TSUN YOUNG, Appellant, *v.* NEVADA GAMING CONTROL BOARD; and HARD ROCK HOTEL AND CASINO, Respondents.

No. 78916

October 8, 2020 473 P.3d 1034

Appeal from a district court order denying a petition for judicial review of an order of the Nevada Gaming Control Board. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Reversed and remanded with instructions.

Nersesian & Sankiewicz and *Robert A. Nersesian* and *Thea Marie Sankiewicz*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, and *Michael P. Somps*, Senior Deputy Attorney General, Carson City, for Respondent Nevada Gaming Control Board.

Lewis Roca Rothgerber Christie LLP and *Marla J. Hudgens*, Phoenix, Arizona, for Respondent Hard Rock Hotel and Casino.

Before the Supreme Court, PARRAGUIRRE, HARDESTY and CADISH, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

Nevada Gaming Commission Regulation (NGCR) 12.060(2)(c) provides in relevant part that a licensee must "[p]romptly redeem its own chips and tokens from its patrons." NGCR 12.060(4) complements that general rule by providing in relevant part that "[a] licensee shall not redeem its chips or tokens if presented by a person who the licensee knows or reasonably should know is not a patron of its gaming establishment." In this appeal, we consider the meaning of "patron" under those rules. We conclude that "patron" should be interpreted by its plain meaning: essentially, a customer. Because the appellant here was in fact a patron, we reverse the district court's order denying his petition for judicial review.

FACTS

Appellant Tsun Young tried to redeem six $5,000 chips from respondent Las Vegas Hard Rock Hotel and Casino, but it refused, explaining that it could not verify that he had won the chips. Young returned with a lawyer, who filed a complaint with respondent Nevada Gaming Control Board and demanded an investigation when Hard Rock again refused to redeem the chips. A Board agent responded to the dispute and issued a decision finding that Young was a patron but concluding that because Hard Rock could not verify that his winnings amounted to $30,000, it need not have redeemed his chips. The agent noted that refusing to redeem was consistent "with the established industry standards and common practice," but cited no authority supporting the proposition that a casino may refuse to redeem chips simply because it cannot verify that the person trying to redeem the chips won them.

Young petitioned the Board for reconsideration, arguing that under NGCR 12.060(2)(c), Hard Rock was required to "[p]romptly redeem its own chips and tokens from its patrons" absent an applicable exception to that rule. Although the Board's agent had found that Young *was* a patron and Hard Rock readily admitted that Young was a regular, rated player who had purchased hundreds of thousands of dollars in chips, the Board justified the agent's conclusion by citing NGCR 12.060(4), which prohibits a licensee from redeeming chips if it "knows or reasonably should know [that the person trying to redeem them] is not a patron of its gaming establishment." The Board defined "patron" for purposes of this rule as someone who has *won* the chips he seeks to redeem. The Board concluded that Young was not a "patron" under its new definition because Hard Rock had no

record of him *winning* any $5,000 chips, so it affirmed the agent's decision despite his finding that Young was a patron.

Young petitioned the district court for judicial review of the Board's order, but the district court denied the petition, thereby affirming the Board's order. Now Young appeals, arguing that the Board's decision was not in accordance with law. We agree.

DISCUSSION

We review issues of statutory interpretation de novo but will "defer to an agency's interpretation of its governing statutes or regulations if the interpretation is within the language of the statute." *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 709, 191 P.3d 1159, 1165 (2008). When reviewing de novo, we will interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous, *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007), the plain meaning "would provide an absurd result," *Simmons Self-Storage Partners, LLC v. Rib Roof, Inc.*, 130 Nev. 540, 546, 331 P.3d 850, 854 (2014), or the interpretation "clearly was not intended," *Sheriff, Clark Cty. v. Burcham*, 124 Nev. 1247, 1253, 198 P.3d 326, 329 (2008).

The Board's interpretation is not within NGCR 12.060(4)'s language

Young argues that the Board's interpretation is not entitled to deference because it is not within NGCR 12.060(4)'s language. Neither the Board nor Hard Rock argues that the Board's interpretation is within the regulation's language or even addresses the within-the-language rule.

In its recommendation affirming the agent's decision under NGCR 12.060(4), the Board noted that NGCR 12.060 does not define "patron." So it used what it described as a definition from an Eighth Judicial District Court order in an unrelated case: "a customer of a gaming establishment that obtained the chips 'through a game, tournament, contest, drawing, promotion or similar activity,'" i.e., winning the chips.[1]

The Board's interpretation of NGCR 12.060(4) is not within the regulation's language. The "game . . . or similar activity" language does not appear in NGCR 12.060,[2] so the Board's interpretation is not entitled to deference, and we must review this issue de novo.

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[1]Young's counsel represented the petitioner in the case from which the Board drew its definition and disputed the Board's interpretation of that order in the district court. He argued that whether the petitioner was a "patron" was not at issue in that case and that the district court in fact never attempted to define "patron."

[2]That language does appear in NRS 463.362(1)(a), which provides that in certain instances, a licensee must notify the Board of a dispute or notify a patron of the right to request a Board investigation, but NRS 463.362(1) is not NGCR 12.060. Further, even if we were to disregard the within-the-language rule and

"Patron" is unambiguous

The first issue upon de novo review is whether "patron" is ambiguous. A word is ambiguous if it "is subject to more than one reasonable interpretation." *Savage*, 123 Nev. at 89, 157 P.3d at 699.

Only Young offers any plain-meaning interpretation of "patron." He argues that "patron" is a common word and should be interpreted by its plain and ordinary meaning: essentially, a customer.

Neither the Board nor Hard Rock argues that "patron" is ambiguous, although by arguing that this court should affirm the Board's order, both implicitly argue that the Board's definition (i.e., someone who wins chips) is a reasonable alternative to its ordinary meaning. But Young argues that the Board's definition is not reasonable because it would allow a licensee to refuse redemption to someone who buys chips, gambles and loses some, and then tries to redeem the remaining chips. Because that person would not have *won* the chips, but merely *purchased* them, he would not be a "patron" under the Board's definition. He argues that while that seems unlikely, it is essentially what happened here.

We agree that "patron" is unambiguous. It is an ordinary word with a commonly understood meaning that is the only reasonable interpretation in this context: a customer. *See Patron*, *Black's Law Dictionary* (11th ed. 2019) (defining "patron" as "[a] customer or client of a business, esp. a regular one"). That understanding is also common to this court. *See, e.g.*, *Humphries v. N.Y.-N.Y. Hotel & Casino*, 133 Nev. 607, 607-08, 403 P.3d 358, 359-60 (2017) (referring to casino-goers as "patron[s]" regardless of whether or how they obtained chips); *Zahavi v. State*, 131 Nev. 51, 53, 343 P.3d 595, 596 (2015) (referring to casino-goers interchangeably as "patrons" and "customers"); *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 862, 265 P.3d 688, 693 (2011) (same).

Interpreting "patron" by its plain meaning would not provide an absurd result and was not clearly unintended

The next issue is whether interpreting "patron" by its plain meaning would provide an absurd result or was clearly unintended. We address both respondents' arguments in turn, beginning with the Board's.

The Board argues that interpreting "patron" by its plain meaning would provide an absurd result by "open[ing] the door for gaming chips to be more freely exchanged." It reasons that not requiring someone to have won the chips in order to redeem them would en-

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look to related law, NRS 463.362 would be inapt because it does not define "patron," but in fact addresses a subset of patrons who have won chips, which implies that someone need not win chips to be a patron—the opposite of the proposition for which the Board cited it. NRS 463.362(1)(a).

able someone to redeem them after obtaining them via some sort of unsanctioned transfer, which would frustrate the purpose of NGCR 12.060(2)(d), which requires a licensee to post signs warning that federal and state law prohibit the use of chips outside the licensee's establishment for any purpose.

But the Board does not explain how that would frustrate the sign regulation's purpose, or why it must interpret NGCR 12.060(4) beyond its plain meaning in order to serve that purpose. And more significantly, the Board does not address the anti-fraud laws that serve that purpose, or NGCR 12.060(2)(a), which requires a licensee to "[c]omply with all applicable statutes, regulations, and policies of Nevada and of the United States pertaining to chips or tokens." Those laws would provide the grounds on which to refuse to redeem Young's chips if in fact they applied, so invoking NGCR 12.060(4) by redefining "patron" would be unnecessary.

Further, NGCR 12.060(4) does not require redemption—NGCR 12.060(2)(c) is the general rule of prompt redemption for a patron, and NGCR 12.060(4) is a contrapositive rule prohibiting redemption for someone the casino knows or reasonably should know is not a patron. Because NGCR 12.060(2)(c), NGCR 12.060(4), and various exceptions to the general redemption rule may be read and enforced harmoniously, the Board's argument does not present any absurd or clearly unintended result of interpreting "patron" by its plain meaning. *See Simmons*, 130 Nev. at 546, 331 P.3d at 854 ("[T]his court interprets 'provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes' to avoid unreasonable or absurd results and give effect to the Legislature's intent." (quoting *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005))).

Hard Rock offers three arguments, all of which are unpersuasive. First, it argues that interpreting "patron" by its plain meaning "would nullify" NRS 463.362, the statute providing a process for disputing payouts. It reasons that the existence of a dispute process implies exceptions to the general redemption rule and concludes that a licensee could never dispute a payout if it must simply redeem chips for a patron. But it does not explain further, so why a licensee could not dispute things like whether it knows or should know that someone is not a patron, or whether the chips are counterfeit or from another casino, are unclear. Those exceptions, like NGCR 12.060(4), can be read and enforced in harmony with the general redemption rule.

Second, it argues that interpreting "patron" by its plain meaning "would make it impossible for gaming licensees to comply with . . . state and federal laws and policies . . . designed to combat financial crime." It essentially reasons that if a patron seeks to redeem chips, and redeeming the chips would be a crime, it would

have no choice but to commit a crime. But if redeeming Young's chips would have somehow violated state or federal law, then Hard Rock would not need to redefine "patron" to suit its needs. As we explained above, those laws would have been the proper authority to invoke, and could be read and enforced in harmony with the general redemption rule.

