MAURICE TERRANCE MOORE, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 79817

October 29, 2020 475 P.3d 33

Appeal from a judgment of conviction, pursuant to a jury verdict, of two counts of lewdness with a child under the age of 16. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed.

The Draskovich Law Group and *Robert M. Draskovich, Jr.*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander G. Chen*, Chief Deputy District Attorney, and *William Jake Merback* and *Jonathan VanBoskerck*, Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Gibbons, J.:

Appellant Maurice Moore was convicted of two counts of lewdness with a child under the age of 16 per NRS 201.230(1)(a). He argues that he had a reasonable, good-faith belief that the victim was 18 years old and the district court erred in preventing him from asserting a mistake-of-fact defense as to the victim's age. We conclude that a mistaken belief as to the victim's age is not a defense to the crime of lewdness with a child under the age of 16. We therefore affirm Moore's conviction.

FACTS AND PROCEDURAL HISTORY

Moore met A.M. on the dating application Tinder. Tinder requires users to be 18 years or older, so A.M., who was 14 years old at the time, falsely claimed she was 18 years old on her profile. Moore, who was 41 years old at the time, falsely claimed he was 23 years old on his profile. While chatting on Tinder, Moore told A.M. she was "pretty" and had "a nice body." A.M. told Moore "[m]aybe we can have sex in your car." Moore responded in kind, stating he would love to "kiss" and "make love" to her.

Shortly thereafter, A.M. and Moore decided to meet. A.M. informed Moore that her parents were very strict, so she would have to sneak out of the house when they were asleep. Moore picked A.M. up just after midnight. When he arrived at her house, he messaged her "[d]on't get caught" and that he was in a blue sports car waiting for her. After the two talked for a bit, Moore groped her breasts. A.M. then performed oral sex on Moore. The two also engaged in vaginal and anal sex. During anal sex, Moore slapped A.M.'s buttocks.

After the sexual encounter, A.M. returned to her house and argued with her mother, who had called the police to report A.M. missing. Before the police arrived, A.M.'s mother took A.M.'s phone and, pretending to be A.M., asked Moore to come back to the house. Moore returned, and the police confronted him. A.M. informed the police that she had sex with Moore in his car but said it was not consensual. When the police arrested Moore, he told the officers that he believed A.M. was 18 years old.

The State charged Moore with five counts of sexual assault with a minor under the age of 16 and two counts of lewdness with a child under the age of 16. At trial, Moore did not deny that a sexual encounter occurred, but he argued it was consensual.

When discussing jury instructions regarding the lewdness charges, Moore argued that he should be able to use a good-faith-mistake-of-fact defense as to A.M.'s age. Specifically, he argued that

whether he knew or should have known that the victim was under the age of 16 was an element of the crime. The district court noted that "Nevada doesn't have anything on that," but that California's lewdness statute, which is essentially the same as Nevada's, precludes a good-faith-mistake-of-fact defense as to the victim's age. The district court declined to provide the jury with a mistake-of-fact instruction or any other instruction that indicated the State must prove Moore knew, or should have known, that A.M. was under the age of 16. The district court permitted Moore to argue in closing arguments that he did not know the victim's age, but precluded him from using that as a defense.

Moore also requested a jury instruction defining the word "willfully" from the lewdness statute. He requested that "willfully" be defined as requiring that he specifically intended to engage in a lewd act *with a person under 16 years of age*—not merely that he intended to engage in a lewd act. The district court responded that "willfully" refers only to the intent to commit the act itself and declined to give Moore's proffered instruction. Instead, it gave Jury Instruction 14, which listed four elements the jury had to find to sustain a lewdness conviction: (1) Moore committed a lewd or lascivious act (specifically fondling A.M.'s breasts and slapping her buttocks); (2) Moore intended to commit the lewd act; (3) A.M. was under 16 years old; and (4) Moore intended to arouse himself or A.M. in committing the lewd act.

The jury found Moore not guilty of the five sexual assault charges, but guilty of the two lewdness charges. The district court sentenced Moore to a minimum of two years and a maximum of eight years for each count, to run consecutively.

DISCUSSION

Moore argues that to be guilty of the crime of lewdness with a child under the age of 16, a person must know or should have known that the child is under the age of 16. He therefore argues that the district court improperly instructed the jury on the lewdness charge and abused its discretion when it refused to instruct the jury that a mistake of fact as to the child's age is a valid defense to the crime.[1] Although we generally review jury instructions for an abuse of discretion or judicial error, when the question is whether an instruction is an accurate statement of the law, our review is de novo. *Cortinas v. State*, 124 Nev. 1013, 1019, 195 P.3d 315, 319 (2008); *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). Where, as here, this determination requires us to interpret a statute, we interpret clear and unambiguous statutory language by its plain meaning un-

[1]To the extent that Moore challenges Jury Instruction 14 as a general-intent instruction, his argument lacks merit. The instruction expressly provided that lewdness with a child under the age of 16 is a specific-intent crime, as discussed more below.

less doing so would lead to an unreasonable or absurd result. *Newell v. State*, 131 Nev. 974, 977, 364 P.3d 602, 603-04 (2015).

NRS 201.230(1)(a) provides, in relevant part:

> 1. A person is guilty of lewdness with a child if he or she:
>
> (a) Is 18 years of age or older and willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 16 years, with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child . . . .

Lewdness with a child under the age of 16 is a specific-intent crime. *State v. Catanio*, 120 Nev. 1030, 1036, 102 P.3d 588, 592 (2004) (stating, "the Nevada statutory language providing that a lewd act be done 'upon or with' a child's body clearly requires specific intent by the perpetrator to encourage or compel a lewd act in order to gratify the accused's sexual desires"). "[W]here a specific intent is required to constitute the offense," a person who acts under "ignorance or mistake of fact, which disproves any criminal intent," is not liable for punishment. NRS 194.010(5). Both parties agree that lewdness with a child under the age of 16 is a specific-intent crime and therefore a defendant may raise a mistake-of-fact defense, but they disagree about which elements of the crime require specific intent.

Moore argues that *all* elements of the crime require specific intent. He therefore contends the State must prove that he had the specific intent to commit a lewd or lascivious act on a minor (i.e., that he knew or should have known that A.M. was under the age of 16). The State argues that the only element that requires specific intent is "the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child." NRS 201.230(1)(a). The State therefore responds that it did not have to prove that Moore knew or should have known that A.M. was under the age of 16 when he committed the lewd or lascivious act.

We agree with the State that the only portion of NRS 201.230(1)(a) that requires the State to prove specific intent is the portion of the statute that follows the word "intent"—i.e., the element that provides "with the intent of arousing, appealing to, or gratifying the lust or passions or sexual desires of that person or of that child." The portion of the statute that requires the child be under the age of 16 is not preceded by the word "intent."[2] Nor does the statute's plain language otherwise require the State to prove that

[2]We recognize that not all specific-intent crimes include the word "intent" in the statutory language. *Ford v. State*, 127 Nev. 608, 614, 262 P.3d 1123, 1127 (2011) (holding that the crime of pandering is a specific-intent crime, even though the statute does not include a stated intent requirement). But when the Legislature expressly includes the word "intent" before just one element, we interpret this placement as deliberate.

the defendant knew or should have known that the child was under the age of 16.

And although the word "willfully" appears at the beginning of NRS 201.230(1)(a), we are not persuaded that this transforms every element of the crime into one requiring specific intent. On the contrary, we have held that "in the context of statutes aimed at the protection of infants, such as child abuse statutes, the term 'wil[l]-fully' has been defined to refer to general intent: as an intent to do the act, rather than any intent to violate the law or injure another." *Jenkins v. State*, 110 Nev. 865, 870, 877 P.2d 1063, 1066 (1994) (concluding that a mistake-of-fact defense is not available for statutory sexual seduction); *see also State v. Second Judicial Dist. Court (Radonski)*, 136 Nev. 191, 196, 462 P.3d 671, 675 (2020) ("A defendant acts 'willfully' when the defendant acts deliberately, as opposed to accidently . . . ."). Thus, the word "willfully" in NRS 201.230(1)(a) requires only that the defendant commit the lewd act deliberately. We therefore conclude that NRS 201.230(1)(a)'s plain language, which is clear and unambiguous, does not entitle a defendant to a mistake-of-fact defense as to the victim's age.[3]

Our reading of this statute is in line with Nevada's long-standing policy of protecting minors from illicit activities—specifically sex crimes—which children often lack the ability to understand or defend against. *See, e.g.*, NRS 200.364(10) (defining statutory sexual seduction); NRS 200.366 (increasing penalties for sexual assault on a child under the age of 16); NRS 200.727 (criminalizing the viewing of any visual presentation of a child under the age of 16 involved in a sexual act); NRS 200.730 (criminalizing the possession of a visual presentation of a child under the age of 16 involved in a sexual act); NRS 201.560 (luring a child under the age of 16); NRS 207.260 (unlawful contact with a child under the age of 16). Requiring the State to prove the defendant knew or should have known the child was under the age of 16, as Moore urges us to do, would be at odds with Nevada's policy of protecting children.

