HOWARD SHAPIRO; AND JENNA SHAPIRO, APPELLANTS/CROSS-RESPONDENTS, *v.* GLEN WELT; RHODA WELT; LYNN WELT; AND MICHELLE WELT, RESPONDENTS/CROSS-APPELLANTS.

No. 67363

GLEN WELT; RHODA WELT; LYNN WELT; AND MICHELLE WELT, APPELLANTS, *v.* HOWARD SHAPIRO; AND JENNA SHAPIRO, RESPONDENTS.

No. 67596

February 2, 2017 389 P.3d 262

Consolidated appeals and a cross-appeal from a district court order granting a motion to dismiss complaint based on anti-SLAPP statutes and the awarding of attorney fees and costs. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Affirmed in part, reversed in part, vacated in part, and remanded with instructions.

[Rehearing denied March 31, 2017]

G Law and *Alex B. Ghibaudo*, Las Vegas, for Howard Shapiro and Jenna Shapiro.

Wilson, Elser, Moskowitz, Edelman & Dicker, LLP, and *Michael P. Lowry*, Las Vegas, for Glen Welt, Rhoda Welt, Lynn Welt, and Michelle Welt.

Randazza Legal Group, PLLC, and *Marc J. Randazza*, Las Vegas, for Amici Curiae Nevada Press Association; TripAdvisor, Inc.; and Yelp, Inc.

Before CHERRY, C.J., DOUGLAS and GIBBONS, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we are asked to decide (1) whether NRS 41.637 is unconstitutionally vague, (2) whether statements made in relation to a conservatorship action constitute an issue of public interest under NRS 41.637(4), and (3) whether those statements fall within the scope of the absolute litigation privilege.

We conclude that (1) NRS 41.637 is not unconstitutionally vague; (2) the district court must analyze the statements under guiding principles enunciated in California law to determine if a statement is an issue of public interest; and (3) the district court must conduct a case-specific, fact-intensive inquiry that balances the underlying

principles of the absolute litigation privilege as enunciated by *Jacobs v. Adelson*, 130 Nev. 408, 411, 325 P.3d 1282, 1284 (2014), prior to determining whether a party has met their burden for proving a likelihood of success on the merits. Accordingly, we affirm in part, reverse in part, vacate in part, and remand with instructions.

FACTUAL AND PROCEDURAL BACKGROUND

Appellant Howard Shapiro petitioned a New Jersey court to appoint him as conservator for his father, Walter Shapiro. The respondents, Glen Welt, Rhoda Welt, Lynn Welt, and Michelle Welt, opposed the petition. During the course of the conservatorship matter, Howard received an email from Glen stating that Howard's "actions have been deemed worthy of [his] own website" and declaring that Glen was "personally inviting EVERY one of [Howard's] known victims to appear in court along with other caretakers, neighbors[,] acquaintances[,] and relatives [Howard] threatened." The Welts published a website that contained several allegations regarding Howard's past debts, criminal history, and alleged mistreatment of his father, in addition to Howard's personal information. Further, the website stated that it is "dedicated to helping victims of Howard Andrew Shapiro & warning others" and encouraged any person "with knowledge of Howard A. Shapiro's actions against Walter Shapiro or other illegal acts committed by Howard Shapiro . . . to appear in court."

Howard and Jenna Shapiro filed a complaint in Nevada alleging various causes of action related to the Welts' statements on the website. The Shapiros' causes of action included, among other allegations, defamation per se, defamation, extortion, civil conspiracy, and fraud. The Welts subsequently filed a motion to dismiss pursuant to NRS 41.660, Nevada's anti-SLAPP statute. The Welts argued that the website constituted a good-faith communication in furtherance of the right to free speech in direct connection with an issue of public concern pursuant to NRS 41.637. Citing to NRS 41.637(3) and (4), the Welts argued that the statements on the website were protected as statements made in direct connection with an issue under consideration by a judicial body and as communications made in direct connection with an issue of public interest in a place open to the public or in a public forum.

The district court issued an order granting the Welts' motion to dismiss. The district court concluded that the Welts met their burden to show by a preponderance of the evidence that the Shapiros' complaint was filed in an attempt to prevent a good-faith communication in connection with an issue of public concern. Specifically, the district court concluded that the website was a "communication regarding an ongoing lawsuit concerning the rights of an elderly individual, and a matter of public concern under NRS 41.637(4)." Additionally, the district court concluded that the Shapiros failed

to show a probability that they would prevail on the lawsuit. The district court relied on this court's decision in *Jacobs* to conclude that the Welts' statements would likely be protected by the absolute litigation privilege.

