.S. *Id.* at 142-43. The trial court found that the mother must have been minimizing the father's involvement in the child's life, and thus, reunification was viable. *Id.* at 142. The Court of Appeals, however, concluded that "the trial court applied too demanding a standard of both 'viability' and 'abandonment,'" as the father had only taken "spasmodic steps in his parental role" and "essentially outsourced all [his parental] duties to others." *Id.* at 142-43. Therefore, the Court of Appeals concluded that reunification was not viable as it was not practicable or workable to send a child "back to the care of a father who has never fulfilled any day-to-day role in the support, care, and supervision during the boy's lifetime." *Id.* at 143.

While not many jurisdictions have had the opportunity to provide guidance on determining when abandonment renders reunification not viable for the purpose of SIJ findings, two jurisdictions have adopted the approach set forth in *J.U. Romero v. Perez*, 205 A.3d 903 (Md. 2019); *Kitoko v. Salomao*, 215 A.3d 698 (Vt. 2019). In fact, the Court of Appeals of Maryland expanded on *J.U.* and provided a nonexhaustive list of factors a court should consider in determining whether abuse, neglect, or abandonment indicate that reunification is not viable:

> (1) the lifelong history of the child's relationship with the parent (i.e., is there credible evidence of past mistreatment); (2) the effects that forced reunification might have on the child (i.e., would it impact the child's health, education, or welfare); and (3) the realistic facts on the ground in the child's home country (i.e., would the child be exposed to danger or harm).

Romero, 205 A.3d at 915.

These cases provide an instructive legal framework for evaluating the SIJ reunification prong, and we therefore adopt the approach discussed in *J.U.*, 176 A.3d at 140-43, and *Romero*, 205 A.3d at 915. While the district court may look to definitions of abandonment

that apply in other contexts, we caution district courts to remember that because SIJ findings do not result in the termination of parental rights, the consideration of whether a parent has abandoned a child such that reunification is not viable is broader than the consideration of whether a parent's abandonment of a child warrants termination of the parent's parental rights.

Because the district court here looked at whether reunification might be possible in the future instead of looking at the viability of reunifying K.M.L. with Serbellon Portillo after considering the history of the parent-child relationship, whether it would be practicable or workable to send K.M.L. back to Serbellon Portillo's care, and the facts on the ground in El Salvador, we conclude the district court erred in declining to make the predicate finding that reunification is not viable under NRS 3.2203(3)(b). *Amaya*, 135 Nev. at 210, 444 P.3d at 452. Because no party challenges the custody decision and the record on appeal does not indicate the district court abused its discretion by awarding Lopez primary physical and legal custody of K.M.L., we affirm the custody decision.

CONCLUSION

For the purpose of SIJ findings, a district court addressing whether reunification is not viable should consider the history of the parent-child relationship, the conditions on the ground in the child's foreign country, and whether returning the child to the parent in the foreign country would be workable or practicable due to abandonment, abuse, or neglect. Because the district court did not apply the proper legal framework in concluding that it could not find that reunification was not viable, we reverse the district court's order insofar as it denied Lopez's motion for SIJ predicate findings, but we affirm the custody aspect of the order. We remand this case to the district court for further proceedings consistent with this opinion.

Parraguirre and Cadish, JJ., concur.

J.E. JOHNS & ASSOCIATES, a Nevada Business Entity; and A.J. JOHNSON, an Individual, Appellants/Cross-Respondents, *v.* JOHN LINDBERG, an Individual; MICHAL LINDBERG, an Individual; and JUDITH L. LINDBERG, an Individual, Respondents/Cross-Appellants.

No. 78086

August 20, 2020 470 P.3d 204

Appeal and cross-appeal from an amended judgment following a bench trial and hearing in a real property matter. Second Judicial District Court, Washoe County; Jerome M. Polaha, Judge.

Affirmed.

[Rehearing denied November 3, 2020]

[En banc reconsideration denied December 4, 2020]

Glade L. Hall, Reno, for Appellants/Cross-Respondents.

Silver State Law LLC and *John D. Moore*, Reno, for Respondents/Cross-Appellants.

Before the Supreme Court, Parraguirre, Hardesty and Cadish, JJ.