Moore does not refute this strong public policy in favor of protecting children. Instead, he argues that the district court erroneously relied on California law. In California, a good-faith mistaken belief as to the victim's age is not a defense to the crime of lewdness with a minor. *People v. Olsen*, 685 P.2d 52, 57 (Cal. 1984). We are not persuaded that the district court *relied* on California law, but to the extent that it did, it did not err. California's lewdness-with-a-minor statute is, for our purposes here, substantially similar to Nevada's, except it protects minors under the age of 14, whereas Nevada's

[3]Moore focuses his argument on the 2015 amendments to this and other statutes relating to sexual crimes, but absent ambiguous language, we decline to look beyond the statute's plain meaning. *See Cabrera v. State*, 135 Nev. 492, 495, 454 P.3d 722, 724 (2019) ("[W]hen a statute is clear on its face, a court can not go beyond the statute in determining legislative intent." (internal quotation marks omitted)).

protects minors under the age of 16.[4] *Compare* Cal. Penal Code § 288 (West Supp. 2020), *with* NRS 201.230(1)(a). Both California and Nevada have strong state policies in favor of protecting children from sex crimes. *See Olsen*, 685 P.2d at 57. Further, we have previously cited California's interpretation of its lewdness statute as persuasive authority. *Catanio*, 120 Nev. at 1036, 102 P.3d at 592 ("We agree with the California courts' interpretation of what must be proven to establish the elements of the crime of lewdness."). Thus, California law is persuasive, and the district court did not err in referencing it.[5]

Because NRS 201.230(1)(a) does not require the State to prove that Moore knew or should have known that A.M. was under the age of 16, Jury Instruction 14 was an accurate statement of the law. Accordingly, the district court did not err in instructing the jury regarding the crime of lewdness with a child under the age of 16, nor did it abuse its discretion in refusing to give Moore's requested jury instruction about the word "willfully."[6]

CONCLUSION

A mistaken belief as to a child's age is not a defense to the crime of lewdness with a child under the age of 16. Thus, the district court did not err in instructing the jury regarding this crime or abuse its discretion in denying Moore's requested jury instructions. Accordingly, we affirm the judgment of conviction.

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

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[4]California's statute reads, in pertinent part:

> Except as provided in subdivision (i), a person who willfully and lewdly commits any lewd or lascivious act, including any of the acts constituting other crimes provided for in Part 1, upon or with the body, or any part or member thereof, of a child who is under the age of 14 years, with the intent of arousing, appealing to, or gratifying the lust, passions, or sexual desires of that person or the child, is guilty of a felony and shall be punished by imprisonment in the state prison for three, six, or eight years.

Cal. Penal Code § 288 (West Supp. 2020).

[5]North Carolina and Michigan also preclude an individual charged with lewdness with a minor from asserting a mistake-of-fact defense as to the victim's age. *State v. Breathette*, 690 S.E.2d 1, 6 (N.C. Ct. App. 2010) (referencing North Carolina's policy of protecting children from sex crimes); *People v. Doyle*, 167 N.W.2d 907, 908 (Mich. Ct. App. 1969). Kentucky and Pennsylvania, on the other hand, permit a defendant to assert a mistake-of-fact defense as to the victim's age when the child is over 14 years old, but that defense is expressly permitted *by statute*. *See* Ky. Rev. Stat. Ann. § 510.030 (LexisNexis Supp. 2020); 18 Pa. Stat. & Cons. Stat. Ann. § 3102 (West 2015).

[6]Because we conclude there was no error, we need not address Moore's cumulative error argument.

MDB TRUCKING, LLC, Appellant, *v.*
VERSA PRODUCTS COMPANY, INC., Respondent.

No. 75022

MDB TRUCKING, LLC, Appellant, *v.*
VERSA PRODUCTS COMPANY, INC., Respondent.

No. 75319

MDB TRUCKING, LLC, Appellant, *v.*
VERSA PRODUCTS COMPANY, INC., Respondent.

No. 75321

MDB TRUCKING, LLC, Appellant/Cross-Respondent, *v.* VERSA PRODUCTS COMPANY, INC., Respondent/Cross-Appellant.

No. 76395

MDB TRUCKING, LLC, Appellant/Cross-Respondent, *v.* VERSA PRODUCTS COMPANY, INC., Respondent/Cross-Appellant.

No. 76396

MDB TRUCKING, LLC, Appellant/Cross-Respondent, *v.* VERSA PRODUCTS COMPANY, INC., Respondent/Cross-Appellant.

No. 76397

November 5, 2020 475 P.3d 397

Consolidated appeals from district court orders dismissing complaints in tort actions (Docket Nos. 75022, 75319, 75321) and consolidated appeals and cross-appeals from post-judgment orders denying a request for attorney fees and partially granting a request for costs (Docket Nos. 76395, 76396, 76397). Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Reversed and remanded (Docket Nos. 75022, 75319, 75321); vacated (Docket Nos. 76395, 76396, 76397).

Clark Hill PLLC and *Nicholas M. Wieczorek* and *Jeremy J. Thompson*, Las Vegas; *Fox Rothschild LLP* and *Colleen E. McCarty*, Las Vegas, for Appellant/Cross-Respondent.

Lewis Brisbois Bisgaard & Smith LLP and *Josh C. Aicklen, Jeffrey D. Olster, David B. Avakian*, and *Paige S. Shreve*, Las Vegas, for Respondent/Cross-Appellant.

Before the Supreme Court, Pickering, C.J., Parraguirre and Cadish, JJ.

OPINION

By the Court, Pickering, C.J.:

The district court imposed case-terminating sanctions on appellant MDB Trucking, LLC, for spoliation of evidence. MDB urges that the law does not support this harshest of civil litigation sanctions because: (1) MDB discarded the evidence as irrelevant, not to gain an unfair litigation advantage over respondent Versa Products Company; (2) the evidence is collateral, such that its loss did not materially prejudice Versa; and (3) the district court failed to adequately consider the fairness and feasibility of alternative, less severe sanctions. We agree with MDB that the record does not support the imposition of case-terminating sanctions and therefore reverse and remand.

I.

A.

Appellant MDB is a commercial trucking company based in Sparks, Nevada. Its drivers transport rock, gravel, and other materials using 18-wheel tractors hauling up to three belly-dump trailers. The tractor/trailer rigs incorporate solenoid valves that control the hydraulic pressure used to open and close the trailer dump gates. Respondent Versa manufactures the dump gate valves.

A year before the incident giving rise to this suit, MDB driver Daniel Koski experienced twice in one week uncommanded activations of the dump gate in his rig's third trailer, causing it to open and unexpectedly dump its load. To prevent a recurrence, MDB mechanics replaced the rig's Versa valve, rewired the control circuit for its dump gate system, and added a master switch in the cab of the truck. MDB made these changes to isolate the electrical circuit for the dump controls from the other electrical systems on the tractor/trailer rig. The objective was to ensure that the Versa valve received no electric current unless the driver flipped both the master switch and the individual trailer switch to the "on" position after lifting the switches' plastic safety covers.

On July 7, 2014, Koski again experienced an uncommanded activation of one of his rig's dump gates. He was driving west on Interstate 80 outside Reno near mile marker 39 when the gate on the third trailer opened, dumping its load of gravel. Both the master and the trailer switches were in the "off" position. The release of gravel created chaos and caused several collisions, damaging vehicles and injuring several of their occupants.

That same day, a second MDB tractor/trailer rig likewise had a dump gate open unexpectedly, releasing the load of sand it was car-

rying. This incident also occurred on Interstate 80 near mile marker 42, about ten minutes before and three miles away from the Koski rig's gravel dump. Like Koski, the driver did not activate the dump gate. There were no accidents or injuries associated with this spill.

Anticipating litigation, MDB retained experts to investigate the July 7, 2014 incidents. They found no vehicle issues but determined that the valve system had design defects and lacked safeguards that later versions of the valve incorporated. They also determined that the Versa valves were susceptible to uncommanded activation when exposed to external electromagnetic fields.

Immediately following the July 7, 2014 incidents, MDB removed its belly dump tractor/trailer rigs from the road. Its mechanics manufactured and installed a pin lock system, so the gates could not open unless a person first physically removed the pin. MDB then put the tractor/trailer rigs, including Koski's, back into service.