The district court subsequently issued an order granting the Welts' attorney fees. The district court did not explicitly address the Welts' request for an additional award pursuant to NRS 41.670(1)(b).

The Shapiros timely appealed the district court's order granting the Welts' motion to dismiss, the Welts cross-appealed that part of the district court's order denying an additional award pursuant to NRS 41.670(1)(b), and the Welts timely appealed the district court's order denying their motion for attorney fees.

DISCUSSION

Standard of review

This court reviews the constitutionality of a statute and questions of statutory construction de novo. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). Prior to 2013, this court treated special motions to dismiss as motions for summary judgment and therefore reviewed the resulting orders de novo.[1] *See John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009). After 2013, however, with the plaintiff's burden increased to clear and convincing evidence, this court will provide greater deference to the lower court's findings of fact and therefore will review for an abuse of discretion.

Vagueness of NRS 41.637

The Shapiros argue that NRS 41.637 is unconstitutionally vague because the term "good faith" and the phrase "without knowledge of its falsehood" are both vague and inherently contradictory. Though not raised before the district court, we exercise our discretion to address the issue of the statute's constitutionality for the first time on appeal. *See Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 798, 358 P.3d 234, 239 (2015) (stating this court may "consider constitutional issues for the first time on appeal"). In doing so, we disagree with the Shapiros' contention and conclude NRS 41.637 is not unconstitutionally vague.

"Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). In reviewing the statute, "every reasonable construction must be re-

[1]NRS 41.660(3)(a), as enacted in 1997, provided specific instruction to "[t]reat the motion as a motion for summary judgment." In 2013, the Legislature amended NRS 41.660(3)(b) to require the plaintiff establish by clear and convincing evidence his or her probability of prevailing on the merits.

sorted to, in order to save a statute from unconstitutionality." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010).

A statute is unconstitutionally vague if it "(1) fails to provide a person of ordinary intelligence fair notice of what [conduct] is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Id.* at 481-82, 245 P.3d at 553 (internal citations and quotation marks omitted). A facial vagueness challenge to a civil statute requires a showing "that the statute is impermissibly vague in all of its applications." *Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 512, 217 P.3d 546, 553 (2009). However, "[e]nough clarity to defeat a vagueness challenge may be supplied by judicial gloss on an otherwise uncertain statute, by giving a statute's words their well-settled and ordinarily understood meaning, and by looking to the common law definitions of the related term or offense." *Castaneda*, 126 Nev. at 483, 245 P.3d at 553-54 (citations and internal quotation marks omitted).

We conclude that NRS 41.637 is not unconstitutionally vague because the statute provides sufficient notice to a person of ordinary intelligence exactly what conduct is prohibited. We conclude that the term "good faith" does not operate independently within the anti-SLAPP statute. Rather, it is part of the phrase "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." This phrase is explicitly defined by statute in NRS 41.637. Further, the phrase "made without knowledge of its falsehood" has a well-settled and ordinarily understood meaning. The declarant must be unaware that the communication is false at the time it was made. Therefore, we conclude that neither phrase renders NRS 41.637 unconstitutionally vague.

Anti-SLAPP litigation

Under Nevada's anti-SLAPP statutes, a defendant may file a special motion to dismiss if the defendant can show "by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If a defendant makes this initial showing, the burden shifts to the plaintiff to show "with prima facie evidence a probability of prevailing on the claim."[2] NRS 41.660(3)(b). The Shapiros challenge the district court's conclusions that the Welts met their burden because their statements were a "good faith com-

[2]We note that a previous version of the statute was in effect at the time of these proceedings. *See* 2013 Nev. Stat., ch. 176, § 3(3)(b), at 623-24. NRS 41.660(3)(b) was amended by the 2015 Legislature, and the "established by clear and convincing evidence" standard has changed to "demonstrated with prima facie evidence." Here, because these proceedings began prior to the 2015 legislative change, the "clear and convincing evidence" standard is proper.

munication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" under NRS 41.660(3)(a), and that the Shapiros failed to meet their burden by clear and convincing evidence because the Welts' statements are protected by the absolute litigation privilege.