OPINION

By the Court, Hardesty, J.:

As a general principle, a plaintiff suing in tort can only recover once for a single injury, even when several defendants are responsible for that injury. This appeal concerns the applicability of NRS 17.245(1)(a), which enables a nonsettling tortfeasor to equitably offset a judgment by the settlement amount obtained from a settling tortfeasor "for the same injury." The buyers of residential real property brought suit against the sellers and the sellers' and buyers' real estate agents, alleging that all parties violated their respective statutory disclosure obligations. The buyers settled with the sellers and the buyers' agents and proceeded to a bench trial against the sellers' agents, after which the district court entered judgment in favor of the buyers. Thereafter, the district court offset the judgment by a portion of the settlement amounts paid by the sellers and the buyers' agents pursuant to NRS 17.245(1)(a). Both parties appeal from the amended judgment. The buyers argue that NRS 17.245(1)(a) does not apply, such that the district court erred by reducing the original judgment. On the other hand, the sellers' agents challenge the district court's judgment offset calculation pursuant to NRS 17.245(1)(a).

We hold that when considering if NRS 17.245(1)(a)'s settlement offsets apply, district courts must determine whether both the settling and the nonsettling defendants were responsible for the same injury. Because substantial evidence supports the district court's determination here that all defendants caused the same injury, and because the district court appropriately calculated the offset amount, we affirm the district court's amended judgment.

FACTS AND PROCEDURAL HISTORY

Respondents and cross-appellants, John Lindberg, Michal Lindberg, and Judith L. Lindberg (collectively, the Lindbergs) alleged several causes of action arising out of their purchase of residential real property located in Washoe County. In the operative complaint, the Lindbergs named as defendants the sellers of the property; the Lindbergs' agents; and the sellers' agents, appellants and cross-respondents A.J. Johnson and J.E. Johns & Associates, along with James E. Johns (collectively, the sellers' agents).[1] Therein, the Lindbergs claimed that the defendants' failure to disclose that two structures on the property lacked the appropriate permits caused the Lindbergs to expend money to enlarge the property's septic tank in order to make the property code compliant. The Lindbergs specifically alleged that the sellers violated their statutory disclosure obligation under NRS 113.130, for which NRS 113.150(4) permits the recovery of treble damages, and that the sellers' agents and the Lindbergs' agents violated their statutory duties of disclosure pursuant to NRS 645.252, which gave rise to a cause of action under NRS 645.257 to recover their actual damages.

Before proceeding to trial, the Lindbergs settled with the sellers and the Lindbergs' agents, and the court entered stipulations and orders for dismissal of all claims arising between those parties. The Lindbergs settled with the sellers for $50,000 and with the Lindbergs' agents for $7,500.

The Lindbergs proceeded to a three-day bench trial against the remaining defendants—Johnson, J.E. Johns, and Johns. After the conclusion of the trial, the district court issued its findings of fact and conclusions of law and judgment. Therein, the district court concluded that the sellers' agents "should have known that the septic system was too small for the residential property in its existing state at the time of the sale," and that they violated NRS 645.252(1)(a) and NRS 645.252(2) by failing to disclose the same to the Lindbergs. The district court further concluded the sellers' agents were liable under a second theory for "incorrectly list[ing] the property as 'single-family residential,' when the property clearly contained three structures and the zoning for this area allowed for one residential structure and one accessory structure (residential or not), for a total of two structures." While both theories support-

[1]James Johns died prior to trial, and his estate did not join in this appeal.

ed damages, to prevent double recovery, the district court awarded the Lindbergs $27,663.95 in damages—the cost of installing the proper-sized septic system and conforming to building code requirements—pursuant to NRS 645.257, rather than under the second theory of liability. The district court also awarded $48,116.84 in attorney fees and costs, plus interest, for a total award of $75,780.79.

The sellers' agents then filed an NRCP 59(e) motion to amend or alter the judgment. The district court granted the motion in part, reasoning that NRS 17.245(1)(a) entitled the sellers' agents to offset the judgment by the settlement amounts, "find[ing] that all defendants, settling and remaining, were responsible for the same injury." Following a hearing to confirm the settlement amounts and determine the appropriate deductions, the district court issued an amended judgment reducing the judgment to $51,630.79 and awarding $13,028.40 in prejudgment interest. The sellers' agents, J.E. Johns[2] and Johnson, appeal; the Lindbergs cross-appeal.

