NRS 608.260's two-year limitations period avoids conflict between the MWA and existing law.

III.

[Headnotes 6, 7]

When a right of action does not have an express limitations period, we apply the most closely analogous limitations period. The MWA does not expressly indicate which limitations period applies and the most closely analogous statute to the MWA is NRS 608.260, as both permit an employee to sue his employer for failure to pay the minimum wage. Moreover, applying the NRS 608.260 limitations period is consistent with Nevada minimum wage law. Accordingly, we affirm the district court's order granting Terrible Herbst's motion for judgment on the pleadings and dismissing Perry's claim.

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

MDC RESTAURANTS, LLC, a Nevada Limited Liability Company; LAGUNA RESTAURANTS, LLC, a Nevada Limited Liability Company; and INKA, LLC, a Nevada Limited Liability Company, Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE TIMOTHY C. WILLIAMS, District Judge, Respondents, and PAULETTE DIAZ, an Individual; LAWANDA GAIL WILBANKS, an Individual; SHANNON OLSZYNSKI, an Individual; and CHARITY FITZLAFF, an Individual, on Behalf of Themselves and All Similarly Situated Individuals, Real Parties in Interest.

No. 68523

COLLINS KWAYISI, an Individual, Appellant, *v.* WENDY'S OF LAS VEGAS, INC., an Ohio Corporation; and CEDAR ENTERPRISES, INC., an Ohio Corporation, Respondents.

No. 68754

THE STATE OF NEVADA, OFFICE OF THE LABOR COMMISSIONER; and SHANNON CHAMBERS, Nevada Labor Commissioner in Her Official Capacity, Appellants, *v.* CODY C. HANCOCK, an Individual, Respondent.

No. 68770

ERIN HANKS, Appellant, *v.* BRIAD RESTAURANT GROUP, LLC, a New Jersey Limited Liability Company, Respondent.

No. 68845

October 27, 2016 383 P.3d 262

Consolidated original petition for a writ of mandamus or prohibition (Docket No. 68523), Eighth Judicial District Court, Clark County; Timothy C. Williams, Judge; certified questions under NRAP 5 (Docket Nos. 68754 and 68845), United States District Court for the District of Nevada; Gloria M. Navarro, Judge; and appeal from a district court injunction (Docket No. 68770), First Judicial District Court, Carson City; James E. Wilson, Judge; concerning Nevada's constitutional minimum wage provision.

The supreme court, Douglas, J., held that: (1) employers need only offer health benefits to pay the lower-tier minimum wage under the MWA; (2) employee tips do not count toward determining the 10-percent wage cap for health insurance premiums under the MWA; and (3) the supreme court's interpretation of the MWA applied retroactively.

Petition granted (Docket No. 68523); certified questions answered (Docket Nos. 68754 and 68845); and appeal affirmed in part, reversed in part, and remanded (Docket No. 68770).

Adam Paul Laxalt, Attorney General, *Scott Davis*, Senior Deputy Attorney General, and *Melissa Flatley*, Deputy Attorney General, Carson City, for State of Nevada, Office of the Labor Commissioner and Shannon Chambers.

Littler Mendelson, P.C., and *Rick D. Roskelley, Roger L. Grandgenett, II, Montgomery Y. Paek*, and *Kathryn B. Blakey*, Las Vegas, for Briad Restaurant Group, LLC; Wendy's of Las Vegas, Inc.; and Cedar Enterprises, Inc.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Don Springmeyer*, Las Vegas, for Paulette Diaz, Lawanda Gail Wilbanks, Shannon Olszynski, Charity Fitzlaff, and Cody Hancock.

Morris Polich & Purdy, LLP, and *Nicholas M. Wieczorek, Deanna L. Forbush*, and *Jeremy J. Thompson*, Las Vegas, for MDC Restaurants, LLC; Laguna Restaurants, LLC; and Inka, LLC.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager, Don Springmeyer*, and *Daniel Bravo*, Las Vegas, for Collins Kwayisi and Erin Hanks.

Jackson Lewis P.C. and *Elayna J. Youchah* and *Steven C. Anderson*, Las Vegas, for Amici Curiae Claim Jumper Acquisition Co., LLC; Landry's, Inc.; Landry's Seafood House–Nevada, Inc.; Landry's Seafood House–Arlington, Inc.; Bubba Gump Shrimp Co. Restaurants, Inc.; Morton's of Chicago/Flamingo Road Corp.; and Bertolini's of Las Vegas, Inc.

Sutton Hague Law Corporation, P.C., and *S. Brett Sutton* and *Charity F. Felts*, Reno, for Amicus Curiae Nevada Restaurant Association.

Fisher & Phillips, LLP, and *Mark Ricciardi*, Las Vegas, and *Joel W. Rice*, Chicago, Illinois, for Amici Curiae Nevada Resort Association and Las Vegas Metropolitan Chamber of Commerce.

1. Mandamus; Prohibition.
   Entertaining petition for writ of mandamus or prohibition was warranted to determine whether the Minimum Wage Amendment to state constitution required employers to actually enroll employees in health insurance benefits plan in order to avoid paying higher-tier minimum wage and employee tips counted toward taxable income for determining 10-percent wage cap for premiums, due to importance of issues, number of people and businesses affected, and volume of cases currently pending before courts raising similar issues. Const. art. 15, § 16.
2. Appeal and Error.
   Questions of constitutional interpretation are reviewed de novo.
3. Constitutional Law.
   When a constitutional provision's language is clear on its face, the supreme court will not go beyond that language in determining the voters' intent.
4. Labor and Employment.
   Under the Minimum Wage Amendment to the state constitution, employers need only offer or make available health benefits to pay the lower-tier minimum wage; employers do not need to actually enroll employees in a benefits plan. Const. art. 15, § 16.
5. Labor and Employment.
   Employee tips do not count toward taxable income for determining the 10-percent wage cap for premiums under the Minimum Wage Amendment to the state constitution requiring employers to offer health insurance benefits at total cost of not more than 10 percent of employee's gross taxable income or pay higher minimum wage; the cost cap can only pertain to compensation and wages paid by employer to employee. Const. art. 15, § 16.
6. Internal Revenue.
   "Taxable income" is a term of art when pertaining to federal income taxes.
7. Courts.
   The supreme court's interpretation of the Minimum Wage Amendment (MWA) to state constitution applied retroactively, where language of MWA was plain, no new principle of law was announced, and resolution could have been foreshadowed. Const. art. 15, § 16.

8. COURTS.
   Retroactivity as to choice of law and as to remedy generally goes without saying.
9. COURTS.
   If a decision does not establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed, the retroactivity analysis ends; the decision should apply retroactively.
10. CONSTITUTIONAL LAW.
    The state constitution is the supreme law of the state.
11. CONSTITUTIONAL LAW.
    The supreme court's role is not to create the law but simply to declare what the law is.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

The Minimum Wage Amendment (MWA) to the Nevada Constitution guarantees a base wage to Nevada workers. Under the MWA, if an employer "provides" health benefits, it may pay its employees a lower minimum wage than if no such health benefits are provided. In these consolidated cases, we address two issues concerning the interpretation of the MWA.

First, we consider whether "provides" means that an employer must "enroll" an employee in a qualifying health benefit plan to pay the lower wage, or if an employer need only "offer" a qualifying health plan. In accord with the plain language of the MWA, we conclude that employers need only offer a qualifying health plan.

We also consider whether the MWA's requirement that health benefit premiums be capped at 10 percent of the employee's gross taxable income "from the employer" allows the employer to include tips in the calculation of taxable income. We conclude that tips are not included.

BACKGROUND

The MWA guarantees to each Nevada employee a base wage. *See* Nev. Const. art. 15, § 16(A). Effective in 2006, that wage was $5.15 per hour (lower-tier wage) if the employer "provides" health benefits, and $6.15 (upper-tier wage) if the employer did not provide health benefits.[2] *Id.* After the MWA was implemented, differing

[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

[2]The MWA contains a clause allowing for the minimum wage to be adjusted by "the amount of increases in the federal minimum wage over $5.15 per hour,

interpretations arose as to what "provides" requires, with some asserting that, to pay the lower rate, the employer must actually enroll employees in a benefits plan, and others arguing that the employer must merely offer benefits to employees. In 2007, the Office of the Labor Commissioner adopted administrative code regulations addressing this question, providing that "[t]o qualify to pay an employee the [lower-tier] minimum wage . . . [t]he employer must *offer* a health insurance plan." NAC 608.102(1) (emphasis added). NAC 608.102(2) further clarifies that "[t]he health insurance plan must be *made available* to the employee and any dependents of the employee." (Emphasis added.)

As to the second issue, the 10-percent premium cap, the MWA states that the employer must provide health benefits "at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer." Nev. Const. art. 15, § 16(A). The Labor Commissioner's construal of this provision states that the 10 percent "includes, without limitation, tips, bonuses or other compensation as required for purposes of federal individual income tax." NAC 608.104(2).

The employees in these consolidated cases argue that employers must do more than offer health benefits to be eligible to pay the lower-tier minimum wage; they argue that employers must actually enroll employees in health benefit plans. They further argue that the 10-percent cap does not include tips in its calculation of taxable income.

[Headnote 1]

The parties in these consolidated cases challenge the interpretation of the MWA via writ petition,[3] direct appeal, and certified questions.[4]

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or, if greater, by the cumulative increase in the cost of living." Nev. Const. art. 15, § 16(A). The minimum wage is currently $7.25 for employers who provide qualifying health benefits and $8.25 for employers who do not. Office of the Labor Commissioner, *State of Nevada Minimum Wage 2016 Annual Bulletin* (2016), *available at* http://labor.nv.gov/Wages/Minimum_Wage_Bulletins/.

[3]The importance of this issue, the number of people and businesses affected, and the volume of cases currently pending before courts raising similar issues mandate our entertaining this writ petition. *See Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 868-69, 124 P.3d 550, 552 (2005) (noting that a writ "is available to compel the performance of an act that the law requires" when important legal issues need clarification).

[4]In particular, the following question was certified to this court in two federal cases: "Whether an employee must actually enroll in health benefits offered by an employer before the employer may pay that employee at the lower-tier wage under the Minimum Wage Amendment, Nev. Const. art. [15], § 16." We accept this question because it is "determinative of part of the federal case[s], there is no controlling [Nevada] precedent, and the answer will help settle important questions of law." *See Orion Portfolio Servs. 2, LLC v. Cty. of Clark*, 126 Nev. 397, 400, 245 P.3d 527, 530 (2010) (second alteration in original) (internal quotations omitted).

DISCUSSION

Standard of review

[Headnotes 2, 3]

We review questions of constitutional interpretation de novo. *See Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). Furthermore, "[w]hen a constitutional provision's language is clear on its face, we will not go beyond that language in determining the voters' intent." *Strickland v. Waymire*, 126 Nev. 230, 234, 235 P.3d 605, 608 (2010) (internal quotation omitted). As to both constitutional interpretation issues raised, we conclude that the language is plain.

Whether employers must merely offer to employees or actually enroll employees in health benefit plans to compensate employees at the lower-tier wage rate

Plain language

Nevada Constitution Article 15, Section 16 states:

> A. Each employer shall pay a wage to each employee of not less than the hourly rates set forth in this section. The rate shall be five dollars and fifteen cents ($5.15) per hour worked, if the employer provides health benefits as described herein, or six dollars and fifteen cents ($6.15) per hour if the employer does not provide such benefits. Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income from the employer.

[Headnote 4]

According to this language, employers need only offer health benefits to pay the lower-tier minimum wage. The applicable definition of "provides" is found within subsection A. First, the minimum wage exception is announced: "[I]f the employer provides health benefits," then the employer may pay the lower-tier minimum wage. In the next sentence, the exception is clarified: "Offering health benefits within the meaning of this section shall consist of making health insurance available to the employee for the employee and the employee's dependents . . . ." This latter sentence clarifies that "[o]ffering" is sufficient to satisfy the provision. The text treats "provides" and "[o]ffering" as synonyms, and then defines what is meant by "[o]ffering," and by association, what is meant by "provides." In the context of the MWA, both "provides" and "[o]ffering" mean to make available. When the provision is read as a whole, as it must be, *S. Nev. Homebuilders Ass'n v. Clark Cty.*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005), the meaning is plain. Thus, under the

MWA, health benefits need only be offered or made available for the employer to pay the lower-tier wage.

Real parties in interest argue that, rather than defining "provides," the third sentence describes the type and cost of the benefits that *may* permit the employer to pay below the upper-tier hourly wage. However, this argument does not negate the MWA's use of the words "[o]ffering" and "making health insurance available" to describe the health benefit requirements. Furthermore, the argument fails to address the obvious absence of any language that suggests that an employee's enrollment is necessary. *Dep't of Taxation v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("[O]missions of subject matters from statutory provisions are presumed to have been intentional.").

Real parties in interest urge this court to look outside the MWA for a definition of "provides." They argue that "provide" means "to supply for use," and they propose the following synonyms in support of that position: "deliver," "give," "hand," "hand over," "supply," and "furnish." This argument also lacks merit. Even accepting real parties in interest's definition, neither "supply for use," nor any of the synonyms offered guarantees use. When an individual delivers, gives, hands, hands over, supplies, or even furnishes another with something, acceptance or use is not guaranteed. Moreover, this court need not resort to a dictionary to discover the definition of "provides" as used in the MWA. The definition is plainly presented therein. And "[w]e should not permit the bootstrapping of several broad definitions to unreasonably distort the uncontested facts of a case or defeat a clear [constitutional] directive." *Id.*

Purpose and policy

The employees also challenge the administrative code regulations on policy grounds. They argue that if "provides" is interpreted to mean "offer," the purposes and benefits of the amendment are thwarted, as employees would receive neither the low-cost health insurance anticipated, nor the raise in wages its passage promised.

Article 15, Section 16 was approved by the voters through a ballot initiative entitled "Raise the Minimum Wage for Working Nevadans." The stated purpose of that measure was to ensure that "workers who are the backbone of our economy receive fair paychecks that allow them and their families to live above the poverty line." Nevada Ballot Questions 2006, Nevada Secretary of State, Question No. 6, § 2(6). Our conclusion does not detract from this purpose. Under the MWA, employers must either offer qualifying health care coverage or pay a higher wage to better enable workers to afford these types of cost-of-living expenses. *Id.* §§ 2(2) and (3). Thus, the support for workers provided through passage of the MWA simply requires that employees who have the option to re-

ceive health benefits take advantage of those rights. In essence, obtaining relief rests with the workers.

Whether employee tips are counted toward income for purposes of the 10-percent cap on premiums

[Headnote 5]

Pursuant to the plain language of the MWA, we conclude that employee tips do not count toward taxable income for determining the 10-percent wage cap for premiums. Although the Office of the Nevada Labor Commissioner argues that NAC 608.104(2) complies with the Nevada Constitution and looks to federal income tax law to properly measure an employee's gross "taxable income," this argument is unpersuasive.