Issue of public interest

The Shapiros argue that the district court erred in granting the Welts' special motion to dismiss pursuant to NRS 41.660 due to an improper analysis of whether the conservatorship action is an issue of public interest under NRS 41.637(4). We agree.

NRS 41.637(4) defines a "[g]ood faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern" as any "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood."

This court has not yet determined what constitutes "an issue of public interest" in the anti-SLAPP context. However, California courts have addressed this question. *See Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015). Because this court has recognized that California's and Nevada's anti-SLAPP "statutes are similar in purpose and language," *John*, 125 Nev. at 752, 219 P.3d at 1281; *compare* NRS 41.637(4), *with* Cal. Civ. Proc. Code § 425.16(e) (West 2016), we look to California law for guidance on this issue.

While California's anti-SLAPP law, similar to Nevada's, provides no statutory definition of "an issue of public interest," California "courts have established guiding principles for what distinguishes a public interest from a private one." *Piping Rock Partners*, 946 F. Supp. 2d at 968. Specifically:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Id. (citing *Weinberg v. Feisel*, 2 Cal. Rptr. 3d 385, 392-93 (Ct. App. 2003)).

We take this opportunity to adopt California's guiding principles, as enunciated in *Piping Rock Partners*, for determining whether an issue is of public interest under NRS 41.637(4). If a court determines the issue is of public interest, it must next determine whether the communication was made "in a place open to the public or in a public forum." NRS 41.637. Finally, no communication falls within the purview of NRS 41.660 unless it is "truthful or is made without knowledge of its falsehood." *Id.*

The district court did not apply the guiding principles enunciated in *Piping Rock Partners* in its analysis of the Welts' statements. Accordingly, we reverse the district court's order and remand for further proceedings. On remand, we instruct the district court to apply California's guiding principles in analyzing whether the Welts' statements were made in direct connection with an issue of public interest under NRS 41.637(4).

Absolute litigation privilege

The Shapiros argue that the district court erred in its application of the absolute litigation privilege test articulated in *Jacobs v. Adelson*, 130 Nev. 408, 325 P.3d 1282 (2014), in this matter. We agree.

"Nevada has long recognized the existence of an absolute privilege for defamatory statements made during the course of judicial and quasi-judicial proceedings." *Id.* at 412, 325 P.3d at 1285.

> This privilege, which acts as a complete bar to defamation claims based on privileged statements, recognizes that certain communications, although defamatory, should not serve as a basis for liability in a defamation action and are entitled to an absolute privilege because the public interest in having people speak freely outweighs the risk that individuals will occasionally abuse the privilege by making false and malicious statements.

Id. at 413, 325 P.3d at 1285 (internal quotation marks omitted). In order for the privilege to apply to defamatory statements made in the context of a judicial proceeding, "(1) a judicial proceeding must be contemplated in good faith and under serious consideration, and (2) the communication must be related to the litigation." *Id.* (internal quotation marks omitted). However, a "[party's] statements to someone who is not directly involved with the actual or anticipated judicial proceeding will be covered by the absolute privilege only if the recipient of the communication is significantly interested in the proceeding." *Fink v. Oshins*, 118 Nev. 428, 436, 49 P.3d 640, 645-46 (2002) (internal quotation marks omitted).

For a statement to fall within the scope of the absolute litigation privilege it must be made to a recipient who has a significant interest in the outcome of the litigation or who has a role in the litigation. *Id.* at 436, 49 P.3d at 645-46; *see also Jacobs*, 130 Nev. at 416, 325 P.3d at 1287. In order to determine whether a person who is not directly involved in the judicial proceeding may still be "significantly interested in the proceeding," the district court must review "the recipient's legal relationship to the litigation, not their interest as an observer." *Jacobs*, 130 Nev. at 416, 325 P.3d at 1287. The review "is a case-specific, fact-intensive inquiry that must focus on and balance the underlying principles of the privilege." *Id.* (internal quotation marks omitted).

Here, the district court failed to conduct a case-specific, fact-intensive inquiry that focused on and balanced the underlying principles of the privilege as required by *Jacobs*. Thus, the district court erred in its analysis of the Welts' statements. Accordingly, we reverse the district court's order and remand for further proceedings consistent with this opinion.