Finally, Hard Rock argues that federal reporting "requirements prevent Hard Rock from simply redeeming $30,000 to any customer presenting chips where internal records don't substantiate his play." But the federal reporting requirement it cites, 31 C.F.R. § 1021.320(a)(1) (2019), simply requires a casino to file "a report of any suspicious transaction relevant to a possible violation of law or regulation." This regulation does not even implicitly prohibit a casino from redeeming chips, but even if it did prohibit redemption, it could be read and enforced in harmony with the general redemption rule as an exception.

None of Hard Rock's arguments show that interpreting "patron" by its plain meaning would provide an absurd result or was clearly unintended. Further, no absurd results are otherwise foreseeable because NGCR 12.060(4) and the various exceptions to the general redemption rule can be read and enforced in harmony with the general redemption rule. So we conclude that interpreting "patron" by its plain meaning would not provide an absurd result and was not clearly unintended.

Young was a "patron"

Because the plain meaning of "patron" is unambiguous, would not provide an absurd result, and was not clearly unintended, we interpret "patron" by its plain meaning. So the final issue is whether Young was a "patron" under the word's plain meaning.

As the Board agent testified before the hearing officer, "Mr. Young is obviously a patron of the casino." The parties do not dispute that Young was a regular, rated player at Hard Rock who wagered hundreds of thousands of dollars, and those facts support the conclusion that Young was a patron. And because Young was a patron, Hard Rock could not have known that he was not a patron, so NGCR 12.060(4) did not apply. Instead, because Hard Rock never alleged any other grounds for refusing to redeem the chips, it should have promptly redeemed Young's chips under NGCR 12.060(2)(c). Because the Board concluded otherwise on the basis of its erroneous definition of "patron," its decision was not in accordance with law.

The Board should have instead interpreted "patron" by its plain meaning and concluded that Young, as the agent found and nearly every person who appears in the appellate record has admitted, was a patron. And because no identifiable statute, regulation, or other

law entitled Hard Rock to refuse redemption simply because its records could not confirm that Young won any $5,000 chips, the Board should have reversed the agent's decision and instructed Hard Rock to redeem Young's chips.

CONCLUSION

The word "patron" should be interpreted by its plain meaning, under which Young was a patron. Because the Board concluded otherwise, its decision was not in accordance with law. We therefore reverse the district court's order denying judicial review of the Board's order and remand to the district court with the instruction that it (1) grant judicial review and reverse the Board's order affirming the agent's decision and (2) remand to the Board with the instruction to enter a new order reversing the agent's decision.

HARDESTY and CADISH, JJ., concur.

THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHLEEN M. DRAKULICH, DISTRICT JUDGE, RESPONDENTS.

No. 79792

THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHLEEN M. DRAKULICH, DISTRICT JUDGE, RESPONDENTS.

No. 80008

THE WASHOE COUNTY DISTRICT ATTORNEY'S OFFICE, PETITIONER, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE KATHLEEN M. DRAKULICH, DISTRICT JUDGE, RESPONDENTS.

No. 80009

October 8, 2020 473 P.3d 1039

Consolidated original petitions for a writ of mandamus or prohibition challenging district court orders directing the Washoe County District Attorney's Office to participate in criminal record-sealing proceedings.

Petitions granted.

Christopher J. Hicks, District Attorney, and *Jennifer P. Noble*, Chief Appellate Deputy District Attorney, Washoe County, for Petitioner.

Aaron D. Ford, Attorney General, *Greg D. Ott*, Chief Deputy Attorney General, and *Peter P. Handy*, Deputy Attorney General, Carson City, for Respondents.

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

OPINION

By the Court, Parraguirre, J.:

INTRODUCTION

NRS 179.2405 through NRS 179.301, and most specifically NRS 179.245, provide a process by which people convicted of certain crimes may petition the district court to seal their criminal records. NRS 179.245(3) instructs the district court upon the filing of such a petition to notify, among other entities, the district attorney's office that prosecuted the petitioner. NRS 179.245(3) further provides that upon notification of the petition, the district attorney's office "may testify and present evidence at any hearing on the petition."

In 2017, the Legislature amended NRS 179.245 to clarify that district courts are not required to hold a hearing on every petition to seal criminal records. In so doing, the Legislature enacted a new subsection 4 permitting a district court to resolve the petition without a hearing if the district attorney's office stipulates to sealing the records, but requiring the district court to hold a hearing if the district attorney's office does not stipulate to sealing the records. The Legislature also enacted NRS 179.2445, which creates a rebuttable presumption in favor of sealing records.

In these consolidated writ petitions, petitioner Washoe County District Attorney's Office challenges respondent Second Judicial District Court's authority to compel it to participate in a record-sealing proceeding if it chooses to neither stipulate to nor oppose the petition to seal. As explained below, a criminal-record-sealing petition is a civil proceeding separate from the original criminal prosecution, and a district attorney's office is not a party to that record-sealing proceeding. Thus, if a district attorney's office chooses not to participate in a proceeding, the district court lacks the authority to compel it to do so. We therefore grant the Washoe County DA's writ petitions.

FACTS

Following the Legislature's above-described 2017 amendments,[1] the Washoe County DA sent the district court a memorandum in January 2019 stating that it would henceforth participate in a given record-sealing proceeding only when it wanted to oppose the petition. Later in 2019, Edward Harsh, Thomas Stokley, and Thomas McCall each filed petitions with the district court to seal their criminal records. Thereafter, and as required by NRS 179.245(3), the district court notified the Washoe County DA that each petition had been filed. After each petitioner requested that his petition be submitted for decision, the district court issued substantively identical "Order[s] to Respond," one of which stated the following:

> IT IS HEREBY ORDERED that the District Attorney will file a response or opposition to the *Petition to Seal Records Pursuant to NRS 179.245 and NRS 179.255*, which shall include whether the representations of Petitioner's criminal history are consistent with the records of the Washoe County District Attorney's Office no later than ten (10) days from the date of this Order.

In lieu of responding, the Washoe County DA promptly filed these three identical writ petitions challenging the district court's authority to compel the Washoe County DA to participate in the record-sealing proceedings.[2]

DISCUSSION

Entertaining the writ petitions is warranted

"A writ of prohibition may issue to arrest the proceedings of a district court exercising its judicial functions when such proceedings are in excess of the jurisdiction of the district court."[3] *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). "A writ of prohibition is an extraordinary remedy, and therefore, the decision to entertain the petition lies within our discretion." *Daane v. Eighth Judicial Dist. Court*, 127 Nev. 654, 655, 261 P.3d 1086, 1087 (2011). We will generally entertain a petition for extraordinary relief when the petitioner lacks

[1]The Legislature amended NRS 179.245 again in 2019, taking effect July 1, 2020, although none of the subsections at issue here were substantively altered. *See* 2019 Nev. Stat., ch. 633, § 37, at 4405-07.

[2]All three writ petitions name the State of Nevada as the petitioner. This appears to be a clerical error because the Washoe County DA filed the petitions. Accordingly, we direct the clerk of this court to modify the captions on these dockets to conform to the captions in this opinion.

[3]Although the Washoe County DA alternatively requests a writ of mandamus, a writ of prohibition is the more appropriate remedy because the issue presented implicates the district court's jurisdiction.

an adequate remedy at law. *Johanson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 248-49, 182 P.3d 94, 96 (2008).

Here, the Washoe County DA does not have an adequate remedy at law. If the Washoe County DA were forced to participate in a record-sealing petition and were able to appeal the district court's order granting or denying the petition, we would not be able to redress the alleged harm inflicted on the Washoe County DA by being forced to participate. Additionally, whether a district court has authority to compel a district attorney's office to participate in a record-sealing petition is an important issue of law in need of clarification. *See Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014) (recognizing that entertaining a writ petition is appropriate when an important legal issue is in need of clarification). Accordingly, we elect to entertain the Washoe County DA's writ petitions.

The district court lacks authority to compel the Washoe County DA to participate in a record-sealing petition

The Washoe County DA contends that the district court exceeded its jurisdiction because it lacks authority to compel a district attorney's office to participate in a record-sealing petition. For support, the Washoe County DA relies on NRS 179.245(3) and (4), which provide the following:

> 3. Upon receiving a petition pursuant to this section, the court shall notify the law enforcement agency that arrested the petitioner for the crime and the prosecuting attorney, including, without limitation, the Attorney General, who prosecuted the petitioner for the crime. *The prosecuting attorney* and any person having relevant evidence ***may*** *testify and present evidence at any hearing on the petition*.
>
> 4. *If the prosecuting attorney who prosecuted the petitioner for the crime stipulates* to the sealing of the records after receiving notification pursuant to subsection 3[,] . . . the court may order the sealing of the records . . . without a hearing. *If the prosecuting attorney does not stipulate to the sealing of the records, a hearing on the petition must be conducted.*

(Emphases added.) According to the Washoe County DA, because subsection 3 *permits* the Washoe County DA to testify and present evidence, it can choose not to. The Washoe County DA further contends that subsection 4 is also permissive, in that the Washoe County DA can choose to either stipulate to sealing or simply not stipulate. The Washoe County DA additionally contends that the Legislature's 2017 amendments to the record-sealing statutes, which included the addition of subsection 4, were intended to streamline the record-sealing process and that the Washoe County DA's election

not to participate in the process serves that intent. *See* 2017 Nev. Stat., ch. 378, § 3, at 2412 (enacting NRS 179.2405, which provides that "*[t]he Legislature hereby declares that the public policy of this State is to favor the giving of second chances to offenders who are rehabilitated and the sealing of the records of such persons*"); *id.* at 2411-12 (Legislative Counsel's Digest describing the changes to the record-sealing process).