DISCUSSION

On appeal, all parties claim that the district court erred in determining the amount to be offset from the original judgment under NRS 17.245(1)(a). The Lindbergs contend that NRS 17.245(1)(a) does not apply to offset the judgment because the statute requires a finding of joint tortfeasor liability for all defendants for the same injury. The sellers' agents challenge the district court's offset calculation, arguing that the district court erred by failing to offset the judgment by the full settlement amount paid by the sellers.

To address these arguments, we first consider NRS 17.245(1)(a)'s "same injury" requirement. Next, we determine whether substantial evidence supports the district court's finding that both the settling and nonsettling defendants were responsible for the same injury. Finally, we address the district court's offset calculation.

NRS 17.245(1)(a)

While we review the district court's order regarding the sellers' agents' NRCP 59(e) motion to alter or amend the judgment for an abuse of discretion, *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010), the district court's inter-

[2]Prior to trial, the district court entered a default against J.E. Johns for its failure to answer the operative complaint. The Lindbergs argue that the default entered against J.E. Johns precludes it from participating in this appeal, and they request that we dismiss the appeal as to J.E. Johns. *See Estate of LoMastro v. Am. Family Ins. Grp.*, 124 Nev. 1060, 1068, 195 P.3d 339, 345 (2008) ("Entry of default acts as an admission by the defending party of all material claims made in the complaint. Entry of default, therefore, generally resolves the issues of liability and causation and leaves open only the extent of damages." (footnote omitted)). Because J.E. Johns challenges the district court's judgment offset calculation, i.e., "the extent of damages," we decline to dismiss the appeal as to J.E. Johns. *Id.*

pretation and construction of NRS 17.245(1)(a) presents a question of law that we review de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (alteration in original) (internal quotation marks omitted). NRS 17.245(1)(a) provides:

> 1. When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of *two or more persons liable in tort for the same injury* or the same wrongful death:
>
> (a) It does not discharge any of the other tortfeasors from liability for the injury or wrongful death unless its terms so provide, but it *reduces the claim against the others to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it*, whichever is the greater . . . .

(Emphases added.) NRS 17.245(1)(a) enables a plaintiff to simultaneously settle with one tortfeasor and proceed to trial against another tortfeasor. *Banks v. Sunrise Hosp.*, 120 Nev. 822, 843, 102 P.3d 52, 67 (2004). "However, to prevent double recovery to the plaintiff, the statute also provides that claims against nonsettling tortfeasors must be reduced by the amount of any settlement with settling tortfeasors." *Id*.

The Lindbergs argue that settling and nonsettling defendants must be adjudicated as joint tortfeasors to receive the benefit of settlement offsets under NRS 17.245(1)(a). In making this claim, the Lindbergs rely on NRS 17.225(1), which provides for the right of contribution "where two or more persons become jointly or severally liable in tort for the same injury to person or property or for the same wrongful death."

As an initial matter, NRS 17.225(1) governs the right to contribution—not to equitable settlement offsets from codefendants responsible for the same injury under NRS 17.245(1)(a). *Compare The Doctors Co. v. Vincent*, 120 Nev. 644, 650-51, 98 P.3d 681, 686 (2004) (explaining that "[c]ontribution is a creature of statute" that permits "one tortfeasor to extinguish joint liabilities through payment to the injured party, and then seek partial reimbursement from a joint tortfeasor for sums paid in excess of the settling or discharging tortfeasor's equitable share of the common liability"), *with Banks*, 120 Nev. at 843, 102 P.3d at 67 (explaining that NRS 17.245(1)(a) enables a nonsettling tortfeasor to equitably offset a judgment by the settlement amount obtained from a settling tortfeasor). For this reason alone, the Lindbergs' position lacks merit.