CONCLUSION

We first conclude that the district court erred in its analysis of whether the Welts' statements concerned an issue of public interest, and we explicitly adopt the California guidelines, as enunciated in *Piping Rock Partners*, for determining whether an issue is of public interest under NRS 41.637(4). We also conclude that the district court failed to conduct a case-specific, fact-intensive inquiry that focused on and balanced the underlying principles of the absolute litigation privilege as required by *Jacobs*. Therefore, we reverse, in part, the district court's order granting the Welts' special motion to dismiss pursuant to NRS 41.660 and remand with instructions to apply California's guiding principles for determining whether an issue is of public interest under NRS 41.637(4) and, prior to determining whether the Shapiros have met their burden of proving a likelihood of success on the merits, to conduct a fact-intensive inquiry that balances the underlying principles of the absolute litigation privilege as required by *Jacobs*.

Additionally, we affirm that part of the district court's order denying an award under NRS 41.660(1)(b), the subject of the Welts' cross-appeal. Finally, because the district court will conduct further proceedings on this matter, we vacate the district court's order of attorney fees. Based upon our holding, it is not necessary to reach the issue of attorney fees pursuant to NRS 41.670(1)(c), the subject of the Welts' appeal.

Cherry, C.J., and Douglas, J., concur.

JAVIER RIGHETTI, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE MICHELLE LEAVITT, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 70591

February 16, 2017 388 P.3d 643

Original petition for a writ of prohibition or mandamus directing the district court to reinstate a guilty plea and vacate a trial date.

Petition denied.

Phillip J. Kohn, Public Defender, and *Christy L. Craig*, Deputy Public Defender, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Giancarlo Pesci*, Chief Deputy District Attorney, and *Christopher F. Burton*, Deputy District Attorney, Clark County, for Real Party in Interest.

Before the Court En Banc.

OPINION

By the Court, Pickering, J.:

The indictment in this case charged petitioner Javier Righetti with murder under three theories. Without any plea negotiations, Righetti decided to plead guilty to murder, but only to two of the three theories alleged. This strategy, if it worked, would eliminate several of the grounds on which the State relied in seeking the death penalty against Righetti. Although the district court initially accepted the plea, problems arose because the defense did not tell the State, and the State did not understand, that Righetti was not pleading guilty to premeditated murder. After the miscommunication came to light, the district court determined that it had lacked authority to accept the guilty plea because it did not conform to the indictment and the State had not consented to amending it. The district court revoked its acceptance of the guilty plea and set the murder count for trial.

Righetti seeks a writ of prohibition or mandamus, directing the district court to enforce his plea. He maintains that he had the right to plead guilty to fewer than all theories alleged and that to force him to trial on a charge to which he has already pleaded guilty will violate the double jeopardy clauses of the United States and Nevada Constitutions. *See* U.S. Const. amend. V; Nev. Const. art. 1, § 8. We do not agree. When the charging document alleges multiple theories

for a single offense, linking them with "and/or," an accused may not undercut the State's charging decision by pleading guilty to only some of the theories alleged without the State's affirmative consent. The guilty plea was therefore defective and the district court appropriately set it aside. Because jeopardy does not attach to a defective guilty plea, Righetti's trial will not violate constitutional prohibitions against double jeopardy and may proceed.

I.

The grand jury heard evidence that Righetti sexually assaulted a young girl in a tunnel beneath a freeway in Las Vegas, and sexually assaulted, tortured, and killed another young girl some months later near the same tunnel. Based on this evidence the grand jury indicted Righetti for murder, among other felonies, and the State filed a notice of intent to seek the death penalty. The indictment offers three theories to support the murder charge: that the killing was "(1) willful, deliberate, and premeditated, and/or (2) perpetrated by means of torture, and/or (3) committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault."