In opposition, the district court does not directly dispute the Washoe County DA's reading of NRS 179.245. Instead, it contends that it has "the inherent authority" to compel the Washoe County DA to participate. For support, it relies on *State ex rel. Marshall v. Eighth Judicial District Court*, 80 Nev. 478, 482, 396 P.2d 680, 682 (1964), in which we concluded that a district court had the inherent authority "to exercise reasonable control over a criminal proceeding" by ordering the district attorney to prepare a trial transcript for the defendant. However, NRS 179.245(7) expressly provides that a record-sealing petition is a "civil proceeding" that is necessarily separate from the original criminal prosecution of the person seeking to seal records.[4] And while NRS 179.245(3) requires the district court to notify the Washoe County DA that a record-sealing petition has been filed, the petitioner is *not* required to serve the petition on the Washoe County DA as would be required to render the Washoe County DA a party to the proceeding. *See* NRS 179.245(2) (listing requirements for filing a record-sealing petition, which do not include serving the petition on the district attorney's office); *see also* NRCP 4(c) (requiring a civil complaint to be served on each party named in the complaint). Thus, *Marshall* is inapposite because the district attorney was a party in that case and was thereby subject to the district court's inherent authority. Here, however, the Washoe County DA is not a party to civil record-sealing petitions, and absent such status, we cannot conclude that the district court's inherent authority permits it to compel a nonparty to participate.[5]

Accordingly, we agree with the Washoe County DA that NRS 179.245(3) and (4) *permit* the Washoe County DA to participate in a record-sealing petition but do not *require* it to do so, and that the district court otherwise lacks authority to compel the Washoe Coun-

[4]The Washoe County DA indicates that record-sealing petitions are assigned docket numbers different from the cases in which the Washoe County DA undertook the criminal prosecution.

[5]The district court also argues that ordering the Washoe County DA to participate is akin to issuing a writ of mandamus, which the district court is constitutionally authorized to do. *See* Nev. Const. art. 6, § 6(1). However, a writ of mandamus is appropriate "to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station," NRS 34.160, and if the Washoe County DA has no duty to participate in a record-sealing petition, a writ of mandamus compelling the Washoe County DA to do so would be ineffective.

ty DA to participate. The district court exceeded its authority, so a writ of prohibition is appropriate. *Club Vista*, 128 Nev. at 228, 276 P.3d at 249.

We do, however, empathize with the district court's frustration. The Washoe County DA's policy essentially forces the district court to hold a hearing when the Washoe County DA does not stipulate to sealing, *see* NRS 179.245(4), but leaves nobody at the hearing to rebut the presumption that the records should be sealed, *see* NRS 179.2445.[6] We are also concerned with the Washoe County DA's unexplained rationale for why it could not simply stipulate to sealing if it did not oppose sealing in a particular case. That being said, NRS 179.245(3) and (4) are unambiguously permissive, and we are confined to construe them accordingly. *City Council of Reno v. Reno Newspapers, Inc.*, 105 Nev. 886, 891, 784 P.2d 974, 977 (1989) ("When the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it.").

Consistent with the foregoing, we grant the Washoe County DA's writ petitions. Accordingly, we direct the clerk of this court to issue writs of prohibition instructing the Second Judicial District Court to vacate its orders requiring the Washoe County District Attorney's Office to respond to the record-sealing petitions.

Hardesty and Cadish, JJ., concur.

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[6]NRS 179.245(3) does permit "any person having relevant evidence" to participate in the hearing. However, given NRS 179.245(3)'s list of entities that are notified of the petition, it appears that the Washoe County DA would have the most relevant evidence in the majority of cases.

JPMORGAN CHASE BANK, NATIONAL ASSOCIATION, a National Association, Appellant, *v.* SFR INVESTMENTS POOL 1, LLC, a Nevada Limited Liability Company, Respondent.

No. 77010

October 29, 2020 475 P.3d 52

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Reversed and remanded with instructions.

[Rehearing denied December 23, 2020]

Ballard Spahr LLP and *Abran E. Vigil, Holly A. Priest*, and *Joel E. Tasca*, Las Vegas; *Ballard Spahr LLP* and *Matthew D. Lamb*, Washington, D.C., for Appellant.

Kim Gilbert Ebron and *Jacqueline A. Gilbert, Diana S. Ebron*, and *Caryn R. Schiffman*, Las Vegas, for Respondent.

Fennemore Craig P.C. and *Leslie Bryan Hart* and *John D. Tennert III*, Reno, for Amicus Curiae Federal Housing Finance Agency.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

We have previously held that the Federal Foreclosure Bar, 12 U.S.C. § 4617(j)(3), preempts NRS 116.3116 and prevents a homeowners' association (HOA) foreclosure sale from extinguishing a first deed of trust that secures a loan owned by the Federal Housing Finance Agency (FHFA) or by a federal entity under the FHFA's conservatorship. *Saticoy Bay LLC Series 9641 Christine View v. Fed. Nat'l Mortg. Ass'n (Christine View)*, 134 Nev. 270, 272-74, 417 P.3d 363, 366-68 (2018). But we have yet to address what statute of limitations, if any, applies to an action brought to enforce the Federal Foreclosure Bar.

That is the question presented in this case. The answer is governed by the federal law that enacted the Federal Foreclosure Bar—the Housing and Economic Recovery Act (HERA). The HERA statute of limitations looks to whether the claim in the action sounds in contract or tort. Although the claims in the underlying action do not fit either category, we conclude that they are best described as sounding in contract for purposes of the HERA statute of limitations. HERA provides for a six-year statute of limitations for claims

sounding in contract. Because the loan servicer commenced the action here within six years of the foreclosure sale, the date the parties agree triggered the running of the statute of limitations, we reverse the district court's summary judgment order. And because we also conclude that the loan servicer sufficiently demonstrated that a regulated entity under the FHFA's conservatorship owned the subject loan, we remand for the district court to enter judgment in favor of the loan servicer.

FACTS AND PROCEDURAL HISTORY

After the nonparty homeowners failed to pay their HOA assessments, the HOA held a foreclosure sale on March 1, 2013, at which respondent SFR Investments Pool 1, LLC, purchased the property. On November 27, 2013, appellant JPMorgan Chase Bank (Chase) filed a complaint seeking a declaration that the first deed of trust survived the sale and for quiet title. On February 2, 2016, Chase moved to amend its complaint to rely on the Federal Foreclosure Bar. After the district court granted the motion, Chase filed its amended complaint on March 9, 2016.

Both parties moved for summary judgment. Chase offered evidence that it was servicing the loan on behalf of Freddie Mac, which had been placed into an FHFA conservatorship in 2008, and argued that the first deed of trust therefore survived under the Federal Foreclosure Bar. The district court ultimately found that Chase adequately demonstrated that Freddie Mac owned the loan at the time of the foreclosure sale but that a three-year statute of limitations applied and Chase had missed that deadline by eight days because it did not mention the Federal Foreclosure Bar until it filed the amended complaint. The district court therefore entered summary judgment in favor of SFR, concluding that the foreclosure sale extinguished the deed of trust. Chase now appeals that decision, and the FHFA has filed an amicus brief in support of Chase's position.

DISCUSSION

The Federal Foreclosure Bar is part of HERA. *See* 12 U.S.C. § 4501 *et seq.* (HERA); *Nationstar Mortg., LLC v. SFR Invs. Pool 1, LLC*, 133 Nev. 247, 250-51, 396 P.3d 754, 757 (2017) (discussing HERA and the Federal Foreclosure Bar). HERA includes a statute-of-limitations provision that applies "to any action brought by the [FHFA]" and specifies the limitations period based on whether the action involves a contract claim or a tort claim:

> [T]he applicable statute of limitations with regard to any action brought by the [FHFA] shall be—
>
> (i) in the case of any contract claim, the longer of—
>
> (I) the 6-year period beginning on the date on which the claim accrues; or

(II) the period applicable under State law; and
(ii) in the case of any tort claim, the longer of—
(I) the 3-year period beginning on the date on which the claim accrues; or
(II) the period applicable under State law.

12 U.S.C. § 4617(b)(12). When the facts are uncontroverted, as they are here, the application of a statute of limitations to bar a claim is a question of law that this court reviews de novo.[1] *Holcomb Condo. Homeowners' Ass'n v. Stewart Venture, LLC*, 129 Nev. 181, 186-87, 300 P.3d 124, 128 (2013).

HERA's statute of limitation applies even if the FHFA and the entities it regulates are not parties

We first address the threshold question of whether HERA dictates the statute of limitations in this case. HERA's statute-of-limitations provision applies to actions brought by the FHFA. 12 U.S.C. § 4617(b)(12). Confronted with an argument that the provision thus did not apply to this action brought by Chase, the district court found that HERA's limitations provision applied regardless of whether the FHFA brought the action or was joined as a party. We agree with the district court.

As we have already held, a loan servicer such as Chase can raise the Federal Foreclosure Bar on the FHFA's behalf without joining the FHFA or the regulated entity that owns the loan as a party to the action. *Nationstar*, 133 Nev. at 251, 396 P.3d at 758. That is so because HERA allows the FHFA to authorize a loan servicer to act on its behalf by contracting with the loan servicer or relying on the regulated entity's contractual relationship with a loan servicer, such that the contractually authorized loan servicer has standing to take action to protect the FHFA's interests. *See id.* at 250, 396 P.3d at 757 (holding that the broad language "such action" in 12 U.S.C. § 4617(b)(2)(D) would include allowing contracted servicers to act to protect an asset owned by a regulated entity that is under an FHFA conservatorship). It thus follows that, when the contractually authorized loan servicer brings an action to protect the FHFA's interests

[1]SFR asserts that an abuse-of-discretion standard applies because the district court struck certain of Chase's arguments regarding the applicable statute of limitations. The supporting record citation SFR directs the court to, however, merely shows that the district court allowed SFR to argue that Chase's argument was untimely, not that the district court struck Chase's argument. And, although SFR argues Chase waived certain arguments regarding the applicable statute of limitations, we have previously considered arguments that were not raised in the district court when the issue presents solely a question of law and the interests of judicial economy warrant resolving the issue. *See Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877 n.9 (1999) ("As the interpretation of the statute is solely a question of law, rather than requiring the [party] to raise the issue in district court in a summary judgment motion, in the interests of judicial economy, we have chosen to address [it] at this time.").

as conservator of a regulated entity, the same statute of limitations would apply as if the FHFA had brought the action itself. *See M & T Bank v. SFR Invs. Pool 1, LLC*, 963 F.3d 854, 857-58 (9th Cir. 2020) (agreeing with the parties that HERA governs the statute of limitations that applies to an FHFA loan servicer's action raising the Federal Foreclosure Bar). We therefore hold that, regardless of whether the FHFA, Freddie Mac, or Fannie Mae is joined as a party, HERA's statute of limitations governs an action brought by a mortgage loan servicer to enforce the Federal Foreclosure Bar. Having determined that the timeliness of Chase's action is governed by HERA's statute-of-limitations provision, we must now determine the appropriate limitations period.