Furthermore, because NRS 17.245(1)(a) applies to "two or more persons liable in tort for the same injury," and because the plain language of the statute imposes no requirement as to the relation-

ship of the defendants, we reject the Lindbergs' contention that the application of settlement offsets pursuant to NRS 17.245(1)(a) first requires a finding of joint tortfeasor liability. *See Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) ("To determine legislative intent, this court first looks at the plain language of a statute."). In fact, we have already said as much in *Banks*, where we rejected the argument that a finding of liability on behalf of a settling defendant was required to offset a judgment under NRS 17.245(1)(a). 120 Nev. at 845-46, 102 P.3d at 68. Because "[t]he express language of the statute contemplates that the defendant and plaintiff have worked out a settlement prior to a final judgment of liability," we reasoned that NRS 17.245(1)(a) "does not require that a party be found liable." *Id*. at 846, 102 P.3d at 68.

Instead, as the district court properly determined, the relevant question governing the applicability of NRS 17.245(1)(a) for the purposes of settlement offsets is whether both the settling and remaining defendants caused the *same injury*. *See Elyousef v. O'Reilly & Ferrario, LLC*, 126 Nev. 441, 444, 245 P.3d 547, 549 (2010) (adopting the prohibition against double recovery whereby "a plaintiff can recover only once for a single injury even if the plaintiff asserts multiple legal theories").

Based on the foregoing, we hold that in determining whether NRS 17.245(1) requires a judgment to be offset by a settlement amount, the inquiry begins and ends with a determination of a single and indivisible injury. To provide additional guidance, we echo the district court's reasoning to further hold that independent causes of action, multiple legal theories, or facts unique to each defendant do not foreclose a determination that both the settling and nonsettling defendants bear responsibility for the *same injury* pursuant to NRS 17.245(1)(a). *See Indivisible Injury*, *Black's Law Dictionary* (11th ed. 2019) (defining "indivisible injury" as one caused by multiple tortfeasors "that is not reasonably capable of being separated").

The district court's "same injury" finding is supported by substantial evidence

Having determined the appropriate inquiry under NRS 17.245(1)(a), we next consider whether substantial evidence supports the district court's finding that the settling defendants and the sellers' agents caused the "same injury." *See Keife v. Logan*, 119 Nev. 372, 374, 75 P.3d 357, 359 (2003) ("[T]his court will not disturb a district court's findings of fact if they are supported by substantial evidence.").

Here, the district court relied on the Lindbergs' operative complaint to find that all settling and remaining defendants were responsible for the same injury under NRS 17.245(1)(a). Specifically, the district court found that the Lindbergs "themselves alleged facts binding all the defendants, settling and remaining, together," because the Lindbergs alleged that the defendants' collective con-

duct—violations of their respective disclosure obligations—brought about the injury suffered—the costs of repairing or replacing the property's undisclosed defects.

On cross-appeal, the Lindbergs challenge the district court's finding of "same injury" and attempt to distinguish between the harms suffered as a result of nondisclosure. The Lindbergs argue that their claims against the sellers involved the lack of permitting for two auxiliary structures, while those against the sellers' agents and the Lindbergs' agents concerned the inadequate septic tank and the incorrect listing of the property as "single-family residential." Based on our review of the record, we are unpersuaded that these alleged distinct harms resulted in separate injuries. At the conclusion of the bench trial against the sellers' agents, the district court found that the Lindbergs

> spent $27,663.95 to remedy the septic system, to obtain a variance from Washoe County to install a second septic tank at the property with a 1,000-gallon capacity to make the septic system conform to Washoe County's building code requirements, and to perform all other requirements imposed by Washoe County to remedy the septic system in order for the plaintiffs to be able to use the unit as an in-law quarter.

Based on the district court's articulation of the Lindbergs' damages, we conclude the Lindbergs' injury stemmed from the disclosure violations by all defendants, and that all issues, including the lack of building permits, stemmed from the inadequate septic tank.