[Headnote 6]

"Taxable income" is a term of art when pertaining to federal income taxes, *see, e.g.*, *United States v. Foster Lumber Co.*, 429 U.S. 32, 41 (1976); *Corp. Prop. Inv'rs v. Dir., Div. of Taxation*, 15 N.J. Tax 14, 18 (1994), but the Nevada Constitution qualifies this term as it applies to the cap. In relevant part, Nevada Constitution Article 15, Section 16(A) provides the following: "Offering health benefits . . . shall consist of making health insurance available to the employee for the employee and the employee's dependents at a total cost to the employee for premiums of not more than 10 percent of the employee's gross taxable income *from the employer*." (Emphasis added.) Further, the MWA prohibits employers from counting tips as part of the minimum wages they provide to the employee: "[t]ips or gratuities received by employees shall not be credited as being any part of or offset against the wage rates required by this section." Nev. Const. art. 15, § 16(A). Under the plain language of this constitutional provision, the MWA's 10-percent cost cap can only pertain to compensation and wages paid by the employer to the employee, which necessarily excludes any tips earned by the employee. Accordingly, the district court did not err in determining that the MWA's 10-percent cost cap on insurance premiums must be computed solely on taxable income from the employer and must exclude tips.

Retroactivity

[Headnotes 7-11]

A final contention among the parties is whether our rulings in these cases apply retroactively or should only apply prospectively. Generally, retroactivity "as to choice of law and as to remedy goes without saying." *James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 538 (1991). In determining if a new rule of law should not apply retroactively, we consider the three factors established by *Chev-*

ron Oil Co. v. Huson, 404 U.S. 97, 106 (1971), *overruled in part by Harper v. Va. Dep't of Taxation*, 509 U.S. 86 (1993), and applied by this court in *Breithaupt v. USAA Property & Casualty Insurance Co.*, 110 Nev. 31, 35, 867 P.2d 402, 405 (1994). The first is a threshold matter, without which the analysis need not continue. *Harper*, 509 U.S. at 122 (O'Connor, J., dissenting); Bennett Evan Cooper, *Federal Appellate Practice: Ninth Circuit* § 21:11 (2015-2016 Edition) ("The Ninth Circuit will apply a decision retroactively without further consideration if the first factor is not present."). That is, if the decision does not "establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed," the analysis ends; the decision should apply retroactively. *Chevron*, 404 U.S. at 106 (citations omitted). "The Nevada Constitution is the supreme law of the state . . . ." *Clean Water Coal. v. The M Resort, LLC*, 127 Nev. 301, 309, 255 P.3d 247, 253 (2011) (internal quotation omitted). And as a court, our role is not to create the law but simply to declare what the law is. *See Am. Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167, 201 (1990) (Scalia, J., concurring). Here, our decision interpreting a constitutional provision, the MWA, is necessarily retroactive to the extent that it is applicable from the date of the MWA's inception, rather than from the date of this decision.

In this case, with regard to whether employers must "offer" or "enroll" employees in health benefit plans to pay the lower-tier wage, our holding is consistent with the Labor Commissioner's promulgations, *see* NAC 608.102 (2007) (providing that an employer must "offer" health benefits), and the language of the MWA is plain: employers need only offer health benefits to pay the lower-tier wage. Thus, we announce no new principle of law as to this issue, and its resolution could clearly have been foreshadowed. Accordingly, retroactivity applies.

As to the issue of whether tips are included in the 10-percent premium cap, although the Labor Commissioner's administrative code regulations contravened the MWA, in deciding this case, we do not overrule any past court precedent. Nor are we resolving an issue of first impression whose resolution was not clearly foreshadowed. The MWA clearly trumps the Labor Commissioner's inconsistent regulations. *We the People Nev. v. Miller*, 124 Nev. 874, 890, 192 P.3d 1166, 1177 (2008) ("[A] statutory provision will not be enforced when to do so would infringe upon rights guaranteed by our state constitution."). Thus, our affirmation of the MWA's clear language was foreseeable. And because we pronounce what the law is, instead of what the law should be, *see Am. Trucking*, 496 U.S. at 201 (Scalia, J., concurring), retroactivity from the time of the MWA's

implementation "goes without saying," *James B. Beam Distilling Co.*, 501 U.S. at 538.[5]

CONCLUSION

We order the petition granted in *MDC Restaurants, LLC v. Eighth Judicial District Court* (Docket No. 68523), and direct the clerk of this court to issue a writ of mandamus to the district court directing the district court to vacate its partial summary judgment order and hold further proceedings in accordance with this opinion. We conclude that a writ of prohibition is not appropriate here.

We affirm in part, reverse in part, and remand the *State, Office of the Labor Commissioner v. Hancock* appeal (Docket No. 68770). We affirm the district court's determination that tips are not included when calculating the gross income to determine the 10-percent health premium cap on employee's gross taxable income. But we reverse the district court's determination of whether an employer must actually enroll employees in a health benefit plan to pay the lower-tier minimum wage, and determine that our holding that employers need only offer qualifying benefits is retroactive.

Lastly, we answer the certified questions for *Hanks v. Briad Restaurant Group, LLC* (Docket No. 68845) and *Kwayisi v. Wendy's of Las Vegas* (Docket No. 68754) consistent with the above analysis.

PARRAGUIRRE, C.J., and HARDESTY, CHERRY, GIBBONS, and PICKERING, JJ., concur.

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[5]We note that retroactive application may have other limitations, such as statutes of limitation. However, the parties did not argue this issue. Thus, we do not consider it here.

NEVADA YELLOW CAB CORPORATION; NEVADA CHECKER CAB CORPORATION; AND NEVADA STAR CAB CORPORATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RONALD J. ISRAEL, DISTRICT JUDGE, RESPONDENTS, AND CHRISTOPHER THOMAS; AND CHRISTOPHER CRAIG, REAL PARTIES IN INTEREST.

No. 68975

BOULDER CAB, INC., PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE, RESPONDENTS, AND DAN HERRING, REAL PARTY IN INTEREST.

No. 68949

October 27, 2016 383 P.3d 246

Original petitions for writs of mandamus challenging district court orders denying, respectively, a motion to dismiss in Docket No. 68975 and a motion for summary judgment in Docket No. 68949.

In two separate cases, taxicab drivers filed class actions against taxicab companies, seeking unpaid wages. Taxicab companies filed motions to dismiss and for summary judgment. The district court denied the motions. Companies filed petitions for writs of mandamus, which were consolidated. The supreme court, HARDESTY, J., held that: (1) statute exempting taxicab drivers from minimum wage requirements was repealed when minimum wage amendment to state constitution took effect, not when the supreme court decided that the amendment impliedly repealed the statute; and (2) it is not the duty of the supreme court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors, disagreeing with *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994).

Petitions denied.

Jackson Lewis P.C. and *Paul T. Trimmer*, Las Vegas; *Marc C. Gordon* and *Tamer B. Botros*, Las Vegas, for Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation, and Nevada Star Cab Corporation.

Winner & Carson, P.C., and *Robert A. Winner*, Las Vegas, for Boulder Cab, Inc.

Leon Greenberg Professional Corporation and *Leon M. Greenberg*, Las Vegas, for Christopher Thomas, Christopher Craig, and Dan Herring.

Joshua D. Buck, Reno; *Michael P. Balaban*, Las Vegas; *Christian J. Gabroy*, Henderson, for Amicus Curiae Nevada National Employment Lawyers Association.

Hejmanowski & McCrea LLC and *Malani L. Kotchka*, Las Vegas, for Amicus Curiae Western Cab Company.

Littler Mendelson and *Rick D. Roskelley, Roger L. Grandgenett, II, Montgomery Y. Paek*, and *Crystal J. Herrera*, Las Vegas, for Amicus Curiae Sun Cab, Inc.

Law Office of Richard Segerblom, Ltd., and *Richard Segerblom*, Las Vegas, for Amicus Curiae International Technical Professional Employee Union.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Don Springmeyer*, Las Vegas, for Amicus Curiae Progressive Leadership Alliance of Nevada.

1. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
2. MANDAMUS.
   Writ relief is generally not available when an adequate and speedy legal remedy exists.
3. CONSTITUTIONAL LAW.
   Statute exempting taxicab drivers from minimum wage requirements was repealed when minimum wage amendment to state constitution took effect, not when the supreme court decided that the amendment impliedly repealed the statute; the supreme court's function was to declare what the law was, not to create the law. Const. art. 15, § 16; NRS 608.250(2)(e).
4. CONSTITUTIONAL LAW.
   Principles supporting state constitution's Separation of Powers Clause preclude courts from having the quintessentially legislative prerogative to make rules of law retroactive or prospective as they see fit. Const. art. 3, § 1.
5. STATUTES.
   Legislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them; this power is indeed very broad. Const. art. 3, § 1.
6. COURTS.
   When the supreme court interprets a constitutional amendment and concludes that it impliedly repeals a statute, that decision applies retroactively to when the amendment was enacted regardless of the balance of equities. Const. art. 3, § 1.

7. Statutes.

It is not the duty of the supreme court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors, disagreeing with *Breithaupt v. USAA Prop. & Cas. Ins. Co.*, 110 Nev. 31, 867 P.2d 402 (1994). Const. art. 3, § 1.

Before the Court En Banc.[1]

OPINION

By the Court, Hardesty, J.:

This court determined in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014), that the Minimum Wage Amendment, Article 15, Section 16 of the Nevada Constitution, enacted by the voters in 2006, impliedly repealed NRS 608.250(2)(e)'s exemption of taxicab drivers from minimum wage requirements. In this opinion, we consider whether our holding in *Thomas* is effective from the date the opinion was published in 2014, only, or whether it should apply retroactively from the date the Amendment was enacted in 2006. As this court's function is to declare what the law is, not to create the law, we conclude that NRS 608.250(2)(e) was repealed when the Amendment became effective.

FACTS AND PROCEDURAL HISTORY

In the 1970s, NRS 608.250 was amended to provide that taxicab drivers were exempt from the existing statutory minimum wage requirements. In 2004 and 2006, Nevada citizens voted to approve the Amendment, which amended the Constitution to set new minimum wage standards in Nevada but did not expressly repeal statutory provisions like NRS 608.250. The Amendment became effective on November 28, 2006.

In 2005, after voters had initially approved the Amendment and while it was pending a second vote, the then-attorney general released an opinion stating that the Amendment likely superseded NRS 608.250(2)'s exemptions of industries from minimum wage requirements. 05-04 Op. Att'y Gen. 12, 21 (2005). However, in 2009, a federal district court reached a different conclusion when it granted a limousine company's motion to dismiss a complaint filed by a group of limousine drivers requesting unpaid minimum wages. *See Lucas v. Bell Trans*, No. 2:08-cv-01792-RCJ-RJ, 2009 WL 2424557, at *8 (D. Nev. June 24, 2009), *abrogation recognized in Thurmond v. Presidential Limousine*, No. 2:15-cv-01066-MMD-PAL, 2016 WL 632222 (D. Nev. Febru-

[1]The Honorable Nancy M. Saitta, Justice, having retired, this matter was decided by a six-justice court.

ary 17, 2016). The court was considering whether the NRS 608.250 exemptions from minimum wage requirements were repealed by the Amendment's enactment in 2006, and it concluded that the exemptions were still valid, precluding the drivers' minimum wage claims. *Id*.

On June 26, 2014, this court published its opinion in *Thomas*, disagreeing with the *Lucas* decision and concluding that the Amendment impliedly repealed NRS 608.250(2)(e). 130 Nev. at 489, 327 P.3d at 522. As a result, taxicab companies were required to pay taxicab drivers the minimum wage set forth in the Amendment. *Id*. at 488, 327 P.3d at 522.

In two separate cases, real parties in interest Christopher Thomas, Christopher Craig, and Dan Herring (collectively, the taxicab drivers) filed class actions in district court against petitioners Nevada Yellow Cab Corporation, Nevada Checker Cab Corporation, Nevada Star Cab Corporation, and Boulder Cab, Inc. (collectively, the taxicab companies), seeking unpaid taxicab driver wages dating back to the effective date of the Amendment. The taxicab companies filed motions to dismiss and for summary judgment, arguing that our holding in *Thomas* applied prospectively, not retroactively, which the district courts denied. The taxicab companies then filed these writ petitions challenging the district courts' orders, arguing that, under these circumstances, caselaw from the United States Supreme Court and this court provide that *Thomas* should apply only prospectively.[2] Given the identical legal issues, we consolidate these writ petitions for disposition. *See* NRAP 3(b).

DISCUSSION

Writ of mandamus

[Headnotes 1, 2]

"A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (quoting *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008)); *see* NRS 34.160. Generally, "[w]rit relief is not available . . . when

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[2]This court permitted amici briefs to be filed in both cases by Western Cab Company, Sun Cab, Inc., Progressive Leadership Alliance of Nevada, and the Nevada affiliate chapter of the National Employment Lawyers Association. Industrial Technical Professional Employees Union filed an amicus brief in Docket No. 68975 only.

Notably, Western Cab Company made a number of additional arguments in its briefs, including that the Amendment is void for vagueness and is preempted. We decline to consider these arguments as these issues were not raised in district court. *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that issues not raised before the district court are waived).

an adequate and speedy legal remedy exists." *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. "While an appeal generally constitutes an adequate and speedy remedy precluding writ relief, we have, nonetheless, exercised our discretion to intervene under circumstances of urgency or strong necessity, or when an important issue of law needs clarification and sound judicial economy and administration favor the granting of the petition." *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008) (footnote and internal quotations omitted).

We are aware of at least five other cases that have been filed in Clark County raising the same or similar question we consider in these writ proceedings. Moreover, the issue impacts employees statewide. Thus, these petitions raise an important legal issue in need of clarification, and this court's review would promote sound judicial economy and administration. We therefore exercise our discretion and consider these writ petitions to clarify whether our holding in *Thomas* is to be applied prospectively or retroactively.

The Nevada Constitution's minimum wage requirements became effective on the day the Amendment was enacted

[Headnote 3]

The taxicab companies argue that under *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), and *Breithaupt v. USAA Property & Casualty Insurance Co.*, 110 Nev. 31, 867 P.2d 402 (1994), the holding in *Thomas* should apply purely prospectively because inequitable results will occur if taxicab drivers are provided back wages for work performed prior to the 2014 opinion. The taxicab companies further contend that they should not have been expected to predict that NRS 608.250(2)(e) was impliedly repealed, because the legal issue in *Thomas* was so close that three justices of this court dissented and the federal court in *Lucas* reached a different conclusion.

United States Supreme Court retroactivity precedent regarding civil laws on direct appeal

In *Chevron Oil*, the United States Supreme Court considered whether to apply its decision in *Rodrigue v. Aetna Casualty & Surety Co.*, 395 U.S. 352 (1969), retroactively. 404 U.S. at 97-98. In *Rodrigue*, the Court concluded that state law remedies apply to claims filed under the Outer Continental Shelf Lands Act (Lands Act). 395 U.S. at 357-59. As a result of *Rodrigue*, the Court in *Chevron Oil* determined that Louisiana's one-year statute of limitations would typically apply to the injured respondent's action under the Lands Act. 404 U.S. at 99. However, if the one-year statute of limitations was applied against the injured respondent, his claim would have been barred because he filed the claim more than a year after the accident. *Id*. at 105.

The Court then considered whether retroactive application of its holding in *Rodrigue* was inappropriate under the circumstances presented. *Id*. at 105-08. The Court articulated three factors to consider when determining retroactivity[3] before declining to apply *Rodrigue*, and the state one-year statute of limitations, against the injured respondent in *Chevron Oil*. *Id*. at 106-07. The Court reasoned that the injury at issue had occurred three years before the *Rodrigue* decision, and the lawsuit was filed one year before that decision. *Id*. at 105. The Court also noted that *Rodrigue* was a case of first impression in the Supreme Court, and it had overruled a long line of federal court precedent applying admiralty law, including the doctrine of laches. *Id.* at 107. Ultimately, the Court concluded that it would be unfair and inconsistent with the Land Act's purposes to retroactively impose the one-year limitations period on the injured respondent. *Id.* at 109.