Chase's claims sound in contract, and therefore a six-year limitations period applies

The HERA statute-of-limitations provision asks whether the action brings a contract claim or a tort claim, 12 U.S.C. § 4617(b)(12), even "if neither description is a perfect fit."[2] *M & T*, 963 F.3d at 858 (recognizing that HERA's statute of limitations "applies to all [actions] brought by the FHFA as conservator," even though it bases the applicable limitations period on whether the action is contract- or tort-based); *FHFA v. UBS Ams. Inc.*, 712 F.3d 136, 143-44 (2d Cir. 2013) (holding that Congress clearly intended HERA's statute-of-limitations provision "to apply to *all* [actions] brought by [the] FHFA as conservator" and that it "supplants any other time limitations that otherwise might have applied"); *see also Nat'l Credit Union Admin. Bd. v. RBS Sec., Inc.*, 833 F.3d 1125, 1131 (9th Cir. 2016) (concluding that an identically worded statute made Congress's intent "clear that no other limitations period applie[d]" to the action brought).

One cannot dispute that no contract exists between SFR and Chase. And Chase's complaint neither alleged a breach of duty by SFR or any other party below, nor sought damages based on injury to a person or property, "two of the traditional hallmarks of a torts action." *M & T*, 963 F.3d at 858. The contract and tort descriptions thus are not a good fit for the claims in Chase's complaint. Faced with the same dilemma, the Ninth Circuit Court of Appeals has looked to "whether a claim is better characterized as sounding in contract or tort." *Id.*; *see also FHFA v. LN Mgmt. LLC, Series 2937 Barboursville*, 369 F. Supp. 3d 1101, 1109 (D. Nev. 2019) (explaining the analysis as "perform[ing] the square-peg-in-round-hole

[2]In this regard, *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020), provides no guidance. In that case, we addressed the statute of limitations that applied to an action brought by the party who purchased the subject property at an HOA foreclosure sale to quiet title to the property. *Id.* at 94, 460 P.3d at 441. Because that case did not involve an action brought by the FHFA or its contractually authorized loan servicer, HERA did not dictate the applicable statute of limitations.

task" of determining whether an action seeking to enforce the Federal Foreclosure Bar fell "into the contract or tort bucket"), *vacated in part on other grounds on reconsideration*, No. 2:17-cv-03006-JAD-EJY, 2019 WL 6828293 (D. Nev. Dec. 13, 2019).

After careful examination, we agree with the courts that have concluded that claims seeking to enforce the Federal Foreclosure Bar sound more in contract than in tort. The key distinction between a tort and a contract claim is whether the alleged harm could have been realized without a contract. *Stanford Ranch, Inc. v. Md. Cas. Co.*, 89 F.3d 618, 625 (9th Cir. 1996). Despite the lack of a contract between SFR and Chase, "the quiet title claims [asserted by Chase] are entirely 'dependent' upon Freddie Mac's lien on the Property, an interest created by contract." *M & T*, 963 F.3d at 858; *see also Ditech Fin. LLC v. SFR Invs. Pool 1, LLC*, 380 F. Supp. 3d 1089, 1094 (D. Nev. 2019) ("At bottom, this action concerns the viability of [the] lien interests against the Propert[y]. As [the] lien[was] created by contract, an action to enforce [it] is necessarily a 'contract action.'"). As a federal district court has explained, the mortgage "lien is the hook that allows [the loan servicer] to seek a declaration that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing Freddie Mac's deed of trust. . . . Indeed, the point of the . . . suit is to marshal and protect Freddie Mac's asset: a mortgage contract secured by a deed of trust." *LN Mgmt.*, 369 F. Supp. 3d at 1110. And to the extent there is any lingering doubt about whether Chase's claims are better characterized as sounding in contract or tort, federal law dictates that we cede to the characterization that results in the longer limitations period.[3] *See Wise v. Verizon Commc'ns Inc.*, 600 F.3d 1180, 1187 n.2 (9th Cir. 2010) (espousing the federal policy to apply the longer limitations period "[w]hen choosing between multiple potentially-applicable statutes"); *see also M & T*, 963 F.3d at 858 (using this policy to further support its decision to apply the statute of limitations for contract claims to the servicer's attempt to enforce the Federal Foreclosure Bar). Here, HERA provides a longer limitations period for contract claims than it does for tort claims. *See* 12 U.S.C. § 4617(b)(12).

HERA provides that if the claim sounds in contract, the statute of limitations is either six years or "the period applicable under State law," whichever is longer. 12 U.S.C. § 4617(b)(12)(A)(i). Nevada law also imposes a six-year statute of limitations on an action arising out of a contract. NRS 11.190(1)(b). We therefore conclude that Chase had six years from the foreclosure sale to bring its claims.[4]

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[3]To the extent Nevada law would dictate a different approach, we must interpret HERA in accordance with federal law. *See Vincent Murphy Chevrolet Co. v. United States*, 766 F.2d 449, 451 (10th Cir. 1985) (holding that a federal statute "must be interpreted in accordance with principles of federal law").

[4]SFR and Chase agree that Chase's claim "accrued" for purposes of triggering HERA's limitations period on the date of the foreclosure sale.

Applying a six-year statute of limitations, Chase timely brought its action seeking to protect the FHFA's interest by enforcing the Federal Foreclosure Bar regardless of whether the operative filing date is that of the original complaint or the amended complaint.[5] The district court therefore erred in entering summary judgment in SFR's favor based on the statute of limitations. *See Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (providing that summary judgment is only appropriate when the facts are not in dispute "and the moving party is entitled to judgment as a matter of law").

Chase adequately proved Freddie Mac's ownership of the mortgage loan

SFR argues that, even if this court finds that Chase timely commenced the action, we should affirm the summary judgment because Chase failed to prove Freddie Mac's interest in the mortgage loan secured by the first deed of trust. Below, SFR moved to strike certain evidence Chase provided in support of its summary judgment motion regarding Freddie Mac's ownership of the loan, arguing that Chase improperly disclosed the evidence after discovery closed. The district court granted the motion. SFR argues on appeal that without the stricken evidence, the district court's finding that Freddie Mac owns the subject loan lacks the evidentiary support necessary to affirm summary judgment in Chase's favor. Chase argues that the district court abused its discretion in granting the motion to strike. Chase alternatively argues that even without the late-disclosed documents, it presented sufficient evidence to show Freddie Mac's ownership of the loan.

We agree with SFR that the district court did not abuse its discretion in granting SFR's motion to strike the untimely disclosed evidence.[6] *See Capanna v. Orth*, 134 Nev. 888, 894-95, 432 P.3d 726, 733-34 (2018) (reviewing a district court's decision to admit untimely disclosed evidence for an abuse of discretion). An abuse of

[5]As stated above, HERA mandates the application of a statute of limitations to an FHFA servicer's action seeking to enforce the Federal Foreclosure Bar. And, having concluded that a six-year statute of limitations applies, we need not address Chase's argument that the Federal Foreclosure Bar is merely a legal theory. That argument would only be relevant if Chase filed its amended complaint outside HERA's six-year statute of limitations, in order to determine whether the amended complaint related back to the original complaint and was therefore timely.

[6]Chase argues that the district court's striking of its evidence constituted case-concluding sanctions, but that argument is misplaced. The district court did not strike the evidence as a sanction, it struck the evidence because Chase disclosed it after discovery closed. And, in any event, Chase fails to demonstrate how striking the evidence was "case concluding." *See Bahena v. Goodyear Tire & Rubber Co.*, 126 Nev. 606, 615 n.6, 245 P.3d 1182, 1188 n.6 (2010) (defining "case concluding sanctions" as ones "in which the complaint is dismissed or the answer is stricken as to both liability and damages").

discretion occurs only when "no reasonable judge could reach a similar conclusion under the same circumstances." *Leavitt v. Siems*, 130 Nev. 503, 509, 330 P.3d 1, 5 (2014). Here, despite Chase's claims that SFR knew before the close of discovery that Chase was relying on the Federal Foreclosure Bar, Chase did not disclose certain of the evidence to prove Freddie Mac's ownership of the subject loan until after discovery closed, and it did not seek to reopen discovery. Chase provided no substantial justification for the late disclosure, and we are not convinced that consideration of the evidence despite its late disclosure would be harmless. *See* NRCP 37(c)(1) (providing that evidence that is not timely disclosed may still be admitted if the party provides substantial justification for the late disclosure or the late disclosure is harmless); *Pizarro-Ortega v. Cervantes-Lopez*, 133 Nev. 261, 265, 396 P.3d 783, 787-88 (2017) (discussing NRCP 37(c)(1)).

We now must determine whether the remaining evidence showed Chase's entitlement to summary judgment. Summary judgment requires the moving party to present evidence to show that it is entitled to judgment as a matter of law. *Wood*, 121 Nev. at 731, 121 P.3d at 1031; *see also Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007) ("If the moving party will bear the burden of persuasion, that party must present evidence that would entitle it to a judgment as a matter of law in the absence of contrary evidence."). We conclude that Chase met its evidentiary burden. Chase presented a sworn declaration from an employee familiar with its business records regarding the subject loan stating that Freddie Mac purchased the loan in 2006 and still owned it. The employee's declaration further stated that Chase had serviced the loan on Freddie Mac's behalf since Freddie Mac purchased the loan. The employee also authenticated Chase's business records, including a loan transfer history showing the sale of the loan to Freddie Mac and screenshots from another database regarding Chase's status as the loan's servicer. Absent any evidence controverting the declaration or a challenge to the business records' accuracy, this evidence is sufficient to show Freddie Mac's ownership of the subject loan. *See Daisy Tr. v. Wells Fargo Bank, N.A.*, 135 Nev. 230, 234-36, 445 P.3d 846, 850-51 (2019) (discussing the evidence demonstrating Freddie Mac's ownership of a loan, including a declaration from the servicer and screenshots of the servicer's business records, and recognizing that the party challenging the accuracy of such evidence "bore the burden of showing that their declarations or the printouts were *not* trustworthy"); *see also* NRS 51.135 (providing that business records are admissible "unless the source of information or method or circumstances of preparation indicate lack of trustworthiness"); *Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (explaining the moving and opposing parties' respective burdens of production and

persuasion on summary judgment). And we are not convinced by SFR's argument that the district court's factual findings on this point were insufficient such that we must remand for additional findings. *Cf. Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 785-86, 312 P.3d 479, 483 (2013) (indicating that remand may be appropriate when a procedurally defective order "precludes adequate review").