We likewise reject the Lindbergs' argument that the distinct statutes giving rise to liability preclude a determination that all defendants caused the same injury under NRS 17.245(1)(a). As an initial matter, we have already held in this opinion that causes of action unique to settling and nonsettling defendants do not automatically preclude a determination that all defendants caused the same injury under the statute. Furthermore, while the Lindbergs claim that the sellers violated NRS 113.130, which gives rise to treble damages under NRS 113.150(4), and that the sellers' agents and the Lindbergs' agents violated NRS 645.252, for which NRS 645.257 provides a cause of action to recover actual damages, we determine that these statutes all govern disclosure requirements regarding the sale of real property. *See* NRS 113.130(1) (governing the disclosure requirements for a seller of residential real property); NRS 113.150(4) (entitling a purchaser of residential real property "to recover from the seller treble the amount necessary to repair or replace the defective part of the property" if a seller fails to adhere to NRS 113.130 or otherwise fails to provide the purchaser "with written notice of all defects in the property of which the seller is aware"); NRS 645.252(1)(a) (requiring a real estate agent to disclose to all parties "[a]ny material and relevant facts, data or information which the [agent] knows, or which by the exercise of reasonable care and

diligence should have known, relating to the property which is the subject of the transaction"); NRS 645.252(2) (requiring a real estate agent to "exercise reasonable skill and care with respect to all parties to the real estate transaction"); NRS 645.257 (providing a cause of action for a person to recover actual damages for a real estate agent's violation of NRS 645.252).

Accordingly, we hold that substantial evidence supports the district court's finding that the settling defendants and the sellers' agents caused the "same injury" under NRS 17.245(1)(a). *See Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008) ("Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." (internal quotation marks omitted)).

The district court correctly calculated the judgment offset amount

Having concluded that the district court properly determined that NRS 17.245(1)(a) applies to offset the Lindbergs' judgment as to the sellers' agents, we finally consider whether the district court appropriately calculated the offset amount. The district court first determined that only the cost to remedy the septic tank and to obtain the appropriate variances ($27,663.95) could be offset by the settlements the Lindbergs received from the settling defendants, and that the award of attorney fees and costs ($48,116.84) could not be offset. Then, the district court offset the $27,663.95 award by the entire settlement amount paid by the Lindbergs' agents ($7,500), and by one-third of the settlement amount paid by the sellers ($50,000 × 1/3 = $16,650),[3] in recognition that the Lindbergs "would be entitled to treble damages against the sellers associated with any claim established under NRS 113.150." In sum, the district court reduced the judgment from $75,780.79 to $51,630.79, of which $3,513.95 constituted the remaining cost associated with the septic tank and respective variances after applying the offset. The $48,116.84 awarded for attorney fees and costs remained unaltered.

On appeal, the sellers' agents argue that the district court erred by failing to offset the judgment by the full settlement amount paid by the sellers because NRS 17.245(1)(a) does not distinguish between treble and actual damages.[4] Whether NRS 17.245(1)(a) requires district courts to automatically deduct the entirety of a settlement award, without considering the makeup of the award in relation to the judgment against the nonsettling defendants, presents a question of law that we review de novo. *Banks*, 120 Nev. at 846, 102 P.3d at 68. We give effect to the plain language of a statute, unless doing so "would violate the spirit of the statute." *Id*.

[3]While the parties do not challenge the district court's mathematical equation, we note that one-third of $50,000 is $16,666.67—not $16,650.

[4]While the Lindbergs contest the application of NRS 17.245(1)(a) to this case, they nevertheless concede that if this court determines that the district court properly reduced the original judgment, then the district court's offset calculation was correct.

NRS 17.245(1)(a) "reduces the claim against the [nonsettling defendants] to the extent of any amount stipulated by the release or the covenant, or in the amount of the consideration paid for it, whichever is the greater." While the plain language of the statute could be interpreted as permitting the reduction of the entire settlement amount obtained—without regard to the *type* of exposure resolved by the settling defendants—we reason that such an interpretation violates the spirit of NRS 17.245(1)(a). *See Banks*, 120 Nev. at 846, 102 P.3d at 68. The principal purpose of equitable settlement offsets under the statute is "to prevent double recovery to the plaintiff"—or in other words, to guard against windfalls. *Id*. at 843, 102 P.3d at 67; *see also Sky View at Las Palmas, LLC v. Mendez*, 555 S.W.3d 101, 107 (Tex. 2018) (explaining that a "plaintiff should not receive a windfall by recovering an amount in court that covers the plaintiff's entire damages, but to which a settling defendant has already partially contributed," because doing so would permit the recovery of "an amount greater than the trier of fact has determined would fully compensate for the injury" (internal quotation marks omitted)).