More recent Supreme Court jurisprudence has strongly disapproved of the *Chevron Oil* factors when considering federal civil law. *See, e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 94-97 (1993) (providing a comprehensive review of cases that call *Chevron Oil* into question). In *American Trucking Ass'ns, Inc. v. Smith*, four dissenting justices concluded that limits on retroactivity in civil cases, such as those placed by *Chevron Oil*, are inappropriate. 496 U.S. 167, 218-24 (1990) (Stevens, J., joined by Brennan, Marshall, and Blackmun, JJ., dissenting). Justice Scalia concurred with the judgment, but agreed with the dissenting justices that:

> prospective decisionmaking is incompatible with the judicial role, which is to say what the law is, not to prescribe what it shall be. The very framing of the issue that we purport to decide today—whether our decision in *Scheiner* shall "apply" retroactively—presupposes a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is. Such a view is contrary to that understanding of "the judicial Power," U.S. Const., Art. III, § 1, which is not only the common and

[3]This court cited to these factors in *Breithaupt v. USAA Property & Casualty Insurance Co.*:

> In determining whether a new rule of law should be limited to prospective application, courts have considered three factors: (1) "the decision to be applied nonretroactively must establish a new principle of law, either by overruling clear past precedent on which litigants may have relied, or by deciding an issue of first impression whose resolution was not clearly foreshadowed;" (2) the court must "weigh the merits and demerits in each case by looking to the prior history of the rule in question, its purpose and effect, and whether retrospective operation will further or retard its operation;" and (3) courts consider whether retroactive application "could produce substantial inequitable results."

110 Nev. 31, 35, 867 P.2d 402, 405 (1994) (quoting *Chevron Oil Co. v. Huson*, 404 U.S. 97, 106-07 (1971)).

> traditional one, but which is the only one that can justify courts in denying force and effect to the unconstitutional enactments of duly elected legislatures, see *Marbury v. Madison*, 1 Cranch 137 (1803)—the very exercise of judicial power asserted in *Scheiner*.

Id. at 201 (Scalia, J., concurring).

Subsequently, in *James B. Beam Distilling Co. v. Georgia*, the Court determined, in plurality and concurring opinions, that in a civil context "it is error to refuse to apply a rule of federal law retroactively after the case announcing the rule has already done so." 501 U.S. 529, 540 (1991).[4] The Court reasoned:

> [L]itigants [should not] be distinguished for [retroactivity] purposes on the particular equities of their claims to prospectivity: whether they actually relied on the old rule and how they would suffer from retroactive application of the new. It is simply in the nature of precedent, as a necessary component of any system that aspires to fairness and equality, that the substantive law will not shift and spring on such a basis.

Id. at 543.

Finally, in *Harper*, for the first time, a majority of Justices joined in a majority opinion that held:

> When this Court applies a rule of federal law to the parties before it, that rule is the controlling interpretation of federal law and must be given full retroactive effect in all cases still open on direct review and as to all events, regardless of whether such events predate or postdate our announcement of the rule.

509 U.S. at 97.

The Chevron Oil factors are inapplicable to this case

The taxicab companies argue, in effect, that NRS 608.250(2)(e) was not expressly or impliedly repealed at the time Article 15, Section 16 was passed; rather, the repeal happened when *Thomas* was decided. We conclude that this argument fails because, as stated by Justice Scalia, "[t]o hold a governmental Act to be unconstitutional is not to announce that *we* forbid it, but that the *Constitution* forbids it." *American Trucking*, 496 U.S. at 201 (Scalia, J., concurring). Furthermore, to conclude that *Thomas* applies only prospectively

[4]This opinion is authored by Justice Souter and joined by Justice Stevens. In two concurring opinions, four other Supreme Court Justices also agreed with this proposition. *See James B. Beam Distilling Co. v. Georgia*, 501 U.S. 529, 544 (1991) (White, J., concurring); *id*. at 547-48 (Blackmun, J., joined by Marshall and Scalia, JJ., concurring).

would be to "presuppose[ ] a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is." *Id*.

[Headnotes 4, 5]

The principles supporting Nevada's Separation of Powers Clause, Nev. Const. art. 3, § 1, preclude this court from having the "quintessentially legislat[ive] prerogative to make rules of law retroactive or prospective as we see fit." *Harper*, 509 U.S. at 95 (alteration in original) (internal quotations omitted).

> The powers of the Government of the State of Nevada shall be divided into three separate departments,—the Legislative,—the Executive and the Judicial; and no persons charged with the exercise of powers properly belonging to one of these departments shall exercise any functions, appertaining to either of the others . . . .

Nev. Const. art. 3, § 1. "[L]egislative power is the power of law-making representative bodies to frame and enact laws, and to amend or repeal them. This power is indeed very broad." *Galloway v. Truesdell*, 83 Nev. 13, 20, 422 P.2d 237, 242 (1967); *see also Harper*, 509 U.S. at 107 (Scalia, J., concurring) (stating that it is "the province and duty of the judicial department to say what the law *is*, not what the law *shall* be" (internal quotations and citation omitted)).

[Headnote 6]

Based on these principles, we hold that when we interpret a constitutional amendment and conclude that it impliedly repeals a statute, that decision applies retroactively to when the amendment was enacted regardless of the balance of equities. Thus, in *Thomas* we simply declared what the law was upon enactment of the Amendment in 2006, we did not create the law in 2014.[5]

For these reasons, we must also reexamine our injection of the *Chevron Oil* factors into this court's analysis in *Breithaupt*. In *Breithaupt*, the appellant sued her automobile insurance company after a 1988 car accident claiming that the insurance company failed to comply with a statutory requirement that automobile insurance companies notify consumers about their uninsured/underinsured motorist coverage options. 110 Nev. at 32, 867 P.2d at 403. In reviewing the statute at issue, the *Breithaupt* court recognized that in

[5]Our holding in this opinion should not be read as overturning the *Chevron Oil* factors in all instances. Certain scenarios may still justify use of the equitable factors. For example, "the paradigm case" where the factors may still apply is when "a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct." *James B. Beam*, 501 U.S. at 534.

Quinlan v. Mid Century Ins., 103 Nev. 399, 741 P.2d 822 (1987), the court previously interpreted the statute as requiring insurers to simply notify consumers that specific coverage was available. *Breithaupt*, 110 Nev. at 33, 867 P.2d at 404. However, this court further recognized that in 1990 the Legislature amended the statute to impose a heightened notice requirement, leaving "no doubt that . . . *Quinlan*'s notice standard [was] inapplicable to insurance transactions which occur after the effective date of the statute." *Id.* at 35, 867 P.2d at 405.

The appellant in *Breithaupt* contended that the "[L]egislature considered *Quinlan* to be wrongly decided" and urged this court to instead retroactively apply the heightened standard imposed by the statute. *Id*. at 35, 867 P.2d at 405. In declining to apply the statute retroactively, we concluded that the legislative history for the 1990 amendment did not indicate the Legislature considered *Quinlan* wrongly decided. *Id*. However, reciting the *Chevron Oil* factors, we also stated that even if *Quinlan* was wrongly decided, we would still not apply the heightened notice requirement retroactively because "[t]he overruling of a judicial construction of a statute" is generally applied prospectively, and based on the potential for "highly inequitable" results. *Id*. at 35-36, 867 P.2d at 405-06.

[Headnote 7]

Although we agree with *Breithaupt*'s holding, we disagree with its reference to the *Chevron Oil* factors because the issue in *Breithaupt* involved whether a rule passed by statute—the heightened notice requirement—should apply retroactivity.[6] The 1987 *Quinlan* decision pronounced what statutory notice requirement was in effect at that time. The Legislature amended that requirement in 1990, but did not express an intent to apply the heightened standard retroactively—this court's analysis should have ended there. *See Pub. Emps. Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 154, 179 P.3d 542, 553 (2008) ("In Nevada, as in other jurisdictions, statutes operate prospectively, unless the Legislature clearly manifests an intent to apply the statute retroactively." (internal quotations omitted)). It is not the duty of this court to determine whether rules adopted in statutory amendments apply retroactively based on equitable factors.

CONCLUSION

We conclude that NRS 608.250(2)(e) was repealed when the Amendment was enacted in 2006, not when *Thomas* was decided in

[6]Despite noting that the United States Supreme Court had recently disapproved of the *Chevron Oil* factors in *American Trucking Ass'ns, Inc. v. Smith*, 496 U.S. 167 (1990), the *Breithaupt* court proceeded to apply the factors to reach its conclusion. 110 Nev. at 35 n.3, 867 P.2d at 405 n.3. Significantly, *Breithaupt* did not cite *James B. Beam* or *Harper*.

2014. Further, we decline to apply our caselaw in a purely prospective manner when considering the effect of a constitutional amendment on a statute.[7] Accordingly, we deny the petitions for writs of mandamus.

PARRAGUIRRE, C.J., and DOUGLAS, CHERRY, GIBBONS, and PICKERING, JJ., concur.

PACIFIC WESTERN BANK, A CALIFORNIA BANKING CORPORATION, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE, RESPONDENTS, AND DARRIN D. BADGER, AN INDIVIDUAL; AND VINCENT T. SCHETTLER, AN INDIVIDUAL, REAL PARTIES IN INTEREST.

No. 69048

November 3, 2016 383 P.3d 252

Original petition for a writ of mandamus challenging a district court order in a proceeding to enforce a domesticated judgment.

Judgment creditor served a writ of execution and garnishment on administrator of debtor's qualified tuition program accounts, and debtor claimed an exemption, to which creditor objected. The district court quashed the writs of execution and garnishment. Creditor petitioned for a writ of mandamus. As a matter of first impression, the supreme court, GIBBONS, J., held that funds contained in debtor's out-of-state accounts were a debt that was garnishable.

Petition granted in part.

Snell & Wilmer, LLP, and *Bob L. Olson, Kelly H. Dove*, and *Karl O. Riley*, Las Vegas, for Petitioner.

Fox Rothschild, LLP, and *Mark J. Connot*, Las Vegas; *Reid Rubinstein & Bogatz* and *I. Scott Bogatz* and *Charles M. Vlasic, III*, Las Vegas, for Real Party in Interest Darrin D. Badger.

Glen J. Lerner & Associates and *Corey M. Eschweiler*, Las Vegas, for Real Party in Interest Vincent T. Schettler.

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[7]We note that, although the taxicab drivers may have claims for back wages, any such claims are subject to the applicable statute of limitations. We do not address the applicable statute of limitations here because it is not raised in these petitions.

1. COURTS.
   The supreme court has original jurisdiction to issue writs of mandamus. Const. art. 6, § 4.
2. MANDAMUS.
   A writ of mandamus is available to control an arbitrary or capricious exercise of discretion.
3. MANDAMUS.
   Whether extraordinary writ relief of mandamus will issue is solely within the supreme court's discretion.
4. MANDAMUS.
   The supreme court may address petitions for writs of mandamus when they raise important issues of law in need of clarification that involve significant public policy concerns, of which the court's review would promote sound judicial economy.
5. MANDAMUS.
   The supreme court would exercise its discretion to consider petition for writ of mandamus, where petition inquired whether district court had jurisdiction to subject accounts held as debt to execution, despite their physical location in another state, which was novel issue that was a significant and potentially recurring question of law in need of clarification.
6. MANDAMUS.
   In the context of a petition for a writ of mandamus, statutory interpretation is a question of law that is reviewed de novo.
7. STATUTES.
   Statutory language must be given its plain meaning if it is clear and unambiguous.
8. GARNISHMENT.
   Restatement (Second) of Conflict of Laws section 68, providing that the situs of a debt to be garnished is immaterial, would be adopted. Restatement (Second) of Conflict of Laws § 68.
9. GARNISHMENT.
   Funds contained in judgment debtor's qualified tuition program accounts were debt, rather than chattel, that the district court had power to garnish for judgment creditor through service of writ of garnishment upon administrator of accounts, even though funds were located in different state, where maintenance of action was statutorily authorized against administrator, as it maintained or referenced account on debtor's behalf, and the district court had jurisdiction over administrator and debtor. 26 U.S.C. § 529; NRS 21.070, 21.120, 31.450; Restatement (Second) of Conflict of Laws § 68.

Before CHERRY, DOUGLAS and GIBBONS, JJ.

OPINION

By the Court, GIBBONS, J.:

In this opinion, we consider whether certain funds contained in financial accounts under 26 U.S.C. § 529 (2012) (529 accounts) constitute a debt and whether they are subject to execution and garnishment in Nevada despite their physical location in New Mexico. In doing so, we grant the petition in part, concluding that funds

contained in 529 accounts constitute a debt and that these funds are subject to execution and garnishment in Nevada despite their physical location elsewhere. Specifically, we adopt Section 68 of the Restatement (Second) of Conflict of Laws and conclude that funds contained in 529 accounts are a debt, not a chattel. Accordingly, the district court had the power to garnish the debt through service of a writ of garnishment upon the accounts' administrator, Nevada affiliate Wells Fargo Advisors (WFA).

FACTS AND PROCEDURAL HISTORY

Petitioner Pacific Western Bank loaned real parties in interest Darren D. Badger, John A. Ritter,[1] and Vincent T. Schettler (together, "the debtors") approximately $10,000,000. The debtors defaulted on the loan. Pacific Western sued the debtors in California, and a California court issued a judgment in favor of Pacific Western and against the debtors in the amount of $2,497,568.73, plus interest. Pacific Western later domesticated the judgment in Nevada.

In efforts to collect on the judgment, Pacific Western caused the constable to serve WFA, a company that administered three 529 accounts on Badger's behalf, with a writ of execution and garnishment on July 22, 2015, ordering WFA to release funds held in the name or for the benefit of Badger. WFA served a written answer on the constable. According to WFA's answer, WFA "maintained or referenced" the 529 accounts on Badger's behalf. However, WFA also noted that the 529 account "shares are actually maintained at [Scholar's Edge], a mutual funds company through the 529 Plan accounts. Since these assets are not held at Wells Fargo Advisors, LLC they are not restricted subject to the [w]rit of [g]arnishment."

Badger claimed an exemption, asserting that the 529 accounts were exempt from execution under NRS 21.090(1)(r)(5) (qualified tuition programs). He also claimed that the funds in the 529 accounts were exempt under NRS 21.090(1)(s) (court-ordered child support) because the accounts were largely funded under an order to set money aside for his children's college education pursuant to a decree of divorce. Badger's three children also filed separate claims of exemption. Each child claimed that the funds held in the 529 accounts on his or her behalf were exempt pursuant to NRS 21.090.

Pacific Western filed an objection to Badger's claim of exemption and the family claims of exemption, arguing that the 529 accounts were not exempt under NRS 21.090(1)(r)(5). Badger filed a response to Pacific Western's objections, claiming that the 529 accounts are outside the reach of Pacific Western and outside of the Nevada district court's jurisdiction because they were located in New Mexico. Badger's response further claimed that the funds held in the 529 accounts are completely exempt under New Mexico law.

[1]The petition has been dismissed as to Ritter.