Over the course of the next year and before any lawsuits were filed, MDB's mechanics performed routine maintenance on Koski's rig. The mechanics replaced, at various times, a plug, two sockets, and a damaged cord that were part of the electrical circuit controlling the Versa valve. They also replaced a second cord associated with the electrical circuit controlling the rig's lights and antilock brake system. Believing them irrelevant, MDB's mechanics discarded the plug, sockets, and cords they replaced.

B.

Eight plaintiffs filed three separate lawsuits against MDB and Versa, which the court consolidated for discovery purposes. MDB cross-claimed against Versa for contribution. In its cross-claims, MDB alleged that the unreasonably dangerous and defective design of the Versa valve caused the Koski rig's uncommanded gravel dump on Interstate 80 and the collisions that followed. During discovery, Versa's experts inspected Koski's tractor/trailer rig, including its Versa valve, switches, and electrical systems.

After several years of litigation, MDB mediated a global settlement with the plaintiffs, who assigned their claims against Versa to MDB. About two weeks later, Versa filed the motion for sanctions underlying this appeal, in which it asked the district court to dismiss MDB's claim with prejudice for having spoliated evidence. Versa did not fault MDB for putting the tractor/trailer back into service. But it argued that its theory of defense was that an electrical malfunction caused the valve to open and that, without inspecting the discarded parts, it could not establish that claim. MDB responded that the repairs were routine and the replaced parts irrelevant, so sanctions were unwarranted. Alternatively, MDB argued that Versa was entitled, at most, to a permissive adverse inference instruction.

C.

The district court convened an evidentiary hearing on Versa's motion. Versa called MDB's maintenance director and its lead mechanic adversely. The MDB company witnesses testified (and illustrated their testimony with photographs showing) that the tractor/trailer rig had two main cords: a 4-way cord and a 7-way cord extending from the tractor to the trailers, yoked together with zip ties. The 4-way cord controlled the trailers' dump gates, and the 7-way cord controlled the rig's lights, antilock brakes, and other electrical systems. While electrical current continuously ran through the 7-way cord, the system did not allow any electrical current to run through the 4-way cord unless the driver manually flipped the master-dump and trailer switches to the "on" position. Work orders indicated that, over the course of the year following the accident, MDB, at separate times, replaced the 4-way cord and the 7-way cord leading from the tractor to the first trailer, as well as one of the plugs on the 4-way cord and two sockets. These were routine repairs. The mechanic threw away the replaced parts and did not remember why they needed replacing. Both MDB witnesses acknowledged that cords can abrade due to wear and tear.

Versa called Garrick Mitchell, a mechanical engineer, as its expert. Mitchell testified that he needed to inspect the discarded parts to determine whether an electrical malfunction caused the dump gate to open. Mitchell hypothesized that the coverings on both the 4-way cord and the 7-way cord might have abraded to the point where current running through a 7-way cord wire made contact with a similarly exposed wire in the 4-way cord. If this occurred, he testified it could have sent a current through the 4-way cord, activating the Versa valve and causing the dump gate to open.

MDB called two experts, both of whom disagreed with Mitchell. MDB's principal expert, David Bosch, testified that the 7-way cord could not provide electrical current to the 4-way cord. The cords' coatings are abrasion resistant; inside the coating are four layers of insulation. The coating and insulation layers would have to be worn through on both cords for a wire from the 7-way cord to contact a 4-way cord wire. Even accepting this as possible, no completed circuit for an electrical current could reach the trailer's dump gate valve unless Koski had activated the double-pole master switch in the truck's cab, which he denied. Bosch opined that there was a "nearly zero" percent chance the valve activated the way Mitchell hypothesized. Bosch is a forensic engineer with degrees in mechanical, materials, and science engineering. MDB also called an electrical engineer, who agreed with Bosch.

At the end of the hearing, the court vacated the then-imminent trial date and announced that it would dismiss MDB's claims with

prejudice. A written order followed, in which the district court found—as Versa conceded at the hearing—that MDB did not intend to harm Versa when its mechanics discarded the plug, sockets, and cords. Nonetheless, the court concluded that MDB acted "willfully," as required for case-terminating sanctions, because it did not lose or misplace the parts but threw them away. The district court questioned Versa's defense theory and deemed MDB's evidence more compelling. Despite this, it held that MDB's failure to preserve the replaced parts caused Versa prejudice that lesser sanctions could not cure and ordered MDB's claims dismissed with prejudice.

MDB appealed. Versa filed a motion for attorney fees and costs, which the district court granted in part and denied in part. Versa appealed and MDB cross-appealed from this order. This court consolidated the appeals and cross-appeals, so this opinion resolves them all.

II.

A.

Spoliation occurs when a party fails to preserve evidence it knows or reasonably should know is relevant to actual or anticipated litigation. *Fire Ins. Exch. v. Zenith Radio Corp.*, 103 Nev. 648, 651, 747 P.2d 911, 914 (1987). Historically, Nevada courts have relied on NRCP 37(b) as the source of their authority to sanction a party for spoliation of evidence. *Id.* at 649, 747 P.2d at 912; *see Stubli v. Big D Int'l Trucks, Inc.*, 107 Nev. 309, 312, 810 P.2d 785, 787 (1991). Because NRCP 37(b) only authorizes sanctions against a party who disobeys a court order, the rule does not literally apply to most pre-litigation spoliation, where no court order to preserve or produce evidence is in place. *See Unigard Sec. Ins. Co. v. Lakewood Eng'g & Mfg. Corp.*, 982 F.2d 363, 367-68 (9th Cir. 1992) (declining to apply NRCP 37(b)'s counterpart, Fed. R. Civ. P. 37(b), to pre-litigation spoliation and questioning this court's reliance on Rule 37(b) in *Fire Insurance Exchange* and *Stubli*). But, separate and apart from the Rules of Civil Procedure, courts have inherent authority to manage the judicial process so as to achieve the fair, orderly, and expeditious disposition of cases, which empowers them to impose sanctions for pre-litigation spoliation of physical evidence. *Id.* at 368 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43 (1991)); *Silvestri v. Gen. Motors Corp*., 271 F.3d 583, 590 (4th Cir. 2001) (stating that "[t]he right to impose sanctions for spoliation arises from a court's inherent power to control the judicial process and litigation" and noting that "the power is limited to that necessary to redress conduct 'which abuses the judicial process'") (quoting *Chambers*, 501 U.S. at 45); *see Young v. Johnny Ribeiro Bldg., Inc.*, 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (invoking the court's inherent authority and NRCP 37(b) in affirming the dis-

trict court's imposition of case-terminating sanctions on a party who abused the judicial process by fabricating evidence and then refused to account for it after the court ordered him to do so).[1]

A district court has discretion in choosing spoliation sanctions. *Stubli*, 107 Nev. at 312, 810 P.2d at 787. But "[f]undamental notions of fairness and due process require that [the] sanctions be just and . . . relate to the specific conduct at issue." *GNLV Corp. v. Serv. Control Corp.*, 111 Nev. 866, 870, 900 P.2d 323, 325 (1995). "The dismissal of a case, based upon . . . the destruction or loss of evidence, should be used only in extreme situations; if less drastic sanctions are available, they should be utilized." *Id.* (internal quotation omitted).

Because case-terminating sanctions are so harsh, this court applies a heightened standard of review to orders imposing them. *GNLV*, 111 Nev. at 869, 900 P.2d at 325; *Young*, 106 Nev. at 92, 787 P.2d at 779. Factors a district court should consider before imposing case-terminating sanctions include:

> the degree of willfulness of the offending party, the extent to which the non-offending party would be prejudiced by a lesser sanction, the severity of the sanction of dismissal relative to the severity of the discovery abuse, whether any evidence has been irreparably lost, the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party, the policy favoring adjudication on the merits, whether sanctions unfairly operate to penalize a party for the misconduct of his or her attorney, and the need to deter both the parties and future litigants from similar abuses.