CONCLUSION

The district court correctly determined that neither the FHFA nor Freddie Mac needed to be joined as a party for HERA's statute-of-limitations provision to apply to Chase's action seeking to enforce the Federal Foreclosure Bar. The district court erred, however, in applying a three-year limitations period. Because Chase's claims seeking to enforce the Federal Foreclosure Bar are best characterized as sounding in contract, a six-year statute of limitations applies. Chase's action therefore was timely filed. Accordingly, we reverse the district court's grant of summary judgment in SFR's favor based on the statute of limitations. And because Chase demonstrated that Freddie Mac owned the loan even without the late-disclosed evidence struck by the district court, we remand for the district court to enter judgment in favor of Chase such that the Federal Foreclosure Bar prevented the foreclosure sale from extinguishing the first deed of trust and SFR therefore took the property subject to that deed of trust. *See Christine View*, 134 Nev. at 272-74, 417 P.3d at 367-68; *Pink v. Busch*, 100 Nev. 684, 691, 691 P.2d 456, 461 (1984) ("[U]pon reversal, where the material facts have been fully developed . . . and are undisputed such that the issues remaining are legal rather than factual, we will . . . remand the case to the lower court with directions to enter judgment in accordance with the opinion . . . .").

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

JANETTE BYRNE, AS TRUSTEE OF THE UOFM TRUST, APPELLANT, *v.* SUNRIDGE BUILDERS, INC., A NEVADA CORPORATION; LANDS WEST BUILDERS, INC., A NEVADA CORPORATION; BRYANT MASONRY, LLC, A NEVADA LIMITED LIABILITY COMPANY; DMK CONCRETE, INC., A NEVADA CORPORATION; GREEN PLANET LANDSCAPING, LLC, A NEVADA LIMITED LIABILITY COMPANY; LIFEGUARD POOL MAINTENANCE, DBA LIFEGUARD POOLS, A NEVADA CORPORATION; PRESTIGE ROOFING, INC., A NEVADA CORPORATION; PYRAMID PLUMBING, INC., A NEVADA CORPORATION; RIVERA FRAMING, INC., DBA RIVERA FRAMERS, A NEVADA CORPORATION; AND S&L ROOFING, INC., A COLORADO CORPORATION, RESPONDENTS.

No. 77668

October 29, 2020 475 P.3d 38

Appeal from a district court nunc pro tunc order, certified as final under NRCP 54(b), granting summary judgment in a construction defect action. Eighth Judicial District Court, Clark County; Richard Scotti, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied February 4, 2021]

Molof & Vohl and *Robert C. Vohl*, Reno; *Springel & Fink, LLP*, and *Wendy Walker* and *Adam Springel*, Las Vegas, for Appellant.

Gordon & Rees Scully Mansukhani, LLP, and *Robert E. Schumacher* and *Brian Walters*, Las Vegas, for Respondent Lands West Builders, Inc.

Wolfenzon Rolle and *Bruno Wolfenzon* and *Jonathan Rolle*, Las Vegas, for Respondent Green Planet Landscaping, LLC.

Resnick & Louis, P.C., and *Athanasia E. Dalacas*, Las Vegas, for Respondent Sunridge Builders, Inc.

Brown Bonn & Friedman, LLP, and *Kevin Brown* and *Lori Jordan*, Las Vegas, for Respondents DMK Concrete, Inc., and Prestige Roofing, Inc.

Keating Law Group and *Bryce Buckwalter*, Las Vegas, for Respondent Pyramid Plumbing, Inc.

Law Offices of David R. Johnson, PLLC, and *David R. Johnson*, Las Vegas, for Respondent Rivera Framing, Inc.

Morris Sullivan Lemkul, LLP, and *Christopher Turtzo* and *Matthew Yarling*, Las Vegas, for Respondents Bryant Masonry, LLC, and S&L Roofing, Inc.

Stephenson & Dickinson, P.C., and *Marsha L. Stephenson*, Las Vegas, for Respondent Lifeguard Pool Maintenance.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

When the Legislature retroactively shortened the statute of repose for construction defect lawsuits with the enactment of Assembly Bill (A.B.) 125 in 2015, it created a grace period for a claimant to "commence" an action even after the statute of repose had run. In this appeal, we clarify that "commence" means a claimant must have filed a lawsuit, not merely served notice of a construction defect pursuant to NRS 40.645, within the grace period to preserve his or her action. Because appellant Janette Byrne failed to file a lawsuit within the grace period and the statute of repose had run, we determine that her action was time-barred and therefore affirm the district court order granting summary judgment in favor of respondents. However, we also determine that the district court abused its discretion in awarding attorney fees to respondent Lands West Builders, Inc., and therefore reverse the district court order granting Lands West's motion for attorney fees and remand for further proceedings.

BACKGROUND

Respondent Sunridge Builders, Inc., a general contractor, along with numerous subcontractors, substantially completed building a single-family home in Henderson in May 2009. Byrne, as trustee of the UOFM Trust, subsequently purchased the home.

In December 2015, approximately six years and seven months after the home was built, Byrne served notice of a construction defect pursuant to NRS 40.645 (NRS Chapter 40 Notice) on Sunridge and various subcontractors. In August 2016, approximately seven years and three months after the home was built, Byrne filed a construction defect lawsuit against Sunridge, Lands West as Sunridge's alter ego or successor and, subsequently, other subcontractors, who are respondents in this appeal.[1] Three months after initially appearing in

[1]All but one of the respondents in this appeal filed a joint answering brief. Respondent Green Planet Landscaping, LLC, filed its own answering brief. Although we frame our analysis in terms of Sunridge and Lands West, our holding regarding the timeliness of Byrne's claim applies to all respondents in this case.

the case, Lands West offered Byrne a settlement of $10,001. Byrne did not respond to the offer, thereby rejecting it. A few months later, Byrne failed to respond to Sunridge's settlement offer of $50,000.

Sunridge and Lands West moved for summary judgment, arguing that because Byrne's construction defect action was filed more than six years after the home was built, it was barred by the statute of repose. Byrne countered that by serving an NRS Chapter 40 Notice during the statutory grace period, she effectively tolled the case. The district court granted Sunridge and Lands West's motion, concluding that because Byrne failed to file her lawsuit during the grace period and the statute of repose had run, her claim was time-barred.[2] It reasoned that although Byrne served an NRS Chapter 40 Notice within the grace period, the provision permitting a claimant's service of an NRS Chapter 40 Notice to toll the statute of repose did not apply because Byrne served such notice after the statute of repose had already expired.[3]

Sunridge and Lands West independently moved for attorney fees. The district court denied Sunridge's motion but granted Lands West's, explaining that Byrne knew or should have known that Lands West was not the general contractor and therefore did not bring her action against Lands West in good faith. This appeal follows.

DISCUSSION

We first consider whether the district court erred in granting summary judgment in favor of respondents based on its determination that Byrne's action was time-barred. We then assess whether the district court abused its discretion in awarding attorney fees to Lands West.

The district court did not err in granting summary judgment in favor of respondents because Byrne's action was time-barred

We review a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment may be granted for a party "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." *Shadow Wood Homeowners*

[2]The district court subsequently issued a nunc pro tunc order granting summary judgment on the same grounds for all respondents in this appeal.

[3]The district court also rejected Byrne's equitable estoppel argument. Because Byrne does not challenge the district court's conclusion regarding equitable estoppel, we need not consider it. *Cf. Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (holding that this court need not consider claims that are not cogently argued or supported by relevant authority).

Ass'n, Inc. v. N.Y. Cmty. Bancorp, Inc., 132 Nev. 49, 55, 366 P.3d 1105, 1109 (2016) (quoting former NRCP 56(c)).

For construction defect actions, a claimant must file a lawsuit within the statute of repose. "[A] statute of repose bars a cause of action after a specified period of time regardless of when the cause of action was discovered or a recoverable injury occurred." *FDIC v. Rhodes*, 130 Nev. 893, 899, 336 P.3d 961, 965 (2014). Prior to 2015, depending on the category of defect, the statute of repose ranged from 6 to 12 years, as measured from the date of the home's substantial completion. NRS 11.203-.205 (2014). In February 2015, however, the Legislature enacted A.B. 125 in part to amend the statute of repose for construction defect actions to 6 years for all defects. 2015 Nev. Stat., ch. 2, at 2 (enacting A.B. 125).[4]

The 6-year statute of repose applied retroactively. 2015 Nev. Stat., ch. 2, § 21(5), at 21. However, the Legislature created a grace period to protect claimants adversely affected by the retroactive change. *Id.* § 21(6), at 21;[5] *see also id.*, Legislative Counsel's Digest, at 4 (explaining that section 21 provided that the statute of repose applied retroactively and simultaneously established a 1-year grace period). Relevant here, the grace period mandated that the new statute of repose did not limit "an action . . . [t]hat accrued before the effective date of [A.B. 125], and was *commenced* within 1 year after the effective date of [A.B. 125]." *Id.* § 21(6), at 21 (emphasis added).