The district court heard argument on the claimed exemptions and jurisdictional issue. Counsel for Pacific Western stated that "although the funds were deposited with [WFA] and the account was clearly to be accounts under 529, as well as the statute 21.090, [WFA] has apparently invested the funds . . . and those funds physically are with . . . New Mexico." The district court then characterized the relationship between WFA and Scholar's Edge as "[WFA] chose a vehicle for investment from New Mexico"—namely, Scholar's Edge. The district court stated that it would be more appropriate for the 529 accounts to be addressed in New Mexico, since the 529 accounts were managed and controlled by a New Mexico entity, and declined to make a determination regarding the 529 accounts.

The district court ultimately issued an order quashing the writs of execution and garnishment served upon WFA. With respect to the 529 accounts, the district court ordered that "because the funds held in the [529 accounts] for the benefit of Darrin D. Badger's children . . . are physically located in New Mexico with Scholar's Edge, a New Mexico court must decide whether these funds are exempt from execution." Pacific Western filed a petition for a writ of mandamus with this court challenging the district court's ruling that Pacific Western must attempt to execute upon Badger's 529 accounts in New Mexico.

DISCUSSION

Consideration of the writ petition

[Headnotes 1-4]

"This court has original jurisdiction to issue writs of mandamus." *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012); *see also* Nev. Const. art. 6, § 4. A writ of mandamus is available "to control an arbitrary or capricious exercise of discretion." *Humphries v. Eighth Judicial Dist. Court*, 129 Nev. 788, 791, 312 P.3d 484, 486 (2013) (internal quotation marks omitted). Additionally, "[w]hether extraordinary writ relief will issue is solely within this court's discretion." *MountainView*, 128 Nev. at 184, 273 P.3d at 864. Where there is no "plain, speedy, and adequate remedy" available at law, extraordinary relief may be available. NRS 34.170; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Further, this court may address writ petitions when they "raise important issues of law in need of clarification, involving significant public policy concerns, of which this court's review would promote sound judicial economy." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 142-43, 127 P.3d 1088, 1096 (2006).

[Headnote 5]

We exercise our discretion to consider this writ petition because the petition involves a significant and potentially recurring question

of law in need of clarification. Namely, the petition inquires whether a district court has jurisdiction to subject accounts held as a debt to execution, despite their physical location in another state. This issue is novel to the state of Nevada and prompts us to adopt Section 68 of the Restatement (Second) of Conflict of Laws to prevent further confusion. Accordingly, we conclude that this writ petition warrants our consideration.[2]

Merits of the writ petition

[Headnotes 6, 7]

In the context of a writ petition, statutory interpretation is a question of law that this court reviews de novo. *Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 808, 312 P.3d 491, 498 (2013). Statutory language must be given its plain meaning if it is clear and unambiguous. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007).

The district court had jurisdiction to subject the 529 accounts to execution consistent with Section 68 of the Restatement (Second) of Conflict of Laws, which this court now adopts

[Headnotes 8, 9]

Pacific Western argues that the 529 accounts are essentially a debt owed to Badger by WFA. Pacific Western's argument is based upon the definition of "debt" as set forth in *Black's Law Dictionary* and as construed by the United States Supreme Court in *Cohen v. de la Cruz*, 523 U.S. 213, 218-20 (1998), and *Citizens Bank of Maryland v. Strumpf*, 516 U.S. 16, 21 (1995), under which funds in a financial account constitute debts because depositing funds into such an account creates a right to payment at the request of the depositor. Thus, Pacific Western argues that the district court may garnish the 529 accounts regardless of their physical location pursuant to Section 68 of the Restatement (Second) of Conflict of Laws, under which the situs of the debt is immaterial. We agree and expressly adopt Section 68 of the Restatement (Second) of Conflict of Laws.

Section 68 of the Restatement (Second) of Conflict of Laws provides that

> [a] state has power to exercise judicial jurisdiction to apply to the satisfaction of a claim an obligation owed to the person against whom the claim is asserted if the obligor is subject to the judicial jurisdiction of the state, even though the state lacks jurisdiction over the person against whom the claim is asserted.

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[2]This court previously issued an order to show cause why this proceeding is not moot based on this court's opinion in *Badger v. Eighth Judicial District Court*, 132 Nev. 396, 373 P.3d 89 (2016). After reviewing petitioner's response to the order, this court has determined that this writ petition is not moot.

Restatement (Second) of Conflict of Laws § 68 (Am. Law Inst. 1971). Comment b to Section 68 of the Restatement states that there are only two requirements that must be met to permit garnishment of a debt: (1) "maintenance of the action must be authorized by a statute," and (2) "the state must have judicial jurisdiction over the [debtor/]garnishee." Restatement (Second) of Conflict of Laws § 68 cmt. b (Am. Law Inst. 1971). Aside from these, "[t]here is no further requirement, as in the case of chattels, relating to the situs of the thing. . . . [A] debt may be garnished wherever personal jurisdiction may be exercised over the garnishee." *Id.* Consistent with the Restatement's guidance, a number of courts from other jurisdictions have executed upon debts based on jurisdiction over the broker. *See, e.g.*, *Smith Barney, Inc. v. Ekinci*, 937 F. Supp. 59, 61 (D. Me. 1996) (determining jurisdiction over a party and that party's broker also gave the court jurisdiction over assets held by the broker in out-of-state accounts); *State v. W. Union Fin. Servs., Inc.*, 208 P.3d 218, 225 (Ariz. 2009) (recognizing that, where the debt involves a post-judgment garnishment, the "relevant jurisdictional analysis in such cases properly focuses on whether the garnishee is subject to the specific or general jurisdiction of the forum state, not whether the intangible res is located there"). Further, this court consistently looks to the Restatement (Second) of Conflict of Laws for guidance, and has adopted its provisions on many occasions. *See, e.g.*, *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 171, 327 P.3d 1061, 1063 (2014) ("Nevada tends to follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of-law questions involving contracts . . . ."); *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 47, 223 P.3d 332, 336 (2010); *Wyeth v. Rowatt*, 126 Nev. 446, 461, 244 P.3d 765, 775 (2010); *Gen. Motors Corp. v. Eighth Judicial Dist. Court*, 122 Nev. 466, 473, 134 P.3d 111, 116 (2006).

With respect to the first requirement, NRS Chapter 21 governs writs of execution. NRS 21.070 provides that "[w]here the execution is against the property of the judgment debtor [and] requires the delivery of real or personal property, it shall be issued to the sheriff of the county where the property, or some part thereof, is situated." Under NRS 21.120, "[i]f personal property, including debts . . . is not in the possession or control of the debtor, the sheriff . . . shall serve a writ of garnishment in aid of execution upon the party in whose possession or control the property is found." A "debt" is defined as a "[l]iability on a claim; a specific sum of money due by agreement or otherwise." *Debt*, *Black's Law Dictionary* (8th ed. 2004).

More specifically, NRS 31.450, which outlines the procedure and policy goals for post-judgment issuance of a writ of garnishment, provides the following:

> Any person having a judgment remaining unsatisfied in any court of record in the State . . . may, without application to the court, have a writ of garnishment issued, and thereupon attach . . . debts . . . and other personal property of the judgment debtor in the possession or under the control of any third person as garnishee, for the security of such judgment, . . . and all courts shall be liberal in allowing amendments, and in construing this chapter so as to promote the objects thereof.

Further, where a third party other than the actual debtor is served with such a writ, the named garnishee must be "indebted to or [have] property in the garnishee's possession or under the garnishee's control belonging to the defendant." NRS 31.249(2)(b). In *Ellsworth Land & Livestock, Inc. v. Bush*, 233 P.3d 655, 657-58 (Ariz. Ct. App. 2010), the Arizona Court of Appeals concluded that annuity payments subject to a writ of garnishment served upon a garnishee/debtor were properly examined as a "debt" under Section 68 of the Restatement, as opposed to "chattel" under Section 67 of the Restatement.

The parties and garnishee WFA agree that the 529 accounts are located at Scholar's Edge in New Mexico. WFA is a nonbank affiliate of Wells Fargo & Company providing advisory services, asset management, business services, college savings planning, retirement planning, and other financial services. The record establishes that Scholar's Edge plans operate as follows:

> Scholar's Edge® is operated as a qualified tuition program offered by The Education Trust Board of New Mexico and is available to all U.S. residents. . . . These securities are neither FDIC insured nor guaranteed and may lose value. Although money contributed to Scholar's Edge will be invested in portfolios that invest in underlying mutual funds from OppenheimerFunds, Scholar's Edge is not a mutual fund. The state of New Mexico has created a trust specifically for the purpose of offering 529 college savings plans, including Scholar's Edge. An investment in Scholar's Edge is an investment in municipal fund securities that are issued and offered by the trust.

The relationship between WFA and Scholar's Edge is such that WFA retained maintenance of the funds in the 529 accounts.[3] The

[3]While Badger argues that WFA is not a custodian of customer funds and that Scholar's Edge holds the funds contained in the 529 accounts, WFA acknowledged that it "maintained or referenced" the 529 accounts on Badger's behalf. Further, the district court stated that WFA had merely invested the funds in the 529 accounts with Scholar's Edge in New Mexico on Badger's behalf.

529 accounts that are under WFA's control belong to Badger, the defendant against whom Pacific Western secured the underlying judgment, and thus are subject to garnishment under NRS 31.450.

In adopting Section 68 of the Restatement, we conclude that the funds contained in the 529 accounts are a debt, not a chattel. As such, the funds are subject to execution and garnishment in Nevada regardless of location of the funds in New Mexico. Analyzing the funds as a debt under the Restatement, the two requirements to permit garnishment of a debt are satisfied here. *See* Restatement (Second) of Conflict of Laws § 68 cmt. b (1971). First, maintenance of the action is authorized by NRS 31.450, which authorizes the issuance of a post-judgment writ of garnishment and liberal construction of a judgment creditor's ability to collect. Further, NRS 21.120 authorizes garnishment against the party in whose "possession or control" the property is found—where WFA acknowledged that it "maintained or referenced" the account on Badger's behalf, and execution of the funds does not involve the physical delivery of real or personal property pursuant to NRS 21.070. As to the second requirement that the state have judicial jurisdiction over the debtor/garnishee, it is undisputed the Nevada courts have jurisdiction over WFA and Badger. Thus, pursuant to Section 68 of the Restatement, the debt may be garnished in Nevada, regardless of the location of the funds.

Therefore, we conclude that the funds contained in the 529 accounts are a debt that the district court had the power to garnish through service of a writ of garnishment upon WFA pursuant to Section 68 of the Restatement (Second) of Conflict of Laws.

CONCLUSION

We choose to entertain Pacific Western's petition for a writ of mandamus. In doing so, we grant the writ petition in part, concluding that the funds contained in the 529 accounts are a debt, not a chattel. As such, we conclude that the district court had the power to garnish the debt through service of a writ of garnishment upon WFA pursuant to Section 68 of the Restatement (Second) of Conflict of Laws. Therefore, we direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order quashing the writs of execution and garnishment and to proceed with a determination on the claims for exemption.

CHERRY and DOUGLAS, JJ., concur.

ANTHONY MAYO, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE KATHLEEN E. DELANEY, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 69566

November 23, 2016 384 P.3d 486

Original petition for a writ of mandamus directing the district court to grant a pretrial petition for a writ of habeas corpus.

Defendant, charged with murder of his wife, filed pretrial petition for a writ of habeas corpus, seeking dismissal of indictment based on the district attorney's failure to present to grand jury two notes from wife's hospital chart. The district court denied petition. Defendant filed original petition for writ of mandamus. The supreme court, Pickering, J., held that: (1) the district attorney or the deputy district attorney must appreciate the exculpatory value of evidence to be "aware" of it for purposes of statute requiring the district attorney to submit to grand jury evidence of which the district attorney is aware that will explain away the charge; and (2) the district attorney did not violate that statute by failing to submit to grand jury notes in defendant's wife's hospital chart referring to a particular disease.

Petition denied.

Philip J. Kohn, Public Defender, and *Dan A. Silverstein* and *Arlene Heshmati*, Deputy Public Defenders, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

1. Mandamus.
   A writ of mandamus may issue to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.
2. Mandamus.
   Mandamus is an extraordinary remedy, and whether an application for a writ of mandate will be entertained lies within the discretion of the court.
3. Grand Jury.
   The district attorney is not "aware" of evidence that will explain away the charge, so as to be statutorily required to submit that evidence to grand jury, merely by virtue of possessing evidence that later proves exculpatory; rather, the district attorney or the deputy district attorney must appreciate the exculpatory value of the evidence to be "aware" of it for purposes of applicable statute. NRS 172.145(2).

4. Grand Jury.

The district attorney did not fail to submit known exculpatory evidence to grand jury in violation of relevant statute when the district court failed to submit to grand jury, which ultimately indicted defendant for murder of his wife, two notes from wife's hospital chart that referred to a particular disease; the district attorney did not know or have reason to know the references had potential exculpatory value, references appeared only twice in several hundred pages of hospital notes, and disease was obscure enough that defense counsel did not initially see the references as significant either. NRS 172.145(2).

Before Parraguirre, C.J., Hardesty and Pickering, JJ.

OPINION

By the Court, Pickering, J.:

A grand jury indicted petitioner Anthony Mayo for the murder of his wife. Under NRS 172.145(2), the district attorney must provide the grand jury any evidence of which the district attorney is "aware" that "will explain away the charge." Mayo seeks dismissal of his indictment based on the district attorney's failure to present to the grand jury two notes from his deceased wife's hospital chart. The notes' exculpatory potential was not obvious and only emerged when placed in the context of internet research the defense conducted shortly before trial.

NRS 172.145(2) does not require the district attorney to sift through the evidence and conduct research to construct a defense for the accused. The record supports the district court's finding that, although the district attorney had the hospital chart, he was not aware of the notes and their potential exculpatory value when he presented the case to the grand jury. As the district attorney did not violate NRS 172.145(2) by failing to submit known exculpatory evidence to the grand jury, we deny writ relief.

I.

A.

The Clark County grand jury indicted Mayo on charges of murder, battery constituting domestic violence (strangulation), coercion, and dissuading a witness in connection with the death of his wife, Beverly McFarlane. The couple's daughter testified before the grand jury that Mayo strangled and beat Beverly, leaving her dazed and incoherent. Two days later, Beverly remained incoherent, and the daughter called the police. Beverly had a black eye, abrasions on her neck, and the left side of her face was bruised and swollen. When the responding officer tried to interview Beverly, she could not give her date of birth, identify the day of the week, or name the President.

Beverly was taken by ambulance to the hospital, where she was examined more thoroughly. The examination revealed neck injuries, swelling on the left side of her face and head, and petechial hemorrhages consistent with strangulation. Within 24 hours of her admission to the hospital, Beverly could no longer speak. She was placed on life support and died two weeks later.

Clark County medical examiner Dr. Alane Olson performed Beverly's autopsy. Beverly's brain was removed and sent to Dr. Claudia Greco, a neuropathologist at the University of California, Davis, for examination. Both Dr. Olson and Dr. Greco testified before the grand jury. Dr. Olson testified that she observed substantial swelling of the brain; that although Beverly had "other significant contributing conditions," namely, "occlusion of the left internal carotid artery, hypertension, and diabetes," the cause of death was "brain injuries due to assault"; and that the manner of death was "homicide." Dr. Greco also observed massive swelling and hemorrhages on the left side and underside of the brain. She testified that hypertension predisposed Beverly to hemorrhage but that trauma, not disease, produced the profound brain injuries that caused her death.