Young, 106 Nev. at 93, 787 P.2d at 780; *see GNLV*, 111 Nev. at 870, 900 P.2d at 325-26. Essentially, the *Young* factors come down to the willfulness or culpability of the offending party, the prejudice to the

[1]Effective March 1, 2019, this court amended NRCP 37 to adopt as NRCP 37(e) the language added to Fed. R. Civ. P. 37(e) in 2015. *See In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 0522 (Order Amending the Rules of Civil Procedure Dec. 31, 2018). As amended, NRCP 37(e) authorizes the imposition of sanctions on a party who "failed to take reasonable steps to preserve" electronically stored information (ESI) "that should have been preserved in the anticipation or conduct of litigation." Like its federal counterpart, NRCP 37(e) by its terms "applies only to electronically stored information." Fed. R. Civ. P. 37(e) advisory committee's note to 2015 amendment. Because ESI poses unique spoliation concerns, federal courts have maintained separate legal analyses governing the spoliation of ESI versus other forms of tangible evidence, applying the ESI-specific Fed. R. Civ. P. 37(e) to the former and their inherent authority caselaw to the latter. *E.g.*, *Best Payphones, Inc. v. City of New York*, 1-CV-3924 (JG) (VMS), 1-CV-8506 (JG) (VMS), 3-CV-0192 (JG) (VMS), 2016 WL 792396, at *3 (E.D.N.Y. Feb. 26, 2016). Neither MDB nor Versa argues that NRCP 37(e) applies to spoliation of tangible evidence at issue on this appeal.

non-offending party caused by the loss or destruction of evidence, and "the feasibility and fairness of alternative, less severe sanctions." *Young*, 106 Nev. at 93, 787 P.2d at 780. In assessing these factors, the district court must apply "a proper standard of law." *Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006) (internal quotation omitted). Whether the district court applied the proper standard of law is reviewed de novo, not deferentially. *See Liu v. Christopher Homes, LLC*, 130 Nev. 147, 151, 321 P.3d 875, 877 (2014).

B.

1.

The first *Young* factor—"the degree of willfulness of the offending party"—tasks the district court with assessing the culpability or fault of the party against whom spoliation sanctions are sought. MDB urges that, for purposes of case-terminating sanctions, "willfulness" means more than negligence: It requires an intent to gain a litigation advantage and harm one's party opponent by destroying material evidence. As support, MDB cites *Bass-Davis*, 122 Nev. 442, 134 P.3d 103.

Bass-Davis did not concern case-terminating sanctions for spoliation of evidence. It addressed the two principal forms of jury instructions available to remedy spoliation: (1) a permissive adverse inference instruction advising "the jury that it could (but need not) draw a negative inference from the missing evidence," *id.* at 451, 134 P.3d at 108; and (2) a rebuttable presumption instruction advising "[t]hat evidence willfully suppressed would be adverse if produced," as provided in NRS 47.250(3), *see id.* at 452, 134 P.3d at 109. *Bass-Davis* held that negligent failure to preserve relevant evidence supports only a permissive adverse inference instruction. *Id.* at 449, 134 P.3d at 107. For the stronger rebuttable presumption instruction to be given, "willful suppression or destruction" of evidence must exist; this "requires more than simple destruction of evidence and instead requires that evidence be destroyed *with the intent to harm another party*." *Id.* at 452, 134 P.3d at 109 (emphasis added); *see id.* at 448, 134 P.3d at 106 (noting that "willful or intentional spoliation of evidence requires the intent to harm another party through the destruction and not simply the intent to destroy evidence").

The district court rejected MDB's request that it use the *Bass-Davis* definition of "willfulness" in assessing its culpability. Instead, the district court looked to a criminal jury instruction defining "willfully" for purposes of child abuse:

> The word "willfully," when applied to the intent with which an act is done or omitted . . . implies simply a purpose or willingness to commit the act or to make the omission in

> question. *The word does not require in its meaning any intent* to violate law, or *to injure another, or to acquire any advantage.*

Childers v. State, 100 Nev. 280, 282-83, 680 P.2d 598, 599 (1984) (emphases added). Applying *Childers*, the district court found willfulness despite also finding that MDB had no intent to harm Versa or its litigation position when it discarded the replaced parts: "The Court does not find MDB intentionally disposed of the components in order to harm Versa, nor were MDB's employees acting with any malevolence; however, the Court does find MDB is complicit of benign neglect and indifference to the needs of Versa regarding discovery in this action."

The district court's approach allows case-terminating sanctions for negligent spoliation of evidence despite that, under *Bass-Davis*, mere negligent spoliation does not support a rebuttable presumption instruction under NRS 47.250(3). This conflicts with the core principle that case-terminating sanctions are a last resort, appropriate only when no lesser sanction will do. To be sure, appellate courts have upheld case-terminating sanctions for negligent destruction of material evidence where the party opponent can prove the loss of evidence caused extreme and incurable prejudice. *See Silvestri*, 271 F.3d at 593; *Mont. State Univ.-Bozeman v. Mont. First Judicial Dist. Court*, 426 P.3d 541, 553-54 (Mont. 2018). But the general rule is that, without willfulness, bad faith, or an intent to harm, case-terminating sanctions for pre-litigation spoliation of evidence is unwarranted. *See Menz v. New Holland N. Am., Inc.*, 440 F.3d 1002, 1006 (8th Cir. 2006) (stating that "to warrant dismissal as a sanction for spoliation of evidence there must be a finding of intentional destruction indicating a desire to suppress the truth") (internal quotation omitted); *Leon v. IDX Sys. Corp.*, 464 F.3d 951, 958 (9th Cir. 2006) ("[A] finding of willfulness, fault, or bad faith is required for dismissal to be proper [for spoliation of evidence].") (internal quotation omitted); *Micron Tech., Inc. v. Rambus Inc.*, 645 F.3d 1311, 1328 (Fed. Cir. 2011) ("Dismissal is a harsh sanction, to be imposed only in particularly egregious situations where a party has engaged deliberately in deceptive practices that undermine the integrity of judicial proceedings.") (internal quotation omitted); 2 Stephen E. Arthur & Robert S. Hunter, *Federal Trial Handbook: Civil* § 72:16 (4th ed. 2018-19) ("Dismissal as [a] sanction for spoliation of evidence is appropriate if there is a showing of willfulness, bad faith, or fault on the part of the sanctioned party."); *see also* NRCP 37(e)(2), discussed in note 1, *supra* (authorizing case-terminating sanctions for failure to preserve ESI "only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation").

Versa argues that *Fire Insurance Exchange* and *Stubli* equate willfulness with simple negligence and therefore conflict with and

survive *Bass-Davis* outside the jury instruction context. But *Fire Insurance Exchange* did not address willfulness; it focused on the now-settled question of a court's authority to impose sanctions for pre-litigation spoliation of evidence in the context of an order striking expert testimony. 103 Nev. at 651, 747 P.2d at 913-14. And while the dissent in *Stubli* broached the "intent to harm" component of willfulness, 107 Nev. at 315, 810 P.2d at 788-89 (Rose and Springer, JJ., dissenting), the majority did not engage on the issue. It deemed the spoliator's actions "willful" and concentrated instead on the legal issue of a court's authority to impose case-terminating sanctions for pre-litigation spoliation of evidence. *Id.* at 313, 810 P.2d at 787-88. Thus, neither *Fire Insurance Exchange* nor *Stubli* supports imposing case-terminating sanctions for negligent loss of evidence, without more. *See also GNLV*, 111 Nev. at 871, 900 P.2d at 326 (reversing order imposing case-terminating sanctions for negligent loss of evidence, though suggesting a different outcome might obtain if the sanctions had not prejudiced an innocent third party's claims).

In assessing MDB's culpability, the district court should have applied the *Bass-Davis* definition of "willfulness," not the criminal jury instruction definition from *Childers.* This error affected its remaining analysis.

2.

The second and fourth *Young* factors—"the extent to which the non-offending party would be prejudiced by a lesser sanction" and "whether any evidence has been irreparably lost"—require the district court to assess the prejudice to the non-offending party caused by the loss or destruction of evidence. Prejudice, in this context, depends on the extent and materiality of the evidence lost or destroyed. *See Micron*, 645 F.3d at 1328 (stating that spoliation is prejudicial when it "materially affect[s] the substantial rights of the adverse party and is prejudicial to the presentation of his case") (alteration in original) (internal quotation omitted). If the spoliating party willfully destroyed evidence—i.e., destroyed evidence with the intent to harm the opposing party's case—a rebuttable presumption arises that the evidence was materially adverse to that party. *Bass-Davis*, 122 Nev. at 449, 134 P.3d at 107 (applying NRS 47.250(3)); *see Micron*, 645 F.3d at 1328; *Mont. State Univ.*, 426 P.3d at 553. Absent willfulness, the burden lies with the party seeking the imposition of sanctions to prove actual prejudice by showing that the evidence was material to the party's case and that its loss inflicted irreparable harm. *Mont. State Univ.*, 426 P.3d at 554 ("Mere speculation, conjecture, or possibility that negligently-spoliated evidence was materially favorable to the opposing party is insufficient to warrant a severe sanction on the merits."); *see GNLV*, 111 Nev. at 871, 900

P.2d at 326 (reversing order imposing case-terminating sanctions for the negligent loss of evidence in a slip-and-fall case where eyewitness testimony was available to establish the bath mat's condition).