Initially, Righetti entered a "not guilty" plea. Later, with no plea deal from the State, Righetti filed a written "Motion to Change Plea," supported by a declaration stating that he had "decided to plead guilty to the [indictment] in my case thereby bypassing the guilt phase of my trial and moving to the penalty phase." The motion did not disclose the defense's plan to plead guilty to only two of the three murder theories alleged, thereby abridging the State's proof at the penalty hearing. An on-the-record oral plea canvass followed, where the district court questioned Righetti regarding his understanding of the charges, the rights he was giving up by pleading guilty, and the consequences of his decision. The district court then asked him to give a factual basis for each charge. As for the murder count, the following exchange took place:

> THE COURT: As to Count 10, murder with the use of a deadly weapon, on September 2nd, 2011, in Clark County, Nevada, what did you do that makes you guilty of that offense?
>
> THE DEFENDANT: Well, during the course of the kidnapping, sexual assault, and robbery, I stabbed [A.O.] causing her death.
>
> THE COURT: And did you that—that act was willful, deliberate, and premeditated—it's the other theory—okay, it was perpetrated by means of torture, and/or committed during the perpetration or attempt to perpetration [sic] of robbery and/or kidnapping, and/or sexual assault?
>
> THE DEFENDANT: Yes, Your Honor.
>
> THE COURT: Okay. And you—use the deadly weapon, a knife; is that correct?

THE DEFENDANT: Yes.

THE COURT: Is the State satisfied with that?

THE PROSECUTOR: Yes, Judge.

The district court accepted Righetti's guilty plea and adjudicated him guilty of murder and all other charges.

Five days later, Righetti filed a "Motion to Strike Aggravating Circumstances and Evidence in Aggravation." Citing *McConnell v. State*, 120 Nev. 1043, 102 P.3d 606 (2004), and *Wilson v. State*, 127 Nev. 740, 267 P.3d 58 (2011), Righetti argued that he had only pleaded guilty to two of the theories alleged in the murder charge—the theories that the murder was perpetrated by means of torture and committed during the course of a felony; that he "did not admit to a willful, premeditated, and deliberate killing"; and that this limited the aggravating circumstances the State could use in seeking the death penalty. The State cried foul. It denied knowing about—or agreeing to—a guilty plea that eliminated premeditation and urged the district court to hold Righetti had pleaded guilty to all three theories of murder alleged.

In considering the motion, the district court judge observed that, while she understood Righetti's intentions when he offered his guilty plea, the written record did not establish that the State did. The parties and the district court then looked at the video recording of Righetti's plea canvass to clarify whether, and how, the miscommunication occurred. Apparently, when the district court judge asked Righetti if he had committed a willful, deliberate, and premeditated killing, Righetti's attorney, Christy Craig, interrupted the judge with nonverbal communication the written transcript doesn't capture; Craig and the district court judge make eye contact and Craig shakes her head. The district court judge took this to mean Righetti would be pleading guilty to felony murder and murder by torture but not premeditated murder. When the district court judge asked if the State "was satisfied with that" and the prosecutor replied "[y]es, Judge," the judge believed the State had agreed to Righetti pleading guilty plea to only two of the three theories of murder alleged. But the prosecutor denied having seen the nonverbal communication and averred that he believed Righetti had pleaded guilty to all charges and theories alleged in the indictment. After argument, the district court found that the prosecutor had missed the nonverbal interaction and invited the State to file a motion to set aside the guilty plea.

In its motion to set aside the guilty plea, the State argued that Righetti's right to plead guilty without a negotiation depended on him admitting guilt to the charges *as alleged* in the indictment. The State also accused the defense of trickery amounting to fraud in not forthrightly stating in its motion to change plea or at the plea canvass hearing that Righetti was not pleading guilty to premeditated

murder. The defense responded that the district court accepted the guilty plea knowing it did not conform to the indictment and lacked authority to revoke its acceptance of the plea when the State had not timely objected. Although declining to find fraud, the district court declared it not "fair to hold the State to a burden that the cold record does not reflect" and ruled:

> At this time I'm going to reject the guilty plea, make a finding you do have a statutory right to plead guilty, but you don't have a statutory right to plead guilty and carve out a theory that the State has alleged and limit the State in their penalty hearing. So I'm going to reject the plea.

The district court reset the murder count for trial, and this petition followed.

II.

A.

Some background is helpful to place the legal issues presented by this petition in context. In *McConnell*, we held that if a defendant is found guilty of first-degree murder under a felony-murder theory, the prosecution may not use the same felony underlying the felony-murder as an aggravating circumstance to make him eligible for the death penalty. 120 Nev. at 1069, 102 P.3d at 624. In *Wilson*, we clarified that the rule announced in *McConnell* did not apply where a defendant pleaded guilty to a murder count alleging both felony-murder and premeditated murder. 127 Nev. at 744, 267 P.3d at 60. Righetti interpreted these holdings to create a loophole: If he pleaded guilty to felony-murder but specifically did *not* plead guilty to premeditated murder, his case would fall outside of *Wilson* and he could take advantage of the rule in *McConnell*.[1] But to advance his reading of *McConnell* and *Wilson*, Righetti first had to enter a guilty plea to only two theories of first-degree murder when three were charged. Righetti concluded that so long as he pleaded guilty to the murder *count* he was free to select the *theories* of murder upon which to base his guilty plea, regardless of whether the State consented—the position he advances before this court.