Byrne argues that her claim was timely even though she filed it after the grace period expired because, within the grace period, she adequately served an NRS Chapter 40 Notice on the builder. The ultimate goal of statutory construction is to effect the Legislature's intent. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010). Where a statute is clear and unambiguous, this court will give effect to the ordinary meaning of the plain language of the text without turning to other rules of construction. *Id.*

We determine that the grace period's plain language is clear and unambiguous: a claimant must have "commenced" an action—meaning filed a lawsuit within the grace period, not merely served an NRS Chapter 40 Notice—to preserve his or her action. *See* 2015 Nev. Stat., ch. 2, § 21(6); *see also* NRS 40.645 (delineating between serving notice and commencing an action); *Commencement of an Action*, *Black's Law Dictionary* (11th ed. 2019) ("The time at which judicial or administrative proceedings begin, typically with the fil-

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[4]In 2019, the Legislature expanded the statute of repose for construction defect actions from 6 years to 10 years for all defects. 2019 Nev. Stat., ch. 361, § 7(1), at 2262. Byrne specified in her briefing that this amendment was irrelevant to her appeal, and we therefore need not consider it.

[5]The statute of repose's retroactivity and the grace period were not codified in the Nevada Revised Statutes. Rather, such provisions appear only in the 2015 session laws. *See* 2015 Nev. Stat., ch. 2, § 21(5)-(6), at 21.

ing of a formal complaint."). There is simply no other reasonable interpretation of the word "commenced" in this context.

Byrne had until May 2015—six years after the home's substantial completion—to file her action under the statute of repose. She did not. Furthermore, Byrne had until February 2016—one year after the effective date of A.B. 125—to file her lawsuit within the grace period. She did not. Byrne's lawsuit filed in August 2016 was therefore time-barred.

Service of an NRS Chapter 40 Notice during the grace period did not toll the statute of repose

Byrne specifically contends that her service of an NRS Chapter 40 Notice on the builder within the grace period tolled the statute of repose. We disagree.

It is true that service of an NRS Chapter 40 Notice can toll the statute of repose. *See* NRS 40.695(1) (providing that the statute of repose tolls from the time an NRS Chapter 40 Notice is served for either 1 year, or 30 days after mediation is concluded or waived"). However, by the time Byrne served an NRS Chapter 40 Notice in December 2015, the statute of repose had already expired. In other words, in December 2015, there was no statute of repose left to toll. Furthermore, the grace period itself did not constitute a new statute of repose subject to tolling. Rather, the grace period was a distinct mechanism established by the Legislature, by which a claimant could have saved his or her claim from being suddenly time-barred due to the shortened, retroactive statute of repose. In order to salvage a claim under the grace period, a claimant had to commence an action.

We also reject Byrne's argument that the grace period's requirement for a claimant to commence a lawsuit conflicts with NRS Chapter 40's prelitigation process. NRS Chapter 40 requires a claimant to follow an extensive prelitigation process prior to filing his or her lawsuit, including serving an NRS Chapter 40 Notice on the builder. *See* NRS 40.647(1). If a claimant fails to comply with the prelitigation process before filing his or her lawsuit, the court must dismiss the action without prejudice. NRS 40.647(2)(a). However, if dismissal of the action would prevent the claimant from filing another lawsuit due to the statute of repose, "the court shall stay the proceeding pending compliance" of the prelitigation process. NRS 40.647(2)(b).

Nothing prevented Byrne from filing her lawsuit within the grace period and prior to completing the prelitigation process. In fact, NRS 40.647(2)(b) specifically contemplates the scenario in which a claimant must choose between completing the prelitigation process and filing an action before it is time-barred. In this instance, Byrne should have timely filed her lawsuit, at which point the court would

have been obligated to stay the proceedings pending compliance with the prelitigation process if dismissal of the action would have prevented Byrne from timely filing another lawsuit. The grace period's requirement for a claimant to commence a lawsuit is therefore in harmony with NRS Chapter 40. Accordingly, Byrne's action was time-barred, and the district court did not err in granting summary judgment in favor of respondents.[6]

The district court abused its discretion in awarding attorney fees to Lands West

We next consider whether the district court abused its discretion in awarding attorney fees of $94,662.50 to Lands West. When a party rejects an offer and fails to obtain a more favorable judgment in a construction defect action, the district court may order the party to pay reasonable attorney fees incurred by the opposing party that made the offer. NRS 40.652(4)(d). To determine whether an award of attorney fees is appropriate, the district court must evaluate four factors:

> (1) [W]hether the plaintiff's claim was brought in good faith; (2) whether the defendants' offer of judgment was reasonable and in good faith in both its timing and amount; (3) whether the plaintiff's decision to reject the offer and proceed to trial was grossly unreasonable or in bad faith; and (4) whether the fees sought by the offeror are reasonable and justified in amount.

Beattie v. Thomas, 99 Nev. 579, 588-89, 668 P.2d 268, 274 (1983); *see also* NRCP 68 (providing rules for awarding attorney fees based on offers of judgment). The district court's proper evaluation of the *Beattie* factors will not be disturbed absent a clear abuse of discretion. *LaForge v. State, Univ. & Cmty. Coll. Sys. of Nev.*, 116 Nev. 415, 423, 997 P.2d 130, 136 (2000). Byrne argues that the district court clearly abused its discretion by misapplying the first three *Beattie* factors to conclude that Lands West was entitled to attorney fees. We agree.

First, the district court incorrectly relied on the fact that Byrne knew or should have known that Lands West was not the general contractor in finding that she did not bring her claim in good faith. Because Byrne alleged in her complaint that Lands West was liable as Sunridge's alter ego or successor, not only as the general contractor itself, the district court's reliance on this fact was misguided.

As to the second factor, the district court inappropriately weighed Byrne's knowledge that the statute of repose might pose a problem

[6]Because we hold that the statute of repose barred Byrne's action against all respondents, we need not address respondent Green Planet Landscaping's additional argument that the statute of repose did not toll for claims against it because it did not receive an NRS Chapter 40 Notice from Byrne directly.

in finding that Lands West's offer was reasonable. Although Byrne's action was ultimately time-barred, the statute of repose issue was difficult to analyze and remained an unresolved legal matter. Moreover, Lands West's $10,001 offer just three months into the case, before any relevant discovery took place, was unreasonable in light of Byrne's alleged damages of $1.8 million.

Finally, regarding the third factor, the district court improperly found that Byrne had enough information to terminate her claim against Lands West and accept the offer. Nothing indicates that Byrne's rejection of the offer was grossly unreasonable or made in bad faith.

Ultimately, the district court granted Lands West's motion for attorney fees but denied Sunridge's motion for attorney fees, even though Sunridge's offer was approximately five times greater than and served four months after Lands West's. The district court mistakenly based this distinction on the fact that Lands West was not the general contractor, thereby ignoring Byrne's allegation that Lands West was Sunridge's alter ego or successor. We conclude that the district court's application of the *Beattie* factors in its order awarding Lands West attorney fees should have been nearly identical to its application of the factors in its order denying Sunridge attorney fees. If anything, Sunridge's offer was more attractive in both amount and timing. It is clear that Byrne's claim against Lands West was brought in good faith, Lands West's offer was unreasonably low and premature, and Byrne's decision to reject Lands West's offer was not grossly unreasonable. Accordingly, the district court clearly abused its discretion in awarding Lands West attorney fees.

CONCLUSION

We hold that a claimant must have filed a construction defect lawsuit within the grace period, not merely served an NRS Chapter 40 Notice, to preserve his or her claim after the 6-year statute of repose had run. Because Byrne failed to file a lawsuit within the grace period and the statute of repose had run, we conclude that her action was time-barred and therefore affirm the district court order granting summary judgment in favor of respondents. However, we determine that the district court abused its discretion in awarding attorney fees to Lands West and therefore reverse the district court order granting Lands West's motion for attorney fees and remand for further proceedings consistent with this opinion.

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

STEVE WYNN, an Individual, Appellant, *v.* THE ASSOCIATED PRESS, a Foreign Corporation; and REGINA GARCIA CANO, an Individual, Respondents.

No. 77708

October 29, 2020 475 P.3d 44

Appeal from a district court order dismissing a defamation complaint. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Reversed and remanded with instructions.

Pisanelli Bice, PLLC, and *Todd L. Bice*, Las Vegas; *Peterson Baker, PLLC*, and *Tamara Beatty Peterson* and *Nikki L. Baker*, Las Vegas, for Appellant.

Ballard Spahr LLP and *Chad R. Bowman* and *Jay Ward Brown*, Washington, D.C.; *Ballard Spahr LLP* and *Joel E. Tasca*, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cadish, J.:

This appeal arises out of a defamation claim brought by appellant Steve Wynn against respondents The Associated Press and one of its reporters. Respondents published a news article reporting on a 2018 citizen's complaint to the police in which the complainant alleged Wynn sexually assaulted her in 1973 or 1974. For statute of limitations reasons, police did not investigate the allegations and took no further law enforcement action. Wynn's defamation claim alleged that the complainant's accusations were false and that respondents published the article reporting on them with malice. The district court granted respondents' motion to dismiss, concluding that the fair report privilege applied as a defense, thereby shielding respondents from defamation liability.

In resolving Wynn's appeal, we must consider what qualifies as an official action or proceeding warranting application of the fair report privilege to one who reports on it. The fair report privilege shields a defendant from liability for publication of defamatory content in the course of reporting on official actions, official proceedings, or meetings open to the public regarding issues of public concern so long as it is a fair and accurate summary thereof. Here, the district court agreed with respondents that the fair report privilege protected respondents from defamation liability because their article reported on a public record, namely documentation of a citizen's complaint to

the police alleging a crime occurred. We disagree that this citizen's complaint constitutes an official action or proceeding as contemplated by the fair report privilege. To hold that a law enforcement officer's mere transcription of a complainant's allegations, absent any additional official action or proceeding, warrants application of the fair report privilege would be inconsistent with the underlying policies behind the privilege and would unnecessarily impinge on our defamation laws. Therefore, we hold that a news article reporting on the contents of a citizen's complaint to the police—which was neither investigated nor evaluated by the police—is not a report of an official action or proceeding for which the fair report privilege provides an absolute defense. Accordingly, we reverse the district court's dismissal and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

In February 2018, the Las Vegas Metropolitan Police Department (LVMPD) held a press conference informing the public that two women filed complaints alleging that Wynn sexually assaulted them. The *Las Vegas Review-Journal* published an article summarizing the press conference. After reading the article, respondent Regina Garcia Cano, a reporter for respondent The Associated Press (collectively AP Respondents) contacted the LVMPD to inquire about the complaints. The LVMPD sent a copy of an officially released email in response, stating two women alleged that Wynn sexually assaulted them in the 1970s. The email stated that one woman alleged that Wynn sexually assaulted her in Las Vegas, and the other woman alleged that Wynn sexually assaulted her in Chicago, Illinois. Finally, the email stated that the LVMPD would forward a copy of the Chicago allegations to Chicago law enforcement but would not investigate either allegation because the 20-year limitation period on criminal actions for sexual assault had expired.