The district court's error in defining willfulness thus carried over into its prejudice analysis. Given that MDB acted negligently—not willfully—when it discarded the replaced parts, Versa bore the burden of proving that the loss of this evidence materially prejudiced its case in a way lesser sanctions could not cure. Yet, the district court credited Versa's claim of incurable prejudice without adequately evaluating alternative measures. As an example, Versa maintained that it needed the discarded cords to determine whether they had abraded to the extent that a bare wire from the 7-way cord could pass a current to a bare wire from the 4-way cord, activating the valve and opening the dump gate, even with the master and trailer switches in the "off" position. The point dividing the experts was not whether cords can abrade—MDB company witnesses admitted they can—but whether such abrasion could account for the uncommanded activation of the Versa valve. No reason appears why Versa could not establish its theory by abrading identical cords and testing them on a replica model or even on the Koski rig itself, at MDB's expense. *See* Jamie S. Gorelick, Stephen Marzen, Lawrence Solum & Arthur Best, *Destruction of Evidence* § 3.16 (Aspen 2020) (noting that, among the sanctions available for spoliation of evidence, is an order requiring a spoliator to pay for the reconstruction of destroyed evidence to re-create the incident). On remand, the district court should consider whether Versa can meet its burden of proving prejudice.

3.

The fifth *Young* factor—"the feasibility and fairness of alternative, less severe sanctions, such as an order deeming facts relating to improperly withheld or destroyed evidence to be admitted by the offending party"—requires the district court to consider lesser sanctions before imposing case-terminating sanctions for spoliation of evidence. In determining whether the district court properly considered lesser sanctions, we examine "whether the district court explicitly discussed the feasibility of less drastic sanctions and explained why such alternate sanctions would be inappropriate." *Leon*, 464 F.3d at 960 (internal quotation omitted).

In this case, MDB argued that its negligent failure to preserve the replaced parts did not support case-terminating sanctions but, at most, a permissive adverse inference instruction under *Bass-Davis*. The court rejected MDB's argument, reasoning as follows:

> The Court does not find an adverse inference instruction pursuant to NRS 47.250(3) and *Bass-Davis v. Davis*, 122 Nev. 442, 134 P.3d 103 (2006), is appropriate . . . . [A]n adverse

> inference instruction requires "an intent to harm another party through the destruction and not simply the intent to destroy evidence." *Bass-Davis*, 122 Nev. at 448, 134 P.3d at 106. The Court does not find MDB intended to harm Versa by destroying or disposing of the electrical components; therefore it could not give this instruction.

The analysis is incorrect. *Bass-Davis* addressed *two* potential forms of jury instructions to address spoliation: a rebuttable presumption instruction under NRS 47.250(3), and a permissive adverse inference instruction. While *Bass-Davis* holds that a district court may not give a rebuttable presumption instruction absent an intent to harm—or "willfulness"—it supports giving a permissive adverse inference instruction against a party who negligently fails to preserve evidence. *See Bass-Davis*, 122 Nev. at 451, 134 P.3d at 109. Such an instruction would permit, but not require, the jury to infer that MDB replaced and discarded the cords because they had abraded or been cut, as Versa maintained. It would then be up to the jury to decide whether to believe Koski's statement that the switches were "off" and which expert to believe.

Courts have adopted a variety of measures, short of case-terminating sanctions, to redress spoliation of evidence. These measures include "attorneys' fees and costs [associated with curative discovery], monetary sanctions for the cost of reconstructing destroyed evidence, . . . issue-related sanctions, the exclusion of testimony from the spoliator's witnesses regarding the destroyed material, [and] jury instructions on the spoliation inference." Gorelick, *supra*, at § 3.16. For non-willful destruction of evidence, these and other measures, including the permissive adverse inference instruction *Bass-Davis* authorizes for negligent spoliation of evidence, must be considered.

C.

The district court's sanction order was predicated on its finding that MDB had a pre-litigation duty to preserve the discarded parts, or at least, to take pictures of them before throwing them away. A party has a duty to preserve evidence "which it knows or reasonably should know is relevant," *Bass-Davis*, 122 Nev. at 450 n.19, 134 P.3d at 108 n.19, to litigation that is pending or reasonably foreseeable, *Micron*, 645 F.3d at 1320. MDB admits knowing litigation was pending or reasonably foreseeable when it discarded the parts, but denies that it knew or should have known the discarded parts were relevant. The parts' relevance represents a factual determination for the district court. Nothing in this opinion precludes the district court from revisiting this threshold determination on remand, if it deems it appropriate to do so.

III.

The judgment imposing case-terminating sanctions on MDB is reversed and the cases are remanded for further proceedings consistent with this opinion. The orders granting in part and denying in part Versa's motions for costs and fees are vacated.

Parraguirre and Cadish, JJ., concur.

In the Matter of the
CHRISTIAN FAMILY TRUST U.A.D. 10/11/16.

SUSAN CHRISTIAN-PAYNE; ROSEMARY KEACH; and RAYMOND CHRISTIAN, JR., Appellants, *v.* ANTHONY L. BARNEY, LTD.; and FREDRICK P. WAID, Respondents.

No. 75750

December 3, 2020 476 P.3d 861

Appeal from a district court order allowing payment of a creditor's claim in a trust action. Eighth Judicial District Court, Clark County; Vincent Ochoa, Judge.

Affirmed.

Cary Colt Payne, Las Vegas, for Appellants.

Anthony L. Barney, Ltd., and *Anthony L. Barney, Tiffany S. Barney*, and *Zachary D. Holyoak*, Las Vegas, for Respondent Anthony L. Barney, Ltd.

Hutchison & Steffen, LLC, and *Russel J. Geist*, Las Vegas, for Respondent Fredrick P. Waid.

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

OPINION[1]

By the Court, Hardesty, J.:

In this appeal, we consider whether a creditor of a settlor may satisfy its claim against the settlor's trust where the trust does not specifically provide for payment of the claim but the trustees ap-

[1]We originally resolved this appeal in an unpublished order of affirmance. Respondent Anthony L. Barney, Ltd., subsequently filed a motion to publish the order as an opinion. We grant the motion and replace our earlier order with this opinion. *See* NRAP 36(f).

prove the payment. We conclude that a creditor may bring a claim against a settlor of a trust so long as the settlor's interest in the trust is not solely discretionary and there is not a spendthrift provision precluding payment of the claim. Further, where a trust provides broad discretion to its trustees, the trustees may approve a creditor's claim against the trust. Because the creditor's claim here was proper and the trustees were within their broad discretion in approving the claim, we affirm.

FACTS AND PROCEDURAL HISTORY

Settlors Nancy and Raymond Christian, Sr., created the Christian Family Trust (the Trust),[2] naming appellants, three of their children, as co-trustees. Under the Trust, Nancy and Raymond had a mandatory interest in all income and principal from their community property and a mandatory interest in the income and principal of his or her own separate property. After the death of one settlor, the Trust provided that the trustee may in his or her discretion "pay . . . the administrative expenses, the expenses of the last illness and funeral of the [d]ecedent and any debt owed by the [d]ecedent." The Trust did not provide a similar provision governing the death of the second settlor.

Raymond died first, which, under the Trust, left Nancy with a discretionary interest in the remaining income of the Trust property and a mandatory interest in the residence. After Raymond died, Nancy removed appellants as trustees and appointed her son from a different marriage, nonparty Monte Reason, as trustee. Appellants challenged the replacement in district court, and Nancy retained respondent law firm Anthony L. Barney, Ltd. (Barney, Ltd.) to represent her. After Nancy's death, Barney, Ltd. sent letters to Trustee Reason and, after he resigned, to successor Trustee Jacqueline Utkin,[3] requesting attorney fees and costs for representing Nancy. Trustee Reason and Trustee Utkin both approved Barney, Ltd.'s request for payment. Over appellants' objection, the district court ordered $53,031.97 of frozen trust funds be released to pay Barney, Ltd. This appeal followed.

DISCUSSION

Both parties have standing to maintain this action, and the appeal is not moot

Barney, Ltd. first argues that appellants lack standing to pursue this appeal because they are no longer trustees of the Trust. We dis-

[2]The Trust refers to Nancy and Raymond as "trustors," whereas Nevada law refers to trustors as "settlors." *See, e.g.*, NRS 163.003 (describing the requirements for a settlor to create a trust). While the terms may be interchangeable, we use the term "settlors" in this opinion. *See Settlor*, *Black's Law Dictionary* (11th ed. 2019) (defining "settlor" as one who sets up a trust and providing that a settlor may also be called a "trustor").