B.

Mayo filed a pretrial petition for a writ of habeas corpus, and a later addendum thereto, seeking to dismiss the indictment without prejudice. In the addendum, Mayo complained that the district attorney violated NRS 172.145(2) by failing to submit exculpatory evidence in the State's file to the grand jury. The omitted evidence consisted of two notes in Beverly's hospital records: (1) a physician's order for a cerebral arteriogram that mentioned "strokes, possible Moya Moya"; and (2) a radiology report noting, among other impressions, "[f]indings are suggestive of a slow progressive vasculopathy that can be seen with moyamoya disease [a]lthough the hypertrophied vessels are not well developed." The addendum attached internet research on moyamoya disease, including an article describing it as "a progressive, occlusive disease of the cerebral vasculature with particular involvement of the circle of Willis and the arteries that feed it" that can cause death "from hemorrhage [dependent] on the severity and nature of the hemorrhage." *See* Roy Sucholeiki, MD, *Moyamoya disease*, Medscape, January 7, 2015, http://www.emedicine.medscape.com/article/1180952-overview. Based on this research, the defense urged the district court to consider that moyamoya disease may have caused or contributed to Beverly's death.

The district attorney forwarded the addendum to Dr. Greco. In response, Dr. Greco reexamined Beverly's brain and issued a supplemental neuropathology report. Dr. Greco's supplemental report states: "Occlusive changes in the Circle of Willis are those of atherosclerosis. There is no pathology present that would lead to a di-

agnosis of moyamoya disease." Later in the report Dr. Greco concludes: "No evidence of moyamoya disease."

Based on Dr. Greco's supplemental report, the State denied that the notes had exculpatory value, much less that the district attorney was "aware" of them or their significance. The deputy district attorney prosecuting the case acknowledged that, several months before presenting the case to the grand jury, he obtained Beverly's medical records by subpoena, which included the notes mentioning moyamoya disease. There were several hundred pages of records, which the deputy forwarded copies of to his experts, Dr. Olson and Dr. Greco. Both doctors advised him that Beverly died from blunt force trauma; neither raised moyamoya disease as a possible cause of death. The district court accepted the deputy district attorney's representation that he did not notice the references to moyamoya disease in Beverly's medical records or recognize them as potentially exculpatory until the defense filed its addendum, more than a year after the indictment was returned.

The defense appears to have obtained Beverly's medical records from the district attorney's office before the case went to the grand jury. Like the prosecution, the defense did not initially recognize the notes referencing moyamoya disease as significant. In the letter the defense sent asking the State to submit certain exculpatory evidence to the grand jury, nothing is said about moyamoya disease. As defense counsel acknowledged, moyamoya disease is "very rare" and not something he knew about before reviewing the medical records in preparation for trial and conducting internet research into it.

The district court held two hearings on Mayo's pretrial habeas corpus petition, which it ultimately denied by written order. In its order, the district court held that "the State is only required to present to the Grand Jury exculpatory evidence of which the State is aware . . . at that time." It found that "although the State had possession of documents that contained reference to the possible existence of moya moya disease" when it presented the case to the grand jury, "the State was not aware of the exculpatory value of such evidence." The district court declined to decide whether the evidence was in fact exculpatory: "THE COURT ma[kes] no determination that Beverly McFarlane actually had moya moya disease or that Beverly McFarlane succumbed to moya moya disease." Instead, it resolved the case on the basis that

> the State did not purposefully choose to not disclose the possible existence of moya moya disease, but instead the State was simply unaware of the potential of moya moya disease or its exculpatory value. Because the State was unaware of the possible exculpatory value of the reference in the medical

records to moya moya disease the State was not required to present such evidence to the Grand Jury.

The district court stayed Mayo's trial pending this court's decision on Mayo's petition for extraordinary writ relief.

II.

A.

[Headnotes 1, 2]

A writ of mandamus may issue "to compel the performance of an act which the law requires as a duty resulting from an office, trust, or station, or to control an arbitrary or capricious exercise of discretion." *Schuster v. Eighth Judicial Dist. Court*, 123 Nev. 187, 190, 160 P.3d 873, 875 (2007). But mandamus "is an extraordinary remedy," and "whether an application for a writ of mandate will be entertained lies within the discretion of the court." *Kussman v. Eighth Judicial Dist. Court*, 96 Nev. 544, 545, 612 P.2d 679 (1980). Writ relief from pretrial probable cause determinations is disfavored for reasons of judicial economy and sound judicial administration. *Id.* at 546, 612 P.2d at 680. On rare occasion we have, nonetheless, undertaken mandamus review of pretrial habeas corpus determinations that test the scope of the district attorney's obligation under NRS 172.145(2). *See Schuster*, 123 Nev. at 190, 160 P.3d at 875; *Ostman v. Eighth Judicial Dist. Court*, 107 Nev. 563, 565, 816 P.2d 458, 459-60 (1991) (3-2). Mayo's petition presents a substantial legal question: Does the obligation to present exculpatory evidence of which the district attorney is "aware" extend to evidence the district attorney possesses but does not recognize as exculpatory? Although we deny writ relief, this question deserves a definitive answer, so we accept review and resolve the petition by opinion. *See Schuster*, 123 Nev. at 188-89, 160 P.3d at 874.

B.

The right of an accused to have the prosecutor present exculpatory evidence to the grand jury derives from statute. *Compare United States v. Williams*, 504 U.S. 36, 51-53 (1992) (rejecting the proposition that federal prosecutors have a duty to provide the grand jury with exculpatory evidence as a matter of federal constitutional law or the inherent supervisory authority of the federal court), *with Schuster*, 123 Nev. at 193-94, 160 P.3d at 877 (declining to require the State to instruct a grand jury on the legal significance of exculpatory evidence; quoting *Williams* and noting this court's reluctance "to expand the rights of grand jury targets beyond those explicitly provided by statute or constitutionally required").

[Headnote 3]

We therefore begin with the text of NRS 172.145(2):

> If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall submit it to the grand jury.

By its terms, NRS 172.145(2) requires that the district attorney be "aware" of evidence "which will explain away the charge" before the duty to submit the evidence to the grand jury arises. To be "aware" of something is to "hav[e] knowledge or cognizance" of it. *Aware*, *Webster's New College Dictionary* (3d ed. 2008). The district attorney is not "aware" of evidence "which will explain away the charge" merely by virtue of possessing evidence that later proves exculpatory. Rather, the district attorney or his or her deputy must appreciate the exculpatory value of the evidence to be "aware" of it for purposes of NRS 172.145(2).

Citing *United States v. Agurs*, 427 U.S. 97 (1976), Mayo urges us to presume that, if exculpatory evidence exists in the State's file, the district attorney is "aware" of it for purposes of NRS 172.145(2). *See Agurs*, 427 U.S. at 110 ("If evidence highly probative of innocence is in [the prosecutor's file], he should be presumed to recognize its significance even if he has actually overlooked it."). But *Agurs* addresses a defendant's constitutional right, under *Brady v. Maryland*, 373 U.S. 83 (1963), to have the government disclose to the defense for the defendant's use at trial exculpatory evidence that is material to guilt or innocence. *Agurs*, 427 U.S. at 107. Unlike a trial jury, "the grand jury sits not to determine guilt or innocence, but to assess whether there is adequate basis for bringing a criminal charge." *Williams*, 504 U.S. at 51. Consistent with this system, "neither in this country nor in England has the suspect under investigation by the grand jury ever been thought to have a right to testify or to have exculpatory evidence presented," *id.* at 52, except as "explicitly provided by statute." *Schuster*, 123 Nev. at 194, 160 P.3d at 877; *see* NRS 172.145(2); NRS 172.245(1). *Brady*'s constitutional disclosure obligation, and by extension, the presumption stated in *Agurs*, thus do not apply in the grand jury setting. *See Gordon v. Ponticello*, 110 Nev. 1015, 1020, 879 P.2d 741, 744 (1994) (noting that "this court, in step with the United States Supreme Court, is reluctant to expand the rights of grand jury targets and make them coextensive with those of criminal defendants" at time of trial); 1 Sara Sun Beale et al., *Grand Jury Law and Practice* § 4:17 (2d ed. 2015) (observing that "the standards developed for the prosecutor's duty in the adversarial trial context are not well-suited to the traditional procedures of the grand jury").

To import *Agurs* into NRS 172.145(2) as Mayo suggests would be to rewrite the statute, replacing "is aware of" with "has in his file," like this: "If the district attorney ~~is aware of~~ *has in his file* any

evidence which will explain away the charge, the district attorney shall submit it to the grand jury." While the Legislature could write such a statute, it has not. Instead, it has limited the obligation to evidence the district attorney is "aware of . . . which will explain away the charge."[1] Tying the obligation to present evidence to the district attorney's awareness of it and its exculpatory value makes practical sense: When a prosecutor presents a case to the grand jury, the case is in its preliminary stages; the object is for the grand jury to determine whether there is probable cause to believe a violation of the criminal laws has occurred, and that the accused committed that violation.

> A grand jury proceeding is an ex parte investigatory proceeding to determine whether there is probable cause to believe a violation of the criminal laws has occurred, not a trial. Requiring the prosecutor to ferret out and present all evidence that could be used at trial to create a reasonable doubt as to the defendant's guilt would be inconsistent with the purpose of the grand jury proceeding and would place significant burdens on the investigation.

Williams, 504 U.S. at 69 (Stevens, J., dissenting); *see* 4 Wayne R. LaFave et al., *Criminal Procedure* § 15.7(f) (4th ed. 2015) (noting that, at the time the prosecutor submits a case to the grand jury the prosecutor "ordinarily does not have the advantage of defense motions identifying those items that the defense views as potentially exculpatory" and that it "would impose an intolerable burden on the government to require it to sift through all the evidence to find statements or documents that might be exculpatory") (footnotes and quotations omitted).

Though not required by the federal constitution or as a matter of the federal courts' supervisory authority, *see Williams*, 504 U.S. at 51-53, in a number of states and in the District of Columbia, "there are statutes or judicial decisions that require prosecutors to inform the grand jury of exculpatory evidence in some circumstances," 1 Sara Sun Beale et al., *supra*, § 4:17, as do the ABA Standards for Criminal Justice, § 3-4.6(e) (4th ed. 2015). Notably, while "[s]tate courts recognizing a prosecutorial obligation to present the grand jury known exculpatory evidence have varied in their description of the scope of that obligation, [*a*]*ll agree that the evidence must be 'known' to the prosecutor*." 4 Wayne R. LaFave et al., *supra*, § 15.7(f) (emphasis added); ABA Standards, *supra*, § 3-4.6(e) ("A

[1]The Legislature adopted NRS 172.145(2) in 1985. 1985 Nev. Stat., ch. 134, § 6, at 555. Although an interim committee had proposed a more "extensive provision . . . , laying a burden on the district attorney," Hearing on S.B. 103 Before the Assembly Judiciary Comm., 63d Leg. (Nev., April 18, 1985), NRS 172.145(2) was adopted instead, limiting the obligation to evidence of which the district attorney "is aware."

prosecutor with personal knowledge of evidence that directly negates the guilt of the subject of the investigation should present or otherwise disclose that evidence to the grand jury."); *see Moran v. Schwarz*, 108 Nev. 200, 202, 826 P.2d 952, 953 (1992) ("NRS 172.145 requires the grand jury to hear, and the district attorney to submit, *known evidence* which will explain away the charge.") (emphasis added) (dictum). Requiring that the evidence be "known" to the prosecutor—that he or she be "aware" of it, in other words—comports with the investigative and accusatory function of the grand jury, avoids delay, and recognizes the practical difficulties in "[a]scertaining the exculpatory value of evidence at such an early stage of the proceedings." *State v. Hogan*, 676 A.2d 533, 544 (N.J. 1996); *see Frink v. State*, 597 P.2d 154, 166 (Alaska 1979) ("the prosecutor's obligation to present exculpatory evidence to the grand jury does not turn the prosecutor into a defense attorney; the prosecutor does not have to develop evidence for the defendant and present every lead possibly favorable to the defendant"); *Hogan*, 676 A.2d at 544 ("the prosecutor need not construct a case for the accused or search for evidence that would exculpate the accused. Only when the prosecuting attorney has actual knowledge of clearly exculpatory evidence that directly negates guilt must such evidence be presented to the grand jury."); *see also United States v. Gray*, 502 F. Supp. 150, 152 (D.D.C. 1980) (a pre-*Williams* case holding that, while prosecutors may be required to present exculpatory evidence to the grand jury, "prerequisite" to that dismissing an indictment for failure to do so is "awareness by the prosecutors of the exculpatory evidence in question").

[Headnote 4]

Mayo argues that a rule holding the State strictly accountable for the evidence in the district attorney's file is needed to avoid bad faith abuse of the system. We disagree. When a prosecutor has abused NRS 172.145(2) by withholding known exculpatory evidence and engaging in conduct that impairs the function of an independent and informed grand jury, the courts of this state have not stood silently by. *E.g.*, *State v. Babayan*, 106 Nev. 155, 169-70, 787 P.2d 805, 816-17 (1990) (affirming order dismissing indictment without prejudice where the State failed to present to the grand jury substantial exculpatory evidence that the district court found was known to the district attorney's office). This is not such a case. As the district court found, the district attorney did not know or have reason to know the references in the hospital notes to moyamoya disease had potential exculpatory value. The references to possible moyamoya disease appeared only twice in several hundred pages of hospital notes and, as the defense conceded in district court, the disease is obscure enough that defense counsel did not initially see the references as significant either. On this record, we decline to disturb the district

court's finding that no violation of NRS 172.145(2) occurred. If the references to moyamoya disease have significance, Mayo will have the opportunity to establish as much at trial.

We therefore deny writ relief.

PARRAGUIRRE, C.J., and HARDESTY, J., concur.

DAVID JOHN KAPLAN, APPELLANT, *v.*
CHAPTER 7 TRUSTEE, ALLEN DUTRA, RESPONDENT.

No. 69065

December 1, 2016 384 P.3d 491

Certified question, pursuant to NRAP 5, concerning the application of a statute regarding personal injury exemptions in a bankruptcy proceeding. United States Bankruptcy Court, District of Nevada; Gregg W. Zive, Bankruptcy Court Judge.

The supreme court, GIBBONS, J., held that statute providing exemption for money received as compensation for personal injury provides for multiple personal injury exemptions on a per-claim basis.

Question answered.

Christopher P. Burke, Reno, for Appellant.

Michael C. Lehners, Reno, for Respondent.

1. FEDERAL COURTS.
   The supreme court may answer questions of law certified to it by federal courts when the answers may be determinative of part of the federal case, there is no controlling Nevada precedent, and the answer will help settle important questions of law. NRAP 5(a).
2. STATUTES.
   When examining a statute, a purely legal inquiry, the supreme court should ascribe to its words their plain meaning, unless this meaning was clearly not intended.
3. STATUTES.
   If a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply.
4. STATUTES.
   When a statute is ambiguous, legislative intent is the controlling factor, and reason and public policy may be considered in determining what the Legislature intended.
5. EXEMPTIONS.
   Statute providing exemption from execution for money received as compensation for personal injury provides for multiple personal injury exemptions on a per-claim basis. NRS 21.090(1)(u).