Under the Nevada Public Records Act (NPRA), Garcia Cano requested copies of the citizens' complaints. The LVMPD provided copies of the complaints, both of which were partially redacted to exclude identifying information about the complainants. Garcia Cano prepared an article about the allegations contained therein. The article stated that one of the citizens' complaints was by a woman who told officers that Wynn sexually assaulted her at least three times in her Chicago apartment between 1973 and 1974. The article further stated that the woman reported she became pregnant because of the alleged sexual assaults and gave birth in a gas station restroom. Finally, the article stated that the woman and her child now reside in Las Vegas. The Associated Press published the article.

Wynn filed a defamation complaint against AP Respondents, arguing that the Chicago allegations were false and improbable on their face, and that AP Respondents intentionally described the contents of the underlying report in an incomplete and unfair manner.

AP Respondents moved for dismissal, arguing that the fair report privilege provided absolute immunity against Wynn's defamation claim because the article fairly reported the allegations contained in an official police report. Alternatively, AP Respondents argued for dismissal under Nevada's anti-SLAPP statute. In this regard, AP Respondents first contended that the article was a good-faith communication in furtherance of the right to free speech in direct connection with an issue of public concern. Second, they asserted that Wynn, as a public figure, could not meet his burden to establish a probability of prevailing on his defamation claim.

The parties stipulated to a bifurcated argument schedule to avoid unnecessary discovery. First, after briefing of the issue, the district court would determine whether the fair report privilege applied to the article. If the privilege did not apply, then there would be further proceedings to consider the application of the anti-SLAPP statute. After reviewing briefs on the application of the fair report privilege and hearing argument by the parties, the district court concluded that the privilege applied to the article. Therefore, the district court dismissed Wynn's defamation complaint.[1] Wynn appeals, arguing that the district court erred by concluding that the fair report privilege applied to the article.

DISCUSSION

When the district court considers matters outside the pleadings in resolving a motion to dismiss, it effectively treats the motion as one for summary judgment and must apply the summary judgment standard.[2] NRCP 12(d); *Mendenhall v. Tassinari*, 133 Nev. 614, 617, 403 P.3d 364, 368 (2017). We review a district court's decision to grant summary judgment de novo. *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 165 (1999).

The fair report privilege

The issue before this court is whether an article reporting on a citizen's complaint to law enforcement that did not trigger an investigation or further police action constitutes a report of an official action or proceeding that is protected by the fair report privilege. Under the fair report privilege, "[t]he publication of defamatory matter

[1]In dismissing Wynn's defamation complaint, the district court order stated the legal standard under Nevada's anti-SLAPP statute. However, per the parties' stipulation, Wynn's brief only addressed the application of the fair report privilege, and the court's analysis and ruling only addressed this privilege, not the burdens of the anti-SLAPP framework. Thus, although the district court titled its decision an order granting a special motion to dismiss, the district court, in effect, rendered summary judgment.

[2]Here, the district court considered an affidavit as well as various newspaper articles in rendering its decision.

concerning another in a report of an official action or proceeding or of a meeting open to the public that deals with a matter of public concern is privileged if the report is accurate and complete or a fair abridgement of the occurrence reported." Restatement (Second) of Torts § 611 (Am. Law Inst. 1977). The privilege is an exception to the general rule that "one who repeats or otherwise republishes defamatory matter is subject to liability as if he had originally published it." Restatement (Second) of Torts § 578; *see Wynn v. Smith*, 117 Nev. 6, 15, 16 P.3d 424, 430 (2001).

We have recognized the fair report privilege since at least 1880. *See Thompson v. Powning*, 15 Nev. 195, 203 (1880) (holding that the publication of a "fair, full, and true report of judicial proceedings, except upon actual proof or [sic] malice in making the report" is privileged "unless the proceedings are of an immoral, blasphemous, or indecent character, or accompanied with defamatory observations or comments"). Although the fair report privilege originally applied only to reports of statements made during judicial proceedings, courts, including our own, over time have expanded its scope to encompass reports about a variety of official actions beyond judicial proceedings.[3] Our expansion of the fair report privilege is consistent with the privilege's underlying policy. Specifically,

> [t]he fair report privilege is premised on the theory that members of the public have a manifest interest in observing and being made aware of *public proceedings and actions*. Access to information concerning the conduct of public representatives is critical to the *citizenry's supervision and evaluation of actions taken on its behalf*. Obviously unable to monitor all official acts in person, citizens rely on third party accounts of such actions. If accurate reports of official actions were subject to defamation actions, reporters would be wrongly discouraged from publishing accounts of public proceedings.

Wynn, 117 Nev. at 14, 16 P.3d at 429 (emphases added).

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[3]Since *Thompson*, we have abandoned exceptions to the fair report privilege for proceedings involving immorality, blasphemy, or indecency, as well as for statements made with knowledge of falsity or malice. *Nickovich v. Mollart*, 51 Nev. 306, 313, 274 P. 809, 810 (1929) (holding that defamatory matter published from a judicial proceeding is privileged if the witness statements "are relevant and pertinent" to the controversy, "whether or not they are false or malicious"); *Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) (holding that "[t]he [fair report] privilege precludes liability" for communications "published in the course of judicial proceedings" even if "the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff"); *Sahara Gaming Corp.*, 115 Nev. at 215, 984 P.2d at 166 (extending the fair report privilege "to any person who makes a republication of a judicial proceeding from material that is available to the general public"); *Wynn*, 117 Nev. at 14, 16 P.3d at 429 (holding that the fair report privilege extends "to all public, official actions or proceedings" and is not limited to judicial proceedings).

Although those policy considerations favor applying the fair report privilege to reports of official actions and statements beyond judicial proceedings, we are mindful that the privilege's scope remains limited by competing societal interests. We recognized such a limitation in declining to apply the fair report privilege to a publication concerning unauthorized or confidential investigatory reports by law enforcement that were generally unavailable to the public, because applying it to such reports would "conflict with the protections provided by our libel laws" and could facilitate "the spread of common innuendo." *Id.* at 16, 16 P.3d at 430. Thus, while courts recognize that enabling the press to "report freely on public affairs 'requires that we protect some falsehood in order to protect speech that matters,'" they also recognize that "defamatory statements impede society's interest in preserving each individual's right to privacy and freedom from defamation." *Butcher v. Univ. of Mass.*, 136 N.E.3d 719, 729 (Mass. 2019) (quoting *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974)). We keep these competing interests in mind as we evaluate the report here.

The article reporting on the complainant's allegations is not a report of an official action or proceeding

Relying upon the Restatement (Second) of Torts section 611 and authority from other jurisdictions, Wynn argues that the fair report privilege does not apply to AP Respondents' article because it described a citizen's complaint that merely recorded the complainant's allegations without any further action, which does not qualify as a report of an official action or proceeding.[4] We agree for the reasons set forth below.

The citizen's complaint was not an official report

First, we address whether the filing of a report documenting the complainant's allegations to police constitutes an official action under the fair report privilege. Comment d to the Restatement (Second) of Torts section 611 states, in relevant part, that "[t]he filing of a report by an officer or agency of the government is an action bringing a reporting of the governmental report within the scope of the privilege." AP Respondents contend that the citizen's complaint

[4]Wynn also argues that the breadth of the fair report privilege and of the judicial proceedings privilege are identical. The judicial proceedings privilege grants immunity from defamation claims to participants in judicial or quasi-judicial proceedings. *Jacobs v. Adelson*, 130 Nev. 408, 412, 325 P.3d 1282, 1285 (2014). The purpose behind the judicial proceedings privilege is to promote society's "interest in having people speak freely" on matters related to the underlying judicial or quasi-judicial proceeding. *Circus Circus Hotels*, 99 Nev. at 61, 657 P.2d at 104. Because the judicial proceedings privilege protects different actors and promotes different interests than the fair report privilege, we decline to apply our judicial proceedings privilege jurisprudence to resolve the instant appeal.

falls within the privilege under section 611, comment d because a law enforcement officer filed the report documenting it. However, AP Respondents' reliance on section 611, comment d is misplaced. We note that the authorities cited in support of section 611, comment d suggest that governmental reports within the meaning of this comment are reports that are drafted and filed by executive or administrative officers, not reports that are made by private citizens and given to law enforcement.[5] Furthermore, AP Respondents do not point to, nor did our research reveal, any relevant caselaw where a common law fair report privilege jurisdiction applied the privilege to a citizen's complaint of an alleged crime absent any further official action by law enforcement.[6]

The Restatement (Second) of Torts section 611, comment h is also instructive, providing, in pertinent part, that

> [a]n arrest by an officer is an official action, and a report of the fact of the arrest or of the charge of crime made by the officer in making or returning the arrest is therefore within the conditional privilege . . . . On the other hand statements made . . . by the complainant . . . as to the facts of the case . . . are not yet part of the judicial proceeding or of the arrest itself and are not privileged . . . .