[3]Trustee Utkin has since resigned, and respondent Frederick P. Waid is the current Trustee.

agree. Appellants have standing to appeal because the appealed order reduces the Trust assets available for disbursement to them as beneficiaries. *See In re Estate of Herrmann*, 100 Nev. 1, 26, 677 P.2d 594, 610 (1984) (explaining that heirs of an estate are interested parties with a right to contest an award of attorney fees where the award reduces their legacies). Reviewing de novo, *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011), we also reject appellants' claim that Barney, Ltd. lacked standing to petition the district court for payment. NRS 132.390 gave Barney, Ltd. standing to bring its claim because it was Nancy's creditor and because both Trustee Reason and Trustee Utkin accepted its claim.[4] *See* NRS 132.390(1)(c)(8) (explaining that "a creditor of the settlor who has a claim which has been accepted by the trustee" is an interested person as to the trust).

Barney, Ltd. also urges that this appeal is moot because the district court unfroze trust assets such that the current Trustee is now free to approve Barney, Ltd.'s request for payment. *See* NRS 155.123 (explaining that the district court may order "an injunction to preserve and protect [trust] assets"). Although Barney, Ltd. is correct that the district court unfroze Trust assets, it does not explain how this renders the instant appeal moot. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (noting that appellants must "cogently argue, and present relevant authority" to support their claims). And we do not agree that the district court's action rendered this appeal moot, as it has no impact on the propriety of using the Trust assets to pay for alleged non-Trust expenses.

The Trust allows for payment of Barney, Ltd.'s attorney fees

The parties do not dispute that Barney, Ltd. was Nancy's personal creditor rather than a creditor of the Trust, but they disagree as to whether the Trust allows for payment of Barney, Ltd.'s fees. As this dispute involves trust interpretation and there are no disputed facts, our review is de novo. *In re W.N. Connell & Marjorie T. Connell Living Tr.*, 134 Nev. 613, 616, 426 P.3d 599, 602 (2018).

After reviewing the parties' arguments, we disagree with appellants that the Trust does not authorize the payment of Barney, Ltd.'s claim from Trust assets. Barney, Ltd., as a creditor, brought a claim against the settlor of a trust. A creditor may bring a claim against a settlor for the assets of a trust so long as the settlor's interest in the trust is not purely discretionary. NRS 163.5559(1) ("[A] creditor of a settlor may not seek to satisfy a claim against the settlor from

[4]To the extent appellants argue that the Trustees breached their fiduciary duty to protect Trust assets by approving Barney, Ltd.'s request for fees, we decline to reach this argument because it was raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (noting that "[a] point not urged in the trial court . . . will not be considered on appeal").

the assets of a trust if the settlor's sole interest in the trust is the existence of a discretionary power granted to a person other than the settlor . . . ."). Nancy did not have a solely discretionary interest in the Trust. In addition to being the surviving settlor after Raymond's death, Nancy was also a beneficiary of the Trust with both a discretionary interest in receiving support from Trust assets and a mandatory interest as to her possession of the residence and certain personal property of Raymond. Further, the spendthrift provision in the Trust explicitly does not apply to a settlor's interest in the Trust estate.[5] *See generally Matter of Frei Irrevocable Tr. Dated October 29, 1996*, 133 Nev. 50, 55, 390 P.3d 646, 651 (2017) (stating that a valid spendthrift provision prevents a beneficiary's creditors from reaching the trust property (citing NRS 166.120(1))). Accordingly, we conclude that Barney, Ltd.'s claim against the Trust was therefore proper.

Barney, Ltd. satisfied the procedural requirements to file a creditor's claim

We reject appellants' argument that Barney, Ltd. had to file a creditor's claim against the settlor while she was alive. The provisions of NRS 164.025 specifically provide for claims against a settlor to be filed after the death of a settlor. *See* NRS 164.025(3)[6] (requiring a creditor to file a claim against a settlor within 90 days from notice that the settlor has died). We also reject appellants' argument that Barney, Ltd. did not follow the applicable procedure to file a creditor's claim. Upon the death of a settlor, a trustee of a nontestamentary trust may notify known or readily ascertainable creditors that the settlor has died. NRS 164.025(1). A creditor who has a claim against the trust estate must file a claim within 90 days after the first notice. NRS 164.025(2). NRS 164.025(3) reiterates that a person having a claim against a *settlor* must file a claim with the trustee within 90 days of notice. The record before us is unclear as to whether any trustee of the Trust provided formal notice of Nancy's death to ascertainable creditors. Regardless, Barney, Ltd. sent letters to both Trustee Reason and Trustee Utkin within 90 days of Nancy's death notifying them of its claim against her.[7] We conclude that this written notice satisfied the procedural requirements to file a creditor's claim under NRS 164.025(3).

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[5]The settlors were specifically excluded from the spendthrift provision of the Trust. *See* Christian Family Trust Dated October 11, 2016, Article 14, § 14.2 (entitled "Spendthrift Provision" and providing that "[t]his provision shall not apply to a Trustor's interest in the Trust estate").

[6]This statute was amended as of October 1, 2019. *See* 2019 Nev. Stat., ch. 309, § 35, at 1870-71. The references to NRS 164.025 in this opinion are to the previous version.

[7]Nancy passed away on December 14, 2017. Barney, Ltd. sent a letter to Trustee Reason on December 19, 2017, and to Trustee Utkin on January 26, 2018, requesting payment from the Trust for legal work done.

The Trustees had broad discretion to approve Barney, Ltd.'s claim

Although the Trust provides for discretionary payment of the debts of the first settlor to die (Raymond) and is otherwise silent as to the payment of the successor settlor's (Nancy) debts, Trustee Reason and Trustee Utkin had broad authority under the Trust to exercise their discretion in making such a payment.[8] They used this discretionary power to approve payment of Barney, Ltd.'s claim. NRS 163.115(1)(i)[9] generally allows for maintenance of a suit by a beneficiary "[t]o trace trust property that has been wrongfully disposed of and recover the property or its proceeds." Here, however, the Trust language contradicts NRS 163.115(1)(i). Article 12 of the Trust is titled "Exoneration of Persons Dealing with the Trustees" and states as follows:

> No person dealing with the Trustees shall be obliged to see to the application of any property paid or delivered to them or to inquire into the expediency or propriety of any transaction or the authority of the Trustees to enter into and consummate the same upon such terms as they may deem advisable.

Because Trustee Reason and Trustee Utkin used their broad discretionary power to approve payment to Barney, Ltd. as a creditor of the settlor, and because persons dealing with the trustees are exonerated under Article 12 of the Trust, we conclude that the district court did not err by approving the disbursement of Trust funds to pay Barney, Ltd.'s claim.

Accordingly, for the foregoing reasons, we affirm the order of the district court.

Parraguirre and Cadish, JJ., concur.

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[8]*See* Christian Family Trust Dated October 11, 2016, Article 10, § 10.1(t) ("The enumeration of certain powers of the Trustees shall not limit their general powers, subject always to the discharge of their fiduciary obligations, and being vested with and having all the rights, powers and privileges which an absolute owner of the same property would have."); Article 11, § 11.1 ("Every election, determination, or other exercise by Trustees of any discretion vested, either expressly or by implication, in them, pursuant to this Trust Agreement, whether made upon a question actually raised or implied in their acts and proceedings, shall be conclusive and binding upon all parties in interest.").

[9]This statute was amended as of October 1, 2019. *See* 2019 Nev. Stat., ch. 309, § 26, at 1863-64. The references to NRS 163.115 in this opinion are to the previous version.

SILVERWING DEVELOPMENT, A NEVADA CORPORATION; AND J. CARTER WITT, III, AN INDIVIDUAL, APPELLANTS, *v.* NEVADA STATE CONTRACTORS BOARD, RESPONDENT.

No. 79134

December 3, 2020 476 P.3d 461

Appeal from a district court order denying a petition for judicial review in a matter before the Nevada State Contractors Board. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Affirmed.

Hoy Chrissinger Kimmel Vallas P.C. and *Michael S. Kimmel*, Reno; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg*, Reno, for Appellants.

Allison Law Firm Chtd. and *Noah G. Allison*, Las Vegas, for Respondent.

Laxalt & Nomura, Ltd., and *Holly S. Parker*, Reno, for Amici Curiae Builders Association of Northern Nevada, Nevada Builders Alliance, and Reno & Sparks Chamber of Commerce.

Christensen James & Martin and *Evan L. James* and *Laura J. Wolff*, Las Vegas, for Amici Curiae Glaziers Labor-Management Cooperation Committee and Southern Nevada Painters and Decorators.

McDonald Carano LLP and *Philip M. Mannelly* and *Adam D. Hosmer-Henner*, Reno, for Amicus Curiae Construction Trade Associations.