6. EXEMPTIONS.
   Purpose of exemption statutes is to secure to the debtor the necessary means of gaining a livelihood, while doing as little injury as possible to the creditor. NRS 21.090.
7. EXEMPTIONS.
   Purpose of exempting from execution money received as compensation for personal injury is to allow a debtor to retain funds that are necessary to the debtor's recovery from the injury sustained such that the debtor can regain a livelihood. NRS 21.090(1)(u).

Before the Court EN BANC.[1]

OPINION

By the Court, GIBBONS, J.:

In response to a certified question submitted by the United States Bankruptcy Court for the District of Nevada, we consider whether NRS 21.090(1)(u) allows a debtor multiple personal injury exemptions of $16,150 or only a single, aggregate personal injury exemption of $16,150. We conclude that under NRS 21.090(1)(u), a debtor is entitled to multiple personal injury exemptions of $16,150 on a per-claim basis.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant David John Kaplan, in pro se, filed for Chapter 11 bankruptcy, which was later converted to a Chapter 7 bankruptcy. Prior to filing, Kaplan was involved in two personal injury cases. First, Kaplan was involved in a dog attack that injured his back. As a result, Kaplan had surgery on his back. Six weeks later, Kaplan was rear-ended, which also injured his back. The second accident hampered Kaplan's recovery from back surgery, and Kaplan underwent a second back surgery. Kaplan filed personal injury claims for both injuries.

As part of his bankruptcy proceedings, Kaplan claimed two personal injury exemptions under NRS 21.090(1)(u)—$16,150 for the personal injury settlement stemming from the dog attack, and another $16,150 exemption stemming from the automobile accident. The Chapter 7 trustee, Allen Dutra, filed an objection to Kaplan's claim of two exemptions.

The bankruptcy court certified to this court the question of whether a debtor is entitled to more than one personal injury exemption under NRS 21.090(1)(u) if the debtor has more than one personal injury incident.

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[1]THE HONORABLE NANCY M. SAITTA, Justice, having retired, this matter was decided by a six-justice court.

DISCUSSION

[Headnote 1]

"Under NRAP 5(a), this court may answer questions of law certified to it by federal courts when the 'answers may be determinative of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law.'" *Savage v. Pierson*, 123 Nev. 86, 89, 157 P.3d 697, 699 (2007) (alteration in original) (quoting *Volvo Cars of N. Am. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006) (internal quotation marks omitted)). In the present case, (1) answering the question presented by the bankruptcy court will determine part of an ongoing bankruptcy case, (2) it appears that there is no Nevada precedent on the question presented in this case, and (3) the answer will settle an important question of law regarding the scope of NRS 21.090(1)(u). Accordingly, we will address the question presented to this court.

[Headnotes 2-4]

This certified question raises issues of statutory interpretation. "When examining a statute, a purely legal inquiry, this court should ascribe to its words their plain meaning, unless this meaning was clearly not intended." *Savage*, 123 Nev. at 89, 157 P.3d at 699. "If, however, a statute is subject to more than one reasonable interpretation, it is ambiguous, and the plain meaning rule does not apply. When a statute is ambiguous, legislative intent is the controlling factor, and reason and public policy may be considered in determining what the Legislature intended." *Id.*

NRS 21.090(1)(u) is ambiguous

We conclude that the language of NRS 21.090(1)(u) is ambiguous. NRS 21.090 provides that certain property is exempt from execution. Specifically, NRS 21.090(1)(u) provides an exemption for

> [p]ayments, in an amount not to exceed $16,150, received as compensation for personal injury, not including compensation for pain and suffering or actual pecuniary loss, by the judgment debtor or by a person upon whom the judgment debtor is dependent at the time the payment is received.

The terms "payments" and "personal injury" are both susceptible to more than one reasonable interpretation. "Payments" may reasonably be read to include multiple personal injury payments that result from multiple personal injury claims, in aggregate, limiting the claimed exemption under NRS 21.090(1)(u) to a total of $16,150—regardless of the number of claims or incidents. "Payments" may also be read to refer to multiple payments received independently for each incident or claim, given that the statute only refers to "payments . . . received as compensation for personal *injury*" and not for

"personal *injuries*." NRS 21.090(1)(u) (emphasis added). Because the statute is ambiguous, we next turn to legislative intent to determine the meaning of the statute.

NRS 21.090(1)(u) provides for multiple personal injury exemptions, on a per-claim basis

The legislative intent regarding NRS 21.090(1)(u) is unclear. The Nevada Legislature amended NRS 21.090 to include the personal injury exemption, NRS 21.090(1)(u), during the seventy-second regular session. S.B. 70, 72d Leg. (Nev. 2003). S.B. 70 was initially introduced to increase the amount of the homestead exemption and did not include any other changes to NRS 21.090. *See* Hearing on S.B. 70 Before the Senate Judiciary Comm., 72d Leg. (Nev., Feb. 13, 2003). The bill was later amended to include other exemptions under NRS 21.090, including the personal injury exemption. *See* Hearing on S.B. 70 Before the Assembly Judiciary Comm., 72d Leg. (Nev., May 2, 2003). However, there is scant evidence in the legislative history to suggest the Legislature's intent regarding whether NRS 21.090(1)(u) was intended to provide for a single exemption or multiple exemptions. For that reason, we look to reason and public policy to inform our decision regarding the interpretation of NRS 21.090(1)(u).

[Headnotes 5, 6]

We conclude that reason and public policy suggest NRS 21.090(1)(u) should be read to provide for multiple personal injury exemptions on a per-claim basis. This court has previously noted that "[w]e liberally and beneficially construe our state exemption statutes in favor of the debtor." *In re Christensen*, 122 Nev. 1309, 1314, 149 P.3d 40, 43 (2006). "The purpose of Nevada's exemption statutes is to secure to the debtor the necessary means of gaining a livelihood, while doing as little injury as possible to the creditor." *Savage*, 123 Nev. at 90, 157 P.3d at 700 (internal quotation marks omitted).

[Headnote 7]

While discussing the amendment that included the personal injury exemption, the Legislature explained that the policy of the bankruptcy chapter is "to exempt the basics so someone can go on with their life." Hearing on S.B. 70 Before the Assembly Judiciary Comm., 72d Leg. at 26 (Nev., May 2, 2003). The personal injury exemption provides a debtor with the ability to exempt an amount of the funds received as compensation for personal injury that does not include pain and suffering or pecuniary loss. This indicates that the purpose of the exemption is to allow a debtor to retain funds that are necessary to his or her recovery from the injury sustained such that the debtor can regain a livelihood. Should a debtor sustain mul-

tiple injuries, limiting the personal injury exemption to an aggregate $16,150 would defeat the purpose of securing to the debtor the necessary means of gaining a livelihood, as multiple injuries sustained as a result of different events would likely result in a higher cost of recovery to the debtor. Thus, reason and public policy dictate that NRS 21.090(1)(u) entitles a debtor to an exemption for each personal injury claim, on a per-claim basis.

Split of authority

Though we base our holding on Nevada law and the legislative history of NRS 21.090(1)(u), we note that a split of authority exists on this issue at the federal level. Federal courts are split as to whether the federal personal injury exemption, 11 U.S.C. § 522(d)(11)(D) (2012), entitles a debtor to an exemption up to the statutory maximum for each personal injury action or only to a single, aggregate personal injury exemption regardless of the number of separate injuries and have relied on various theories and tools of statutory construction to reach different conclusions. *Compare In re Comeaux*, 305 B.R. 802 (Bankr. E.D. Tex. 2003), *with In re Phillips*, 485 B.R. 53 (Bankr. E.D.N.Y. 2012).

Some federal courts found the federal personal injury exemption applied to each personal injury claim individually. *See, e.g.*, *Comeaux*, 305 B.R. at 807; *see also In re Marcus*, 172 B.R. 502, 504 (Bankr. D. Conn. 1994). In *Comeaux*, the debtors claimed three separate personal injury exemptions for injuries sustained in three separate and distinct accidents. 305 B.R. at 803. The *Comeaux* court based its conclusion on the following: (1) the general rule of construction that exemption statutes are to be liberally construed in favor of the debtor; (2) Congress demonstrated its ability to utilize numeric and aggregate limits elsewhere in § 522 and chose not to do so in § 522(d)(11)(D); and (3) as a policy matter, debtors who suffer personal bodily injuries from multiple accidents should be afforded the small degree of protection the personal injury exemption affords. *Id.* at 807.

Alternatively, other courts have determined that the federal personal injury exemption only entitles a debtor to claim a single exemption for personal bodily injury, in aggregate, regardless of the number of payments, incidents, or accidents that have occurred or how many injuries were sustained. *See, e.g.*, *Phillips*, 485 B.R. at 61-62; *see also In re Christo*, 228 B.R. 48, 53 (B.A.P. 1st Cir.), *aff'd*, 192 F.3d 36 (1st Cir. 1999). The bankruptcy court in *Phillips* concluded the federal personal injury exemption applied to all injuries and payments in aggregate, determining that a single exemption was a more natural reading of 11 U.S.C. § 522(d)(11)(D). *Phillips*, 485 B.R. at 61-62. The *Phillips* court relied on 11 U.S.C. § 102(7), which provides that the federal bankruptcy code should be read such

that "the singular includes the plural." *Id.* at 57. Accordingly, the *Phillips* court reasoned that the terms "a payment" and "injury" included both singular and multiple payments and injuries and should therefore be read to apply to all payments and injuries in the aggregate. *Id.*

We agree with the *Comeaux* court's analysis of federal law, and reach a similar result here. We hold that NRS 21.090(1)(u) should be construed in favor of the debtor and that the statute entitles a debtor to an exemption for each personal injury claim, on a per-claim basis.

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

ESTATE OF MICHAEL DAVID ADAMS, BY AND THROUGH HIS MOTHER JUDITH ADAMS, INDIVIDUALLY AND ON BEHALF OF THE ESTATE, APPELLANTS, *v.* SUSAN FALLINI, RESPONDENT.

No. 68033

December 29, 2016 386 P.3d 621

Appeal from a district court order dismissing a wrongful death action with prejudice. Fifth Judicial District Court, Nye County; Robert W. Lane, Judge.

After summary judgment was granted to estate of motorist in wrongful death action against cow owner, and affirmed in part on direct appeal, cow owner moved for relief from the judgment based on fraud. The district court granted the motion and subsequently granted owner's motion for entry of final judgment. Estate appealed. The supreme court, PARRAGUIRRE, C.J., held that: (1) order granting motion from relief from judgment based on fraud upon the court was interlocutory and not appealable; (2) neither mandate rule, law-of-the-case doctrine, nor doctrine of issue preclusion barred cow owner from raising argument that judgment had been procured by fraud; and (3) summary judgment based in part upon cow owner's deemed admission that fatal accident between motorist and cow did not occur on open range was procured by fraud.

Affirmed.

[Rehearing denied March 21, 2017]

[En banc reconsideration denied June 27, 2017]

Aldrich Law Firm, Ltd., and *John P. Aldrich*, Las Vegas, for Appellants.

Fabian VanCott and *David R. Hague*, Las Vegas, for Respondent.

1. Appeal and Error.
   Because order granting motion from relief from judgment based on fraud upon the court was interlocutory and not appealable, such order merged into the final judgment for purposes of challenging merits of order. NRCP 60(b).
2. Appeal and Error; Courts; Judgment.
   Cow owner's earlier motion for reconsideration and subsequent appeal of summary judgment entered in estate's wrongful death action, brought after motorist died after colliding with a cow, did not address fraud upon the court, and therefore, neither mandate rule, law-of-the-case doctrine, nor doctrine of issue preclusion barred cow owner from raising such argument in motion for relief from judgment. NRCP 60(b).
3. Appeal and Error.
   The supreme court reviews questions of law de novo, including the applicability of the mandate rule, the law-of-the-case doctrine, and the doctrine of issue preclusion.
4. Appeal and Error.
   The mandate rule generally requires lower courts to effectuate a higher court's ruling on remand.
5. Courts.
   The law-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided, i.e., established as law of the case, by that court or a higher one in earlier phases.
6. Appeal and Error.
   Both mandate rule and law-of-the-case doctrine require that the appellate court actually address and decide the issue raised explicitly or by necessary implication.
7. Judgment.
   Issue preclusion requires, among other things, that the issue decided in the prior litigation must be identical to the issue presented in the current action.
8. Judgment.
   Summary judgment in estate of motorist's wrongful death action, based in part upon cow owner's deemed admission that fatal accident between motorist and cow did not occur on open range, was procured by fraud warranting granting owner's motion for relief from judgment; cow owner's counsel had abandoned his client, and estate's counsel's duty of candor required him to refrain from relying on opposing counsel's default admission that the accident did not occur on open range, which provided a complete defense to estate's claims, when he knew or should have known that it was false. NRS 568.360; NRCP 36, 60(b).
9. Appeal and Error.
   The supreme court reviews a district court's decision to set aside a judgment based on fraud upon the court for an abuse of discretion. NRCP 60(b).
10. Judgment.
    When a judgment is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment. NRCP 60(b).
11. Attorney and Client.
    An attorney is an officer of the court.
12. Attorney and Client.
    An attorney owes a duty of loyalty to the court, which demands integrity and honest dealing with the court; when an attorney departs from that

standard in the conduct of a case, the attorney perpetrates fraud upon the court. NRCP 60(b).

13. JUDGMENT.
Relief from a judgment based on fraud upon the court is rare and normally available only to prevent a grave miscarriage of justice. NRCP 60(b).

14. ATTORNEY AND CLIENT.
A lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent, not those who dealt with the agent in his or her representative capacity.

15. ATTORNEY AND CLIENT.
Although counsel may request that the opposing party admit certain facts that counsel already knows or should know the answer to, if the opposing party fails to respond, counsel may not rely on the deemed admission of a known false fact to achieve a favorable ruling. NRCP 36.

16. ATTORNEY AND CLIENT.
Counsel violates his or her duty of candor to the court when counsel: (1) proffers a material fact that counsel knew or should have known to be false, and (2) relies upon the admitted false fact to achieve a favorable ruling. NRCP 36.

Before PARRAGUIRRE, C.J., HARDESTY and PICKERING, JJ.

OPINION

By the Court, PARRAGUIRRE, C.J.:

In this case, we consider whether a party may appeal a district court's order granting an NRCP 60(b) motion to set aside a final judgment for fraud upon the court. We hold that such an order is interlocutory in nature and, thus, may not be appealed until there has been a final judgment. In addition, we consider whether the district court's consideration of the NRCP 60(b) motion was barred by various preclusive doctrines and whether plaintiff's counsel committed a fraud upon the court. We hold that the district court did not err in considering the motion, nor did it abuse its discretion in granting relief based on fraud upon the court given the unique circumstances presented here. Therefore, we affirm the district court's order dismissing the action.

FACTS AND PROCEDURAL HISTORY

Michael Adams struck respondent Susan Fallini's cow while driving on a portion of highway designated as open range.[1] Adams died as a result, and Adams' estate (the Estate) sued Fallini for negligence. The Nevada Highway Patrol's accident report indicated that the accident had occurred on open range. Additionally, Adams' fam-

[1]NRS 568.355 defines "open range" as "all unenclosed land outside of cities and towns upon which cattle, sheep or other domestic animals by custom, license, lease or permit are grazed or permitted to roam."

ily appears to have created a memorial website for Adams prior to the lawsuit, which explained that Adams' accident occurred on open range and opined that open range laws are unjust.