Here, the LVMPD did not make an arrest based on this complaint. However, even if it had, section 611, comment h suggests that the citizen's complaint would still not fall within the fair report privilege because it is simply the complainant's statement about the facts of

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[5]*See Time, Inc. v. Pape*, 401 U.S. 279, 292 (1971) (analyzing a Civil Rights Commission report under Illinois' fair report privilege); *Brandon v. Gazette Publ'g Co.*, 352 S.W.2d 92, 94-95 (Ark. 1961) (holding that a report about an official investigation ordered by the governor is subject to the fair report privilege); *Begley v. Louisville Times Co.*, 115 S.W.2d 345, 351 (Ky. 1938) (holding that a report drafted by the adjutant general and submitted to the governor is subject to the fair report privilege); *Conner v. Standard Publ'g Co.*, 67 N.E. 596, 598 (Mass. 1903) (holding that a report containing the findings of the fire marshal is subject to the fair report privilege); *Briarcliff Lodge Hotel, Inc. v. Citizen-Sentinel Publishers, Inc.*, 183 N.E. 193, 197-98 (N.Y. 1932) (holding that a water board's demand letter is subject to the fair report privilege); *Painter v. E. W. Scripps Co.*, 148 N.E.2d 503, 506-07 (Ohio Ct. App. 1957) (holding that a coroner's order is subject to the fair report privilege).

[6]*See White v. Fraternal Order of Police*, 909 F.2d 512, 514 (D.C. Cir. 1990) (involving complaints regarding deviations from a law enforcement drug-testing program and subsequent investigation); *Wilson v. Birmingham Post Co.*, 482 So. 2d 1209, 1210 (Ala. 1986) (involving police interrogations in the course of an investigation contained within an incident report); *Solaia Tech., LLC v. Specialty Publ'g Co.*, 852 N.E.2d 825, 844 (Ill. 2006) (involving a filed anti-trust complaint); *Thomas v. Tel. Publ'g Co.*, 929 A.2d 993, 1006 (N.H. 2007) (involving a presentence investigation report); *Salzano v. N. Jersey Media Grp. Inc.*, 993 A.2d 778, 791-92 (N.J. 2010) (involving a civil complaint filed in bankruptcy); *Trainor v. Standard Times*, 924 A.2d 766, 768 (R.I. 2007) (involving a police report detailing the arrest of a citizen).

the case rather than an official action or proceeding such as an arrest or the bringing of charges.

Finally, we note that extending the fair report privilege to a citizen's complaint, absent any official action by law enforcement, would not further the underlying policy behind the privilege. As stated above, the fair report privilege is designed to promote citizen supervision and oversight of government action. Here, the LVMPD did not take any action on the citizen's complaint because the limitation period for the alleged sexual assault expired. Therefore, there was no government action for the citizenry to evaluate. Accordingly, we hold that a law enforcement officer's mere transcription and filing of a complainant's allegations does not constitute an official action for purposes of applying the fair report privilege.[7]

The LVMPD's press conference and subsequent email did not bring AP Respondents' article reporting on the complainant's allegations within the fair report privilege

There is no question that the LVMPD's press conference and subsequent email notifying the public that two women accused Wynn of sexual assault constituted an official action. *See Jones v. Taibbi*, 512 N.E.2d 260, 267 (Mass. 1987) (holding that the fair report privilege applies to descriptions of allegations made during a police press conference). Therefore, any reporting on the substance of the LVMPD press conference and official statements in the email is protected by the fair report privilege so long as the reporting is a fair, accurate, and impartial summary of the contents thereof. However, the LVMPD never disclosed any details about the allegations in its press conference or email. Therefore, we must determine whether the LVMPD's decision to inform the public about the existence of the allegation via a press conference and email was sufficient for the fair reporting privilege to protect the AP Respondents' article reporting on the specific allegations in the underlying complaint.

In *Lewis v. NewsChannel 5 Network, L.P.*, the Tennessee appellate court addressed a similar question. 238 S.W.3d 270 (Tenn. Ct. App. 2007). There, a police chief issued a press release informing the public "that he had disempowered" an officer within his department without including any details of the incident leading to

[7]Other jurisdictions have followed a similar approach. *See Pittsburgh Courier Publ'g Co. v. Lubore*, 200 F.2d 355, 356 (D.C. Cir. 1952) (stating that "few if any courts would extend the [fair report] privilege so far as to cover reports of charges made, without results, to a policeman or prosecutor"); *Snitowsky v. NBC Subsidiary (WMAQ-TV), Inc.*, 696 N.E.2d 761, 768 (Ill. App. Ct. 1998) (stating "that in general charges made to the police are not rendered official acts by the officer's act of recording the charge"); *Howell v. Enter. Publ'g Co.*, 920 N.E.2d 1, 18 n.14 (Mass. 2010) (noting "that mere allegations made to public officials cannot support the privilege; something must imbue the allegations with an official character").

the disempowerment. *Id*. at 286. A local news channel broadcast a story about the disempowerment, which included details about the underlying incident obtained through its own investigation. *Id*. The appellant, the disempowered officer's brother-in-law who the local news channel named in its broadcast, filed a libel claim. *Id*. at 280. The court rejected the news channel's argument that the fair report privilege protected the entire broadcast. *Id*. at 286. Specifically, the court distinguished between the information that the police chief made available through an official action, i.e., a press conference, and the information that the news channel obtained through its own investigation and outside of any official action. *Id*. at 287. The latter information "[did] not reflect official agency action and [did] not have sufficient authoritative weight" to fall within the fair report privilege. *Id*. (internal citation and quotation omitted).

We agree with the approach used in *Lewis*. The fair report privilege protects publications reporting on official actions and proceedings. When a publication goes beyond the scope of what was revealed by an official action, we must determine whether the additional information, on its own, falls within the fair report privilege. As discussed above, the AP article reported on the allegations in the citizen's complaint, and that statement is not an official action to which the fair report privilege applies. Accordingly, the LVMPD's press conference and publicly released email did not bring the AP article within the privilege because neither the press conference nor the email addressed the substance of the allegations that were described in the article.

The LVMPD's turnover of the documented citizen's complaint in response to a public records request did not bring AP Respondents' article within the fair report privilege

The last issue we address is whether the LVMPD, by providing the citizen's complaint to Garcia Cano pursuant to the NPRA, specifically NRS 239.0105(2)(c), brought the AP's article reporting on the allegations within the fair report privilege. Relying on *Northland Wheels Roller Skating Center, Inc. v. Detroit Free Press, Inc.*, 539 N.W.2d 774 (Mich. Ct. App. 1995), AP Respondents argue that records generally available to the public are subject to the fair report privilege. While AP Respondents are correct that the court in *Northland Wheels* included a citizen's complaint within the fair report privilege, that court based its decision upon a Michigan statute that expressly included such reports within Michigan's fair report privilege. *Id*. at 779; *see also* Mich. Comp. Laws Ann. § 600.2911(3) (West 2010) (including a "written or recorded report or record generally available to the public" within Michigan's statutory fair report privilege). Our fair report privilege is a common law privilege, however, and Nevada courts have not applied the privilege in the same

way required by Michigan's statute. Therefore, we conclude that AP Respondents' reliance on *Northland Wheels* is misplaced.

In addressing Massachusetts' application of the common law fair reporting privilege, the Massachusetts Supreme Judicial Court recently declined to extend the fair report privilege to all police blotter entries, even though the entries are public records. *Butcher*, 136 N.E.3d at 731-32; *see also* Mass. Gen. Laws Ann. ch. 41, § 98F (West 2006) (providing that "[a]ll entries in [police department] daily logs shall . . . be public records available . . . to the public"). The court weighed the underlying policy behind the fair report privilege and the societal interest in preventing defamation in concluding that the fair report privilege does not apply solely because the police blotter entries are subject to disclosure as public records. *Butcher*, 136 N.E.3d at 732. In particular, the court was concerned that extending the privilege to all police blotter entries "would create a risk that blotters could become a tempting device for the unscrupulous defamer who could report, anonymously, scandalous accusations, knowing they could be given wide currency in the tabloids and newspapers." *Id*. (internal quotations omitted). Therefore, the court held that the ability of the public to inspect a government record was not determinative as to whether the fair report privilege applied. *Id*. at 730. Instead, the court concluded that such records fell within the fair report privilege only if "they [were] reports of either official statements or official actions." *Id*.

We agree with the approach used in *Butcher*, which is consistent with our own jurisprudence on the fair report privilege, cautioning against expansions of the privilege that would "allow the spread of common innuendo that is not afforded the protection accorded to official or judicial proceedings." *Wynn*, 117 Nev. at 16, 16 P.3d at 430. If we were to expand the fair report privilege to all citizen complaints to police regardless of whether official action was taken thereon solely because they are publicly available under the NPRA, a clever defamer could make defamatory accusations to law enforcement, knowing that the media could republish those accusations without liability. Accordingly, we must reject a blanket expansion of the fair report privilege that includes all records that are available under the NPRA. Instead, we hold, consistent with the Restatement (Second), that whether a report on such a record falls within the fair report privilege turns on whether the record is a report of an official action or proceeding. Here, the report outlined in the AP article is not a report of an official action or proceeding. Therefore, it does not fall within the fair report privilege even though it is available to the press under the NPRA.[8]

[8]Because we hold that the citizen's complaint at issue is not an official action or proceeding within the meaning of the fair report privilege, we need not address whether the district court properly determined that Garcia Cano's report was a fair, accurate, and impartial summary of the allegations contained therein.

CONCLUSION

As relevant here, the fair report privilege shields a defendant from liability for publication of defamatory content contained within reports of official actions regarding issues of public concern so long as the publication is a fair, accurate, and impartial summary of the underlying occurrence. Applying these principles to the facts of this case and considering the common law development of the privilege, we conclude that the district court erred by extending the fair report privilege. The AP article republished allegations of criminal conduct contained in a citizen's complaint on which law enforcement did not take any official action. Accordingly, the report on these allegations, which were not investigated, evaluated, or pursued by law enforcement in any way, is not within the scope of the fair report privilege. Therefore, we reverse the district court's order dismissing Wynn's complaint on fair report privilege grounds.

On remand, consistent with the parties' stipulation, the district court shall evaluate AP Respondents' anti-SLAPP motion to dismiss under NRS 41.660. Specifically, the district court shall determine whether AP Respondents can meet their burden under the first prong of the anti-SLAPP framework under NRS 41.660(3)(a). If so, the district court shall determine whether Wynn, as a public figure, can demonstrate a probability of prevailing on his defamation claim under NRS 41.660(3)(b).

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