Because the principal purpose of equitable settlement offsets is to avoid windfalls, we determine that it would be inconsistent with the legislative intent of NRS 17.245(1)(a) to then permit the blanket deduction of entire settlement amounts without scrutinizing the allocation of damages awarded therein. Specifically, actual damages "redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001); *see also Actual Damages*, *Black's Law Dictionary* (11th ed. 2019) (defining "actual damages" as those "that repay actual losses"). Treble damages, on the other hand, represent "[d]amages that, by statute, are three times the amount of actual damages that the fact-finder determines is owed." *Treble Damages*, *Black's Law Dictionary* (11th ed. 2019). Thus, ensuring that a plaintiff does not recover twice for the same injury does not mean that a plaintiff should otherwise be precluded from receiving the portion of a settlement award that resolves a settling defendant's exposure *beyond* actual damages—such as treble or punitive damages—*if* such exposure is unique to the settling defendant. *Cf. Mobil Oil Corp. v. Ellender*, 968 S.W.2d 917, 927 (Tex. 1998) (explaining that a nonsettling defendant "cannot receive credit for settlement amounts representing punitive damages" due to their individual nature). To conclude otherwise would penalize the plaintiff, while granting a windfall to the nonsettling defendant.

For these reasons, we reject the sellers' agents' argument that NRS 17.245(1)(a) requires the automatic deduction of the entire settlement amount from a nonsettling defendant's judgment. Instead, we conclude that settlement offset calculations pursuant to NRS 17.245(1)(a) must adhere to the statute's goal of avoiding windfalls, which necessarily includes restricting the settlement credit to the

amount that fully compensates the plaintiff's injury and does not otherwise provide for double recovery.

Because the consideration paid by the sellers accounted for their exposure to treble damages, we further conclude that the sellers' agents fail to demonstrate that the district court erred in offsetting the original judgment by one-third of the settlement amount obtained from the sellers. NRS 113.150(4) entitles a buyer to recover "treble the amount necessary to repair or replace the defective part of the property, together with court costs and reasonable attorney's fees," while NRS 645.257(1) permits the recovery of actual damages. Here, the district court reasoned that the settlement amount took into account the risk of treble damages, or in other words, the sellers resolved their exposure for treble damages. Because NRS 645.257(1) limits the sellers' agents' liability to actual damages, the district court appropriately accounted for the treble damages associated with the sellers' settlement in offsetting the judgment. Accordingly, we conclude that the district court correctly calculated the judgment offset amount pursuant to NRS 17.245(1)(a).

CONCLUSION

We conclude that NRS 17.245(1)(a)'s application requires a determination by the district court that the settling and nonsettling defendants were responsible for the "same injury." We further conclude that substantial evidence supports the district court's finding that all defendants were responsible for the same injury within the meaning of NRS 17.245(1)(a) and that the district court appropriately calculated the offset amount. Accordingly, we affirm the district court's amended judgment.[5]

Parraguirre and Cadish, JJ., concur.

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[5]The sellers' agents raise several other arguments on appeal. First, the sellers' agents argue that the district court erred in finding that they violated NRS 645.252 and NRS 645.257 by misleading the buyers before the close of escrow. Because the sellers' agents' argument relies on a mischaracterization of the district court's findings and conclusions, we reject this argument. Next, the sellers' agents claim that the district court erred in finding that the costs of enlarging the septic tank constituted actual damages caused by the sellers' agents. Since the sellers' agents provide no citation to the record to support their characterization of the district court's finding, we reject this argument as well. Finally, the sellers' agents maintain that the district court abused its discretion in calculating the prejudgment interest award pursuant to our holding in *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 430, 132 P.3d 1022, 1036 (2006) ("As the attorney fees are awarded as an element of past damages, attorney fees draw interest from the time of service of the summons and complaint, as specified in NRS 17.130(2)."), claiming that applying *Albios* to this case would be unjust. We are unpersuaded by the sellers' agents' argument to revisit our decision in *Albios* and thus conclude this argument lacks merit.