Fallini's initial counsel filed an answer, arguing that Fallini could not be held liable under Nevada law because the accident occurred on open range. *See* NRS 568.360. However, Fallini's counsel subsequently failed to participate in the case.[2] The Estate's counsel submitted several discovery requests, including a request for Fallini to admit that her property was not located on open range. Fallini's counsel did not respond to any of the discovery requests, and the Estate's counsel filed an unopposed motion for partial summary judgment as to Fallini's negligence, arguing that Fallini had effectively admitted, *inter alia*, that her property was not located within open range. The district court granted the motion.

Eventually, Fallini discovered that her counsel had failed to respond to opposing counsel's discovery requests and motions, and she promptly obtained new counsel and sought reconsideration of the district court's prior orders. The district court denied reconsideration and, after striking Fallini's answer, entered a default judgment for the Estate, which we affirmed in substance but remanded with respect to the district court's award of damages. *Fallini v. Estate of Adams*, Docket No. 56840 (Order Affirming in Part, Reversing in Part and Remanding, March 29, 2013). On remand, the district court entered a final judgment against Fallini for $1,294,041.85.

Subsequently, Fallini brought an NRCP 60(b) motion, arguing that the district court should set aside the judgment because the Estate's counsel committed a fraud upon the court when he sought and relied on the admission that the accident did not occur on open range. The district court granted the motion. Thereafter, Fallini filed a motion for entry of final judgment, arguing that NRS 568.360 (providing that an owner of animals has no duty to prevent the animals from entering a highway traversing open range and will not be subject to liability for injuries resulting from a motor vehicle collision with the animals on any such highway) established a complete defense to the Estate's claims. The district court granted the motion and dismissed the action, and the Estate now appeals.

DISCUSSION

On appeal, the Estate argues that (1) the mandate rule, the law-of-the-case doctrine, and the doctrine of issue preclusion prohibited the district court from considering NRCP 60(b) relief; and (2) the district court abused its discretion in finding fraud upon the court. Additionally, Fallini argues that, because the Estate did not appeal directly from the district court's order granting NRCP 60(b) relief,

[2]We note that Fallini's initial counsel has since been disbarred.

this court does not have jurisdiction to review that order in the present appeal from the final judgment.

This court has jurisdiction to hear the appeal

[Headnote 1]

As a threshold matter, Fallini contends that this court does not have jurisdiction to hear this appeal because the district court's NRCP 60(b) order was an appealable order, and the Estate did not file a timely notice of appeal for that order. We disagree. The district court's order granting Fallini's NRCP 60(b) motion for fraud upon the court was interlocutory and not appealable. *See* 11 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2871 (3d ed. 2016) (stating that "[a]n order granting a motion under [federal] Rule 60(b) and ordering a new trial is purely interlocutory and not appealable"). Therefore, the NRCP 60(b) order merged into the final judgment. *See Am. Ironworks & Erectors, Inc. v. N. Am. Constr. Corp.*, 248 F.3d 892, 897 (9th Cir. 2001) (noting that "a party may appeal interlocutory orders after entry of final judgment because those orders merge into that final judgment"); *see also Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (noting that this court may review an interlocutory order in the context of an appeal from a final judgment).[3] As such, we conclude that this court has jurisdiction to consider challenges to the district court's NRCP 60(b) order in this appeal from the final judgment.

The district court properly addressed the merits of Fallini's NRCP 60(b) motion

[Headnote 2]

The Estate contends that the district court's NRCP 60(b) order violated the mandate rule, the law-of-the-case doctrine, and the doctrine of issue preclusion, because this court had previously determined that the arguments underlying Fallini's NRCP 60(b) motion were without merit. We disagree.

[Headnote 3]

We review questions of law de novo, *S. Cal. Edison v. First Judicial Dist. Court*, 127 Nev. 276, 280, 255 P.3d 231, 234 (2011), including the applicability of the mandate rule, the law-of-the-case doctrine, and the doctrine of issue preclusion, *Wheeler Springs Plaza, LLC v. Beemon*, 119 Nev. 260, 263, 71 P.3d 1258, 1260 (2003) (mandate rule); *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 984, 103 P.3d 8, 16 (2004) (issue preclusion); *see* 18B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure*

[3]The district court was not asked to and did not grant a new trial; hence NRAP 3A(b)(2) does not affect our analysis.

§ 4478 (2d ed. 2002) (noting that the mandate rule is nothing more than one of "many illustrations" of the law-of-the-case doctrine).

[Headnotes 4-7]

The mandate rule generally requires lower courts to effectuate a higher court's ruling on remand. *See United States v. Thrasher*, 483 F.3d 977, 981 (9th Cir. 2007). "The law-of-the-case doctrine refers to a family of rules embodying the general concept that a court involved in later phases of a lawsuit should not re-open questions decided (i.e., established as law of the case) by that court or a higher one in earlier phases." *Recontrust Co. v. Zhang*, 130 Nev. 1, 7-8, 317 P.3d 814, 818 (2014) (internal quotation marks omitted). However, both doctrines require that "the appellate court . . . actually address and decide the issue [raised] explicitly or by necessary implication." *Dictor v. Creative Mgmt. Servs., LLC*, 126 Nev. 41, 44, 223 P.3d 332, 334 (2010). Similarly, issue preclusion requires, *inter alia*, that "the issue decided in the prior litigation must be identical to the issue presented in the current action." *Five Star Capital Corp. v. Ruby*, 124 Nev. 1048, 1055, 194 P.3d 709, 713 (2008) (internal quotation marks omitted).

Neither Fallini's motion for reconsideration nor the district court's denial of that motion addressed fraud upon the court; therefore, we likewise did not consider or resolve any fraud issues. As this issue was not previously litigated or decided, the district court properly addressed the merits of Fallini's NRCP 60(b) motion.

The district court did not abuse its discretion in granting Fallini's NRCP 60(b) motion

[Headnote 8]

The Estate argues that the district court erred in granting NRCP 60(b) relief because the conduct involved did not rise to the level of fraud upon the court. We disagree.

[Headnotes 9-13]

This court reviews a district court's decision to set aside a judgment based on fraud upon the court for an abuse of discretion. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 650, 218 P.3d 853, 856 (2009). "[W]hen a judgment is shown to have been procured by fraud upon the court, no worthwhile interest is served in protecting the judgment." *Id.* at 653, 218 P.3d at 858 (internal quotation marks omitted). We have defined a "fraud upon the court" as "only that species of fraud which does, or attempts to, subvert the integrity of the court itself, *or is a fraud perpetrated by officers of the court* so that the judicial machinery cannot perform in the usual manner its impartial task of adjudging cases . . . ." *Id.* at 654, 218 P.3d at 858 (emphasis added) (internal quotation marks omitted). "An attorney is an officer of the court"; as such, an attorney "owes a duty of loy-

alty to the court . . . , [which] demands integrity and honest dealing with the court." *Id.* at 654-55, 218 P.3d at 858-59 (internal quotation marks omitted). "And when [an attorney] departs from that standard in the conduct of a case[,] he perpetrates fraud upon the court." *Id.* at 655, 218 P.3d at 859 (internal quotation marks omitted). Even then, relief from a judgment based on fraud upon the court is rare and normally "available only to prevent a grave miscarriage of justice." *United States v. Beggerly*, 524 U.S. 38, 47 (1998); *see also Bonnell v. Lawrence*, 128 Nev. 394, 400, 282 P.3d 712, 715 (2012).

[Headnote 14]

We hold the district court did not abuse its discretion in granting Fallini's NRCP 60(b) motion for fraud upon the court. First, the initial judgment in this case would likely not have been obtained but for Fallini's counsel's abandonment of his client and his professional obligations to his client. *See NC-DSH, Inc.*, 125 Nev. at 656, 218 P.3d at 860 (discussing *Passarelli v. J-Mar Dev., Inc.*, 102 Nev. 283, 720 P.2d 1221 (1986)). Standing alone, that might not warrant relief, as the lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent, not those who dealt with the agent in his representative capacity. *Id.* But here, the Estate's counsel seized on that abandonment as an opportunity to create a false record and present that record to the district court as the basis for judgment. Together, these acts and omissions merited relief.

[Headnote 15]

The district court did not abuse its discretion in finding that the Estate's counsel breached his duty of candor to the court. Although counsel may request that the opposing party admit certain facts that counsel already knows or should know the answer to, if the opposing party fails to respond, we hold that counsel may not rely on the deemed admission of a known false fact to achieve a favorable ruling.

[Headnote 16]

It is well-settled that unanswered requests for admission may be properly relied upon as a basis for granting summary judgment. *Wagner v. Carex Investigations & Sec. Inc.*, 93 Nev. 627, 630, 572 P.2d 921, 923 (1977) (concluding that summary judgment was properly based on admissions stemming from a party's unanswered request for admission under NRCP 36, even where such admissions were contradicted by previously filed answers to interrogatories); *Smith v. Emery*, 109 Nev. 737, 742, 856 P.2d 1386, 1390 (1993) (explaining that "failure to respond to a request for admissions will result in those matters being deemed conclusively established . . . even

if the established matters are ultimately untrue" (internal citation omitted)). However, counsel violates his duty of candor to the court when counsel: (1) proffers a material fact that he knew or should have known to be false, *see generally Sierra Glass & Mirror v. Viking Indus., Inc.*, 107 Nev. 119, 125-26, 808 P.2d 512, 516 (1991) (providing that counsel committed fraud upon the court "in violation of SCR 172(1)(a) and (d)" when he proffered evidence and omitted pertinent portions of a document to "buttress" his client's argument, and that he "knew or should have known" that the omitted portion was harmful to his client's position); *cf. Seleme v. JP Morgan Chase Bank*, 982 N.E.2d 299, 310-11 (Ind. Ct. App. 2012) (providing that under FRCP 60(b)(3), a party alleging fraud or misrepresentation must demonstrate that "the opposing party knew or should have known from the available information that the representation made was false, and . . . the misrepresentation was made with respect to a material fact which would change the trial court's judgment" (internal quotation marks omitted)); and (2) relies upon the admitted false fact to achieve a favorable ruling, *see Kupferman v. Consol. Research & Mfg. Corp.*, 459 F.2d 1072, 1078-79 (2d Cir. 1972) (holding that counsel pursuing case with known complete defense could be fraudulent, where defense was unknown to the court, or, apparently, unknown to the defending parties); *see also Conlon v. United States*, 474 F.3d 616, 622 (9th Cir. 2007) ("Admissions are sought, first, to facilitate proof with respect to issues that cannot be eliminated from the case and, second, to narrow the issues by eliminating those that can be. The rule is not to be used . . . in the hope that a party's adversary will simply concede essential elements. Rather, the rule seeks to serve two important goals: truth-seeking in litigation and efficiency in dispensing justice." (internal quotation marks and citations omitted)).

Here, (1) Fallini's answer from March 2007 plainly asserts an open range defense; (2) the accident report dated July 2005 states that the accident occurred on a stretch of highway with open range warning signs; and (3) a memorial website created no later than July 2006 by Michael Adams' family explained that Michael's accident occurred on open range, and expressed its belief that open range laws are unjust and should be changed. However, despite clear indication that the accident occurred on open range, the Estate's counsel propounded his request for admissions in 2007, sought partial summary judgment in 2008, and applied for default judgment in 2010, all based on the false premise that the accident did not occur on open range. Thus, the district court did not abuse its discretion in finding that the Estate's counsel knew or should have known that the accident occurred on open range when he used the deemed admission to the contrary to secure a judgment for the Estate.

Lastly, counsel's fraudulent conduct prevented the district court from properly adjudicating the case at hand. The Estate does not dispute the fact that Nevada's open range statute provides Fallini a total defense to liability. *See* NRS 568.360. However, as a result of the Estate's improper use of a deemed admission, the district court entered a $1,294,041.85 judgment against Fallini.[4] We hold that the Estate's counsel's duty of candor required him to refrain from relying on opposing counsel's default admission that the accident did not occur on open range, when he knew or should have known that it was false, and that the district court did not abuse its discretion in finding the Estate's counsel committed a fraud upon the court when he failed to fulfill his duties as an officer of the court with candor.[5]

CONCLUSION

We hold that an order granting an NRCP 60(b) motion to set aside a final judgment for fraud upon the court is interlocutory and not appealable. Therefore, the Estate properly challenges the district court's NRCP 60(b) order in this appeal from the final judgment. Furthermore, we hold that the district court properly considered the merits of Fallini's NRCP 60(b) motion and that it did not abuse its discretion in granting the motion. Accordingly, we affirm the district court's order granting NRCP 60(b) relief and dismissing the action.[6]

HARDESTY and PICKERING, JJ., concur.

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[4]The Estate argues that it did not deceive the district court because the district court took judicial notice of the fact that the accident had occurred on open range. However, after an examination of the record, the district court later clarified that it did not know that "open range" had a significant legal consequence, much less that it gave Fallini a total defense to liability. Thus, we reject this argument.

[5]The Estate also argues that the district court erred in granting Fallini's NRCP 60(b) motion because it considered hearsay evidence and unauthenticated documents. We hold that the Estate waived these evidentiary objections by failing to raise them during the proceedings below. *See Guy v. State*, 108 Nev. 770, 780, 839 P.2d 578, 584 (1992) (refusing to consider hearsay arguments on appeal that were not raised below); *accord Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

[6]The Estate only raises errors relating to the district court's NRCP 60(b) decision and fails to make any separate arguments as to why the district court's final judgment should not stand.

ROBERT M. DYKEMA, INDIVIDUALLY; AND RONALD TURNER, INDIVIDUALLY, APPELLANTS, *v.* DEL WEBB COMMUNITIES, INC., AN ARIZONA CORPORATION, RESPONDENT.

No. 69335

December 29, 2016 385 P.3d 977

Appeal from a district court summary judgment, certified as final under NRCP 54(b), in a construction defect action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Homeowners brought construction defect claims against developer. Developer moved to dismiss based on the statute of repose. The district court converted the motion into a summary judgment motion and granted it. Homeowners appealed. The supreme court, HARDESTY, J., held that: (1) for purposes of statute listing issuance of a notice of completion as trigger date for construction defect statutes of repose, a notice of completion is "issued" on the date it is recorded, not when it is signed and notarized; and (2) homeowners' claims were governed by pre-repeal ten-year statute of repose applied to construction defect claims for known deficiencies.

Reversed and remanded.

Shinnick, Ryan & Ransavage P.C. and *Duane E. Shinnick* and *Courtney K. Lee*, Las Vegas, for Appellants.

Koeller, Nebeker, Carlson & Haluck, LLP, and *Robert C. Carlson, Jason W. Williams*, and *Richard D. Young, Jr.*, Las Vegas, for Respondent.

1. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo.
2. JUDGMENT.
   Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law.
3. APPEAL AND ERROR.
   Questions of statutory interpretation are reviewed de novo.
4. STATUTES.
   If a statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, the supreme court looks to the provision's legislative history and the context and the spirit of the law or the causes that induced the Legislature to enact it.
5. LIMITATION OF ACTIONS.
   For purposes of statute listing issuance of a notice of completion as trigger date for construction defect statutes of repose, a notice of completion is "issued" on the date it is recorded, not when it is signed and notarized. NRS 11.2055(1)(b).

6. Limitation of Actions.
Claims by homeowners that developer knew or should have known that homes were not properly constructed were governed by pre-repeal ten-year statute of repose applied to construction defect claims for known deficiencies. NRS 11.203(1) (2013).