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

OPINION

By the Court, PARRAGUIRRE, J.:

INTRODUCTION

NRS 624.220(2) requires respondent Nevada State Contractors Board to impose a monetary license limit on the amount a contractor can bid on a project. The limit is calculated with respect to "one or more construction contracts on a single construction site or subdivision site for a single client." NRS 624.220(2). Here, the Board lodged a complaint against appellant Silverwing Development and its owner, appellant J. Carter Witt, III (collectively Silverwing), al-

leging that Silverwing had improperly entered into contracts with contractors that exceeded the contractors' license limits in conjunction with several of Silverwing's condominium development projects. A hearing officer determined that "subdivision site" in NRS 624.220(2) refers to the general location of a subdivision, rather than a particular location within a subdivision, such that the multiple contracts that Silverwing entered into with each contractor for work within the condominium development project should be added together to determine whether the contractors' license limits had been exceeded. The hearing officer consequently sustained the Board's complaint and fined Silverwing. Silverwing petitioned for judicial review, which the district court denied.

Silverwing appeals, arguing primarily that "subdivision site" in NRS 624.220(2) is unconstitutionally vague. We conclude that "subdivision site" is commonly used in the planning-and-zoning context to mean the general location of a subdivision. Consequently, that term as it is used in NRS 624.220(2) is not unconstitutionally vague. And because we agree with the Board's construction of that term, we necessarily affirm the district court's denial of Silverwing's petition for judicial review.

FACTS AND PROCEDURAL HISTORY

As indicated, NRS 624.220(2) requires the Board to impose a monetary license limit on the amount a contractor can bid on a particular project. The limit applies with respect to "one or more construction contracts on a single construction site or *subdivision site for a single client*." NRS 624.220(2) (emphasis added). The italicized portion of the statute was added in 1967, *see* 1967 Nev. Stat., ch. 535, § 2, at 1593, and although there is no recorded legislative history regarding the meaning of the added language, both Silverwing and the Board agree that the primary purpose of NRS 624.220(2)'s monetary limit is to ensure that contractors have the financial solvency to pay their subcontractors, as well as to ensure that subcontractors have the financial solvency to complete their projects. In turn, NRS 624.3015(3) prohibits an entity such as Silverwing from knowingly hiring a contractor to perform work in excess of the contractor's license limit.

As these statutes pertain here, Silverwing developed three different condominium projects in Reno and Sparks between 2013 and 2017. For each project, Silverwing recorded a plat map describing the project as a "Condominium Subdivision." Each project comprised multiple, separate buildings, and Silverwing was required to obtain separate building permits and certificates of occupancy for each building. In 2016, the Board received an anonymous complaint that one of Silverwing's contractors was exceeding its NRS 624.220(2) license limit, and one of the Board's investigators, Jeff Gore, began an investigation.

Mr. Gore's investigation revealed that Silverwing had entered into multiple contracts with its contractors within a given condominium development, none of which individually exceeded the contractors' respective license limits, but when added together did exceed those limits. For example, Silverwing entered into five separate contracts with ABC Builders, which had a license limit of $150,000, all for work at the same condominium development. One contract was for roughly $80,000, and the other four were for roughly $147,000 each. Consequently, the combined amount of the five contracts greatly exceeded ABC Builders' $150,000 license limit.

Based on Mr. Gore's findings, the Board filed a complaint against Silverwing alleging that Silverwing had committed 30 of the above-described violations. The Board eventually clarified that it believed each of Silverwing's three condominium development projects was a "subdivision site" under NRS 624.220(2). Silverwing answered the complaint by denying the allegations and arguing primarily that NRS 624.220(2) is unconstitutionally vague in violation of Silverwing's Fifth Amendment due-process rights under the United States Constitution.[1]

A hearing was held before an administrative law judge (ALJ), at which the Board's counsel put forth the Board's position that "subdivision site" in NRS 624.220(2) means a place where a subdivision is, i.e., the location of an entire subdivision. Silverwing's counsel reiterated Silverwing's belief that "subdivision site" is unconstitutionally vague because it could mean the location of an entire subdivision or an indeterminate location within a subdivision. In this respect, Silverwing's owner, Mr. Witt, testified that he viewed each individual building within each condominium development as its own separate "site" since each building required separate building permits and certificates of occupancy. He explained that the reason Silverwing had multiple contracts with a given contractor was because each contract pertained to a specific building.

Following the hearing, the ALJ issued a decision in which he sustained the Board's complaint, concluding that Silverwing violated NRS 624.220(2) by entering into multiple contracts with its contractors within a particular condominium development that, when added together, exceeded the contractors' license limits. He also determined that "subdivision site" is not unconstitutionally vague and that the Board's construction of that term was entitled to deference. The hearing officer imposed a $1,000 per-violation fine against Silverwing.

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[1]Silverwing also argued that NRS 624.220(2) violated the United States Constitution's Equal Protection Clause and that, even if NRS 624.220(2) was constitutional, its condominium development projects were not actually "subdivisions" subject to NRS 624.220(2)'s license limit. Silverwing continues to make these same two arguments on appeal, which we summarily reject.

Silverwing petitioned for judicial review, which the district court denied, concluding that the hearing officer appropriately deferred to the Board's construction of "subdivision site." This appeal followed.

DISCUSSION

"On appeal from a district court order denying a petition for judicial review, this court reviews an appeals officer's decision in the same manner that the district court reviews the decision." *City of Reno v. Yturbide*, 135 Nev. 113, 115, 440 P.3d 32, 34 (2019). "The construction of a statute is a question of law, and independent appellate review of an administrative ruling, rather than a more deferential standard of review, is appropriate."[2] *Maxwell v. State Indus. Ins. Sys.*, 109 Nev. 327, 329, 849 P.2d 267, 269 (1993). Relatedly, "[t]he determination of whether a statute is constitutional is a question of law, which this court reviews de novo." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d 546, 551 (2009).

Silverwing contends that "subdivision site" in NRS 624.220(2) is unconstitutionally vague. "A law may be struck down as impermissibly vague for either of two independent reasons: '(1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited'; or (2) if 'it is so standardless that it authorizes or encourages seriously discriminatory enforcement.'" *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013) (quoting *State v. Castaneda*, 126 Nev. 478, 481-82, 245 P.3d 550, 553 (2010)).

We are not persuaded that either of these standards is met. To the contrary, "subdivision site" has a common meaning in statutes, regulations, and ordinances relating to planning and zoning.[3] *See* 2A

[2]Although we defer to an agency's interpretation of its governing statutes if the interpretation is "within the language of the statute," *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013) (internal quotation marks omitted), Silverwing contends that no deference is owed here because the Board engaged in ad hoc rulemaking, in that the Board never promulgated any regulations defining "subdivision site" and proffered its definition of that term for the first time in the underlying proceedings. We agree with Silverwing that the Board cannot engage in ad hoc rulemaking and that no deference is owed to the Board's interpretation of "subdivision site." *Cf. Pub. Serv. Comm'n of Nev. v. Sw. Gas Corp.*, 99 Nev. 268, 273, 662 P.2d 624, 627 (1983) (recognizing that an agency engages in ad hoc rulemaking when its interpretation of a statute, even though directed at a single entity in the adjudication of a contested case, is of "major policy concern and . . . significance to all [similarly situated entities]"). However, we are not persuaded that the Board needed to formally define "subdivision site" in a regulation to enforce NRS 624.220(2) and its use of that term. *See State v. GNLV Corp.*, 108 Nev. 456, 458, 834 P.2d 411, 413 (1992) (recognizing that an agency need not promulgate a regulation in order to enforce a statute's plain meaning).

[3]Although NRS 624.220(2) does not pertain to planning and zoning, "subdivision site" appears to be most prevalently used in the context of planning and zoning. Nevada's chapter pertaining to planning and zoning, NRS Chapter 278,

Norman J. Singer & Shambie Singer, *Sutherland Statutes & Statutory Construction* § 47:31 (7th ed. 2014) (recognizing the rule of statutory construction that "commercial terms in a statute relating to trade or commerce have their trade or commercial meaning"); *see also Yassin v. Solis*, 108 Cal. Rptr. 3d 854, 859 (Ct. App. 2010) (applying this rule); *Lawyers Sur. Corp. v. Riverbend Bank, N.A.*, 966 S.W.2d 182, 185-86 (Tex. Ct. App. 1998) (same); *Rest. Dev., Inc. v. Cananwill, Inc.*, 80 P.3d 598, 603 (Wash. 2003) (same). And as the Board points out, that common meaning is consistent with the Board's construction of NRS 624.220(2), i.e., "subdivision site" means the general physical location of a subdivision. *See, e.g.*, Md. Code Ann., Envir. § 9-514 (West 2014) (referring to "subdivision site" as the general location of a subdivision); Wash. Rev. Code Ann. § 58.17.120 (West 2004) (same); N.Y. Comp. Codes R. & Regs. tit. 10, § App. 74-A (2020) (same); *see also* Redding, Cal., Code § 17.12.050 (2010) (referring to "subdivision site" as the general location of a subdivision); Iron County, Utah, Code § 16.12.020 (2000) (same); N.J. Admin. Code § 5:21-1.5 (2020) (using "subdivision" and "site" synonymously).

Consistent with this common usage, we conclude that "subdivision site" in NRS 624.220(2) plainly refers to the general physical location of a subdivision.[4] Consequently, the statute provides a person of ordinary intelligence fair notice that it is impermissible to exceed a contractor's license limit in a particular subdivision, and it provides an adequate standard to preclude the Board from enforcing it discriminatorily. The statute is therefore not unconstitutionally vague. *Carrigan*, 129 Nev. at 899, 313 P.3d at 884.

Silverwing contends that construing "subdivision site" to mean an entire subdivision is bad policy because a subdivision could comprise hundreds of homes and that a developer might be able to hire a contractor to do work on only a handful of homes before that contractor's license limit is exceeded. Silverwing also contends that such a construction is unfair because a contractor could do work contemporaneously for multiple developers within a subdivision, which would defeat NRS 624.220(2)'s purpose of ensuring con-

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does not use the phrase "subdivision site" but instead refers simply to a "subdivision." *See generally* NRS 278.320-.5695. Although NRS 278.320 defines "subdivision" by referring to land that is "divided or proposed to be divided into five or more lots, parcels, *sites*, units or plots" (emphasis added), we are not persuaded by Silverwing's argument that the inclusion of "sites" in that definition proves that "subdivision site" as it is used in NRS 624.220(2) means a particular location within a subdivision.

[4]And as the Board points out, Silverwing's own recorded plat maps for the projects refer to each particular project as the "site." Relatedly, Silverwing's plat maps belie Silverwing's contention that it did not intend for its projects to be "subdivisions" for purposes of NRS Chapter 278.

tractors' solvency.[5] While we do not discount these arguments, we believe that they involve policy considerations that would be best addressed by the Legislature and the Board. In light of the foregoing, we affirm the district court's denial of Silverwing's petition for judicial review.

Hardesty and Cadish, JJ., concur.

IN THE MATTER OF THE PETITION OF
MICHAEL LORENZO ARAGON.

MICHAEL LORENZO ARAGON, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 79638

December 3, 2020 476 P.3d 465

Appeal from a district court order denying a petition to seal criminal records. Eighth Judicial District Court, Clark County; Jacqueline M. Bluth, Judge.

Reversed and remanded with instructions.

The Draskovich Law Group and *Robert M. Draskovich*, Las Vegas, for Appellant.

Steven B. Wolfson, District Attorney, Clark County, for Respondent.

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

OPINION

By the Court, Cadish, J.:

In this appeal we consider whether the district court abused its discretion in denying appellant Michael Lorenzo Aragon's petition to seal his criminal records stemming from a guilty plea to open

[5]The Board observes that allowing a contractor to perform work for multiple developers lessens the likelihood that the subcontractor will go out of business if the contractor does not get paid by a particular developer. This is a rational explanation for the Legislature's decision to permit work for multiple developers, which defeats Silverwing's equal-protection argument. *See Flamingo Paradise Gaming*, 125 Nev. at 520, 217 P.3d at 559 ("This court is not limited, when analyzing a rational basis review, to the reasons enunciated for enacting a statute; if *any* rational basis exists, then a statute does not violate equal protection." (emphasis added)).

or gross lewdness, a gross misdemeanor. The district court denied Aragon's petition, concluding that the underlying offense related to a crime against a child, and thus the records could not be sealed under NRS 179.245(6) (2017)[1] (providing that records of crimes against a child or sexual offenses are not sealable). We hold that the district court abused its discretion in denying Aragon's petition, as misdemeanor open or gross lewdness is not an offense for which the records cannot be sealed. Therefore, Aragon is entitled to the presumption in favor of sealing criminal records under NRS 179.2445. Because no interested person provided evidence to rebut the presumption, we reverse the district court's order and remand with instructions for the district court to order Aragon's criminal records sealed.

FACTS AND PROCEDURAL HISTORY

Several years ago, the State charged Aragon, via information, with felony sexually motivated coercion of a minor. Aragon entered into a guilty plea agreement with respondent the State of Nevada. Under the plea agreement, Aragon agreed to plead guilty to the charged offense, and the State agreed that upon Aragon's successful completion of probation, Aragon could withdraw that guilty plea and enter a plea of guilty to gross misdemeanor open or gross lewdness instead. Aragon did so, and three years later the State thus charged Aragon, via information, with gross misdemeanor open or gross lewdness, and Aragon entered a plea of guilty. Three years later, Aragon filed a petition to seal his criminal records. The State agreed that the records were eligible for sealing and did not object to the petition. But the district court declined to grant the petition, concluding that the offense was a crime against a child under NRS 179.245(6)(a) and the records therefore were not sealable.

DISCUSSION

We review a district court's decision to grant or deny a petition to seal a criminal record for an abuse of discretion. *State v. Cavaricci*, 108 Nev. 411, 412, 834 P.2d 406, 407 (1992). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Whether the district court committed legal error here turns on the proper construction of NRS 179.245. "We review issues of statutory construction de novo." *Leven v. Frey*, 123 Nev. 399, 402, 168 P.3d 712, 714 (2007). When a

[1]When Aragon filed his petition to seal his criminal record, the 2017 version of NRS 179.245 was controlling. The Legislature subsequently amended NRS 179.245, 2019 Nev. Stat., ch. 633, § 37, at 4405, which became effective on July 1, 2020.

statute's language is plain and unambiguous, we will apply the statute's plain language. *Id*. at 403, 168 P.3d at 715.

NRS 179.245 provides the process that a convicted person may use to seal his or her criminal records. If a convicted person meets all the statutory requirements under NRS 179.245, then he or she is entitled to a rebuttable presumption in favor of sealing the criminal records. NRS 179.2445(1). However, NRS 179.245(6)(a) and (b), respectively, specifically preclude individuals convicted of "[a] crime against a child" or "[a] sexual offense" from filing a petition to seal his or her criminal records "relating to [such] a conviction." As relevant here, "crime against a child" is defined as:

> 1. Kidnapping pursuant to NRS 200.310 to 200.340, inclusive, unless the offender is the parent or guardian of the victim.
> 2. False imprisonment pursuant to NRS 200.460, unless the offender is the parent or guardian of the victim.
> 3. Involuntary servitude of a child pursuant to NRS 200.4631, unless the offender is the parent or guardian of the victim.
> 4. An offense involving sex trafficking pursuant to subsection 2 of NRS 201.300 or prostitution pursuant to NRS 201.320.
> 5. An attempt to commit an offense listed in this section.
> . . . .

NRS 179D.0357 (2013).

Aragon was convicted of the crime of gross misdemeanor open or gross lewdness. This offense is not expressly listed as a "[c]rime against a child" under NRS 179D.0357. Had the Legislature intended to preclude the sealing of criminal records relating to a gross misdemeanor open or gross lewdness conviction, it would have expressly done so by including it in this list of convictions that a defendant may not petition to seal. *See Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) (observing that we "construe statutes to give meaning to all of their parts and language, . . . read[ing] each sentence, phrase, and word to render it meaningful within the context of the purpose of the legislation"); *Galloway v. Truesdell*, 83 Nev. 13, 26, 422 P.2d 237, 246 (1967) (recognizing that, in interpreting statutes, we have consistently applied the rule that "the expression of one thing is the exclusion of another"). With the Legislature having defined a "crime against a child" for purposes of this statute, the court may not independently evaluate the facts to make its own decision about whether the conviction relates to a "crime against a child," but instead must look to the crimes identified in the statute as being precluded from record sealing. Because Aragon's offense is not included in the list of offenses ineligible for record sealing under NRS 179.245(6)(a), we hold that under the statute's plain language, the district court

abused its discretion by finding that Aragon did not meet the statutory requirements for sealing and was not entitled to a rebuttable presumption that his records should be sealed pursuant to NRS 179.2445(1).[2]

Considering that the State did not attempt to rebut the presumption and instead stipulated that Aragon met the statutory requirements to seal his records,[3] and that no other person presented any evidence in rebuttal, the presumption in favor of sealing his criminal records applies and was not rebutted. *See Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 366, 184 P.3d 378, 386 (2008) ("In general, rebuttable presumptions require the party against whom the presumption applies to disprove the presumed fact."). Accordingly, we reverse the district court's order and remand the matter with instructions that the district court grant Aragon's petition to seal his criminal records.

Parraguirre and Hardesty, JJ., concur.