Before Parraguirre, C.J., Hardesty and Pickering, JJ.

OPINION

By the Court, Hardesty, J.:

In this appeal, we are asked to determine when a notice of completion has been "issued" for purposes of determining the commencement date under NRS 11.2055(1)(b) for NRS Chapter 11's construction defect statutes of repose; and thus, when the statute of repose expired on appellants' claims. Consistent with the recording requirement in NRS Chapter 108's mechanics' lien statutes, we conclude that a notice of completion is "issued" on the date it is recorded, not when it is signed and notarized. Accordingly, appellants' complaint was timely filed, and we reverse the district court's summary judgment against appellants.

FACTS AND PROCEDURAL HISTORY

Appellants Robert M. Dykema and Ronald Turner own homes developed by respondent Del Webb Communities, Inc., in the Anthem Heights subdivision of Henderson, Nevada. A notice of completion of Dykema's residence was signed and notarized on November 30, 2004, and was recorded on December 8, 2004. A notice of completion of Turner's residence was signed and notarized on December 14, 2004, and was recorded on December 23, 2004.

Pursuant to NRS Chapter 40, Dykema served a notice of construction defect on Del Webb on December 2, 2014. Turner served a notice of construction defect on Del Webb on December 22, 2014. Dykema and Turner, among others, filed a complaint against Del Webb in district court on February 27, 2015. Del Webb moved to dismiss Dykema's and Turner's claims pursuant to NRCP 12(b)(5), arguing that their claims were untimely under NRS Chapter 11's statutes of repose for construction defect claims. *See* NRS 11.203-11.205.[1] Del Webb argued that the statutes of repose began

[1]As the district court recognized, the 2015 Legislature repealed NRS 11.203-11.205, providing for six-, eight-, and ten-year statutes of repose for construction defect claims, leaving such claims governed by NRS 11.202, which provides for a six-year statute of repose. 2015 Nev. Stat., ch. 2, § 22, at 21; A.B. 125, 78th Leg. (Nev. 2015). While A.B. 125 applied NRS 11.202 retroactively, a savings clause permitted claims "[t]hat accrued before the effective date of this act, and [were] commenced within 1 year after the effective date of this act." 2015 Nev.

to run when the notices of completion were signed and notarized. In opposing Del Webb's motion to dismiss, Dykema and Turner argued that the statutes of repose began to run on the date the notices of completion were recorded.

The district court converted Del Webb's motion into a summary judgment motion, considered the exhibits provided by the parties, and dismissed Dykema's and Turner's claims. The district court found that because Dykema and Turner served Del Webb with Chapter 40 notices more than ten years after the notices of completion were signed and notarized, their claims were time-barred pursuant to the ten-year statute of repose in NRS 11.203. This appeal followed.

DISCUSSION

[Headnotes 1, 2]

"This court reviews a district court's grant of summary judgment de novo . . . ." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper when, viewing the evidence in the light most favorable to the nonmoving party, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Id.*

A notice of completion is issued when it is recorded

The NRS 11.203-11.205 statutes of repose start to run on the date of "substantial completion" of an improvement to real property. NRS 11.2055(1) specifies that the date of "substantial completion"

> shall be deemed to be the date on which:
>
> (a) The final building inspection of the improvement is conducted;
>
> (b) A notice of completion is issued for the improvement; or
>
> (c) A certificate of occupancy is issued for the improvement,
>
> whichever occurs later.[2]

The parties agree that the "substantial completion" dates for Dykema's and Turner's homes were the dates the notices of completion were issued. However, they disagree as to what act signifies the issuance of the notices for purposes of NRS 11.2055. Dykema and Turner argue that notices of completion are issued on the date they are recorded and that NRS 11.2055 should be harmonized with

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Stat., ch. 2, §§ 21(5) and (6)(a), at 21. As the complaint in this matter was filed three days after the effective date of A.B. 125, it is timely if filed within the repose period specified by NRS 11.203-11.205. Thus, the complaint and this appeal are governed by the pre-repeal versions of the statutes. *See* NRS 11.203-11.205 (2013).

[2]The 2015 Legislature did not alter the relevant portions of NRS 11.2055. *See* 2015 Nev. Stat., ch. 2, § 18, at 17-18.

NRS Chapter 108, wherein mechanics' lien rights are triggered by, among other things, recording a notice of completion.[3] Del Webb argues that notices of completion are issued on the date they are signed and notarized, attesting that the work of improvement has been completed, and that NRS Chapter 108 does not address statutes of repose and does not define "substantially completed" or "issued." Resolving this issue requires this court to interpret the statute.

[Headnotes 3, 4]

Questions of statutory interpretation are reviewed de novo. *Westpark Owners' Ass'n v. Eighth Judicial Dist. Court*, 123 Nev. 349, 357, 167 P.3d 421, 426-27 (2007). "It is well established that when 'the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself.'" *Nelson v. Heer*, 123 Nev. 217, 224, 163 P.3d 420, 425 (2007) (quoting *State, Div. of Ins. v. State Farm Mutual Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)). "[I]f the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, this court . . . look[s] to the provision's legislative history and . . . the context and the spirit of the law or the causes which induced the [L]egislature to enact it." *Torres v. Nev. Direct Ins. Co.*, 131 Nev. 531, 535, 353 P.3d 1203, 1206-07 (2015) (alterations in original) (internal quotation marks omitted).

In this case, the parties offer two competing interpretations of when a notice of completion is "issued," and there is nothing in NRS 11.2055 distinguishing between the parties' interpretations. Therefore, the term "issued" is ambiguous, and we turn to the legislative history and the context of notices of completion in the statutory scheme. The Legislature examined the term "substantial completion" in NRS 11.2055 when considering various amendments to NRS Chapter 11 in 1999. *See* S.B. 32, 70th Leg. (Nev. 1999) (Bill Summary) ("The bill specifies how to determine when substantial completion of an improvement to real property occurs."). But in doing so, the Legislature focused on how the statutes of repose would be triggered under NRS 11.2055(2)'s common-law "catchall" provision, not the requirements of a notice of completion. *See* Hearing on S.B. 32 Before the Senate Commerce & Labor Comm., 70th Leg. (Nev., April 16, 1999). As to a notice of completion, a commentator indicated that "typically a builder would file a notice of completion because that triggers the lien rights." *Id*. (summary of statement of

[3]Dykema and Turner did not raise the applicability of NRS Chapter 108 below, and thus, the district court did not consider it in reaching its decision. However, we may consider the issue sua sponte. *See Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986).

David T. Pursiano, Lobbyist, Nevada Trial Lawyers' Ass'n). But the legislative history does not define what act signifies that a notice of completion has been "issued."

The commentary in the legislative history addressing lien rights refers to NRS 108.221-108.246, which are the statutory provisions governing mechanics' and materialmen's liens. Under NRS 108.228(1), an owner[4] "may record a notice of completion after the completion of the work of improvement." "Upon recording the notice . . . the owner shall, within 10 days," serve the recorded notice on any potential lien claimants, which then triggers the time period during which a lien claimant must perfect its lien. NRS 108.228(4); *see also* NRS 108.226(1)(b). NRS 108.22116(3) explicitly defines "[c]ompletion of the work of improvement" as including "[t]he cessation of all work on a work of improvement for 30 consecutive days, provided a notice of completion is timely recorded and served and the work is not resumed under the same contract."

[Headnote 5]

When interpreting NRS 11.2055, "[w]e presume that the Legislature enacted the statute with full knowledge of existing statutes relating to the same subject." *Nev. Attorney for Injured Workers v. Nev. Self-Insurers Ass'n*, 126 Nev. 74, 84, 225 P.3d 1265, 1271 (2010) (internal quotation marks omitted). The legislative history shows that the purpose of NRS 11.2055 was to give builders and homeowners a clear date on which the statutes of repose begin to run and further suggests that the Legislature knew that prudent builders would promptly secure their lien rights after a notice of completion is recorded. *See* Hearing on S.B. 32 Before the Senate Commerce & Labor Comm., 70th Leg. (Nev., April 16, 1999). When considering the same notice of completion under NRS 11.2055, it follows that the Legislature intended for the statutes of repose to begin to run on the recording date because that was already a crucial event affecting builders' mechanics' lien rights. Construing the statutes in harmony with one another, and consistent with what reason and public policy suggest the Legislature intended, we conclude that it is the act of recording that signifies that a notice of completion has been "issued." *See Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006) ("Whenever possible, this court will interpret a rule or statute in harmony with other rules and statutes." (internal quotation marks omitted)); *see also Nev. Attorney for Injured Workers*, 126 Nev. at 86, 225 P.3d at 1272.

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[4]NRS 108.22148(1)(d) defines "owner" as including "[t]he person or persons whose name appears as owner of the property or an improvement to the property on the building permit."

The ten-year statute of repose is applicable here

[Headnote 6]

Before applying our conclusion that the statute of repose began to run when the notice of completion was recorded, we must consider which statute of repose applied. The district court applied the ten-year statute of repose in NRS 11.203 without determining the nature of the deficiencies claimed by Dykema and Turner. Del Webb argues that there is an absence of allegations in the operative complaint to apply the ten-year period of repose, and the eight-year period must apply.[5] Dykema and Turner argue that the district court appropriately considered whether their claims were barred by the ten-year statute of repose for known deficiencies.

"NRS 11.203-11.205 . . . bar[red] actions for deficient construction after a certain number of years from the date construction was substantially completed." *Alsenz v. Twin Lakes Vill., Inc.*, 108 Nev. 1117, 1120, 843 P.2d 834, 836 (1992). The period in which a plaintiff must have brought an action depended on the nature of the deficiency; ten years for a known deficiency, eight years for a latent deficiency, and six years for a patent deficiency. NRS 11.203-11.205.

In their complaint, Dykema and Turner

> allege[d] that [Del Webb] *knew or should have known* that if the subject structure and subject premises were not properly or adequately designed, engineered, marketed, supervised and/or constructed, that the owners and users would be substantially damaged thereby, and that the subject structures *would be defective* and not of merchantable quality.

(Emphases added.) They also alleged that Del Webb "knew or should have known that the premises were constructed in an unworkmanlike manner." Based on these allegations, we conclude that the district court properly applied the ten-year statute of repose for known deficiencies under NRS 11.203(1), which governed deficiencies that were "known or through the use of reasonable diligence should have been known" to Del Webb.

Because we conclude that it is the act of recording that signifies when a notice of completion has been issued pursuant to NRS 11.2055, the district court incorrectly calculated the date on which the ten-year statute of repose ran. A notice of completion of Dykema's residence was recorded on December 8, 2004, and a notice of completion of Turner's residence was recorded on December 23, 2004. Thus, the ten-year statute of repose was set to expire

[5]Despite this argument, Del Webb did not specify which, if any, of Dykema's or Turner's claims could be characterized as patent or latent for purposes of the six- or eight-year statutes of repose. Rather, Del Webb argued that regardless of which statute of repose applied, Dykema's and Turner's claims were time-barred.

for Dykema's claims on December 8, 2014, and for Turner's claims on December 23, 2014.

Pursuant to NRS Chapter 40, Dykema served a notice of construction defect on Del Webb on December 2, 2014, and Turner served his notice of construction defect on Del Webb on December 22, 2014. Under NRS 40.695(1)(a), the statute of repose is tolled for "[o]ne year after notice of the claim is given." Therefore, because Dykema and Turner served their Chapter 40 notices within the ten-year repose period, it was tolled for one year and Dykema's and Turner's February 27, 2015, complaint against Del Webb was timely filed. Accordingly, we conclude that the district court erred in concluding that Dykema's and Turner's claims were time-barred by NRS 11.203(1)'s ten-year statute of repose, and in granting Del Webb summary judgment.

For the reasons set forth above, we reverse the district court's summary judgment against Dykema and Turner and remand this matter to the district court for further proceedings consistent with this opinion.

PARRAGUIRRE, C.J., and PICKERING, J., concur.

TODD MITCHELL LEAVITT, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 69218

December 29, 2016 386 P.3d 620

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

The supreme court held that the district court did not err by failing to consider recent federal court decision.

Affirmed.

Todd Mitchell Leavitt, Indian Springs, in Pro Se.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, Clark County, for Respondent.

CRIMINAL LAW.

In considering petition for postconviction relief, the district court did not err by failing to consider recent federal court decision, when petitioner did not discuss decision's holding or apply it to his case.

Before PARRAGUIRRE, C.J., HARDESTY and PICKERING, JJ.

OPINION[1]

Per Curiam:

Appellant Todd Mitchell Leavitt filed his postconviction petition on October 20, 2015, more than 25 years after remittitur issued from his direct appeal in 1989. *Leavitt v. State*, Docket No. 19493 (Order Dismissing Appeal, September 28, 1989).[2] Thus, the petition was untimely filed. *See* NRS 34.726(1). The petition was also successive pursuant to NRS 34.810(1)(b)(2) because Leavitt had previously sought postconviction relief. *Leavitt v. State*, Docket No. 28987 (Order Dismissing Appeal, February 10, 1999); *Leavitt v. State*, Docket No. 50438 (Order of Affirmance, April 18, 2008). Accordingly, the petition was procedurally barred absent a demonstration of good cause and prejudice. *See* NRS 34.726(1); NRS 34.810(1)(b), (3). The district court concluded that Leavitt failed to demonstrate good cause and prejudice and denied his petition.

Leavitt contends that the district court erred by failing to consider his good cause argument regarding *Riley v. McDaniel*, 786 F.3d 719, 721 (9th Cir. 2015) (holding that it was error to give the instruction referenced in *Kazalyn v. State*, 108 Nev. 67, 825 P.2d 578 (1992), in trials conducted before *Powell v. State*, 108 Nev. 700, 838 P.2d 921 (1992), or after *Byford v. State*, 116 Nev. 215, 994 P.2d 700 (2000)), *cert. denied*, 136 S. Ct. 1450 (2016). Although Leavitt cited *Riley* in his petition, he did not discuss *Riley*'s holding or apply it to his case. Therefore, we conclude that the district court did not err by failing to consider *Riley* and by denying the petition.

As a separate and independent ground for denying relief, we also conclude that the district court did not err by denying Leavitt's petition because we do not agree with *Riley* and therefore it would not provide good cause. *See Nika v. State*, 124 Nev. 1272, 1289, 198 P.3d 839, 851 (2008) (discussing the history of Nevada law on the phrase "willful, deliberate, and premeditated," including *Hern v. State*, 97 Nev. 529, 635 P.2d 278 (1981), and explaining that prior to *Byford* this court had not required separate definitions of the terms and had instead viewed them as together conveying a meaning that was sufficiently described by the definition of "premeditation" eventually approved in *Kazalyn* and *Powell*). But even assuming that *Riley* would provide good cause, Leavitt did not establish prejudice because he did not demonstrate that the result of trial would

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[1]We previously issued our decision in this matter in an unpublished order. Cause appearing, we grant respondent's motion to reissue the order as an opinion, *see* NRAP 37(f), and issue this opinion in place of our prior order.

[2]The petition was filed more than 22 years after the effective date of NRS 34.726 on January 1, 1993.

have been different had a different instruction been given. We therefore affirm the judgment of the district court.[3]

[3]Having considered the pro se brief filed by appellant, we conclude that a response is not necessary. NRAP 46A(c). This appeal therefore has been submitted for decision based on the pro se brief and the record. *See* NRAP 34(f)(3). We have excluded from our consideration any claims raised for the first time on appeal.