B.

Although the facts of this case are unusual, the legal issues are straightforward. In our adversarial system, the State has an almost exclusive right to decide how to charge a criminal defendant, *Parsons v. Fifth Judicial Dist. Court*, 110 Nev. 1239, 1244, 885 P.2d 1316, 1320 (1994), *overruled on other grounds by Parsons v. State*,

[1]We express no opinion as to the merits of Righetti's interpretation of *McConnell* and *Wilson*.

116 Nev. 928, 936, 10 P.3d 836, 841 (2000); *see also Bordenkircher v. Hayes*, 434 U.S. 357, 364 (1978), which includes the authority to allege that a defendant committed an offense by one or more alternative means, NRS 173.075(2). While a criminal defendant has a statutory right to tender a guilty plea, NRS 174.035(1), he does not have a right to plead guilty à la carte in order to avoid the State's charging decisions. Indeed, we have rejected attempts to do just that, holding that a defendant's statutory right to plead guilty does not entitle him to plead guilty to a lesser-included offense without the State's consent. *Jefferson v. State*, 108 Nev. 953, 954, 840 P.2d 1234, 1235 (1992). To hold otherwise and allow such a plea would be to "undermine[ ] prosecutorial discretion in charging and the state's interest in obtaining a conviction on the other charges, which may be the more 'serious' charges." *State v. Eighth Judicial Dist. Court (Hedland)*, 116 Nev. 127, 138 n.10, 994 P.2d 692, 699 n.10 (2000).

The same logic applies when a defendant seeks to enter a guilty plea to only some of multiple *theories* supporting a charge. *State v. Bowerman*, 802 P.2d 116, 120 (Wash. 1990) (holding that a defendant does not have a right to plead guilty to only one theory of guilt when alternative theories are charged), *disapproved of on other grounds by State v. Condon*, 343 P.3d 357, 365 (Wash. 2015). In either instance, permitting a defendant to enter a guilty plea that does not conform to the charges as alleged in the charging document circumvents the State's charging authority and forces the State to amend the charging document and accept a deal it never offered. *Id*. And permitting a district court to accept such a guilty plea would allow the judiciary to invade a realm where the executive branch maintains almost exclusive control, in violation of separation-of-powers principles. *See* Nev. Const. art. 3, § 1 ("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."); *Sandy v. Fifth Judicial Dist. Court*, 113 Nev. 435, 440, 935 P.2d 1148, 1150-51 (1997) (observing that a district court runs afoul of the separation-of-powers doctrine when it invades the prosecutor's legitimate charging authority).[2]

The State exercised its charging authority in this case by alleging that Righetti was guilty of first-degree murder because the killing

[2]Righetti provides this court with no authority supporting a contrary position. He argues, for example, that he admitted guilt to the most serious charge against him (first-degree murder) and still faces a possible death sentence, and therefore his failure to admit that he committed a willful, deliberate, and premeditated murder did not thwart the State from pursuing more serious charges. But this ignores the fact that the purpose of his maneuver was to block the State from seeking the aggravating circumstances relating to the predicate felonies pursuant to *McConnell*.

was (1) willful, deliberate, and premeditated, and/or (2) committed by means of torture, and/or (3) committed during the perpetration or attempted perpetration of robbery and/or kidnapping and/or sexual assault. Although the phrase "and/or verges on the inelegant when used in general writing," it retains utility as "a formula denoting that the items can be taken either together or as alternatives." *Fowler's Modern English Usage*, at 53 (3d ed. 2000). By using "and/or," the State reserved the right to proceed to trial on any or *all* of the theories alleged. Without the State's consent, or an amendment of the indictment, Righetti could not abridge the State's charging discretion by pleading guilty to fewer than all the theories alleged.

C.

Rejecting, as we do, Righetti's argument that he could plead guilty to two of the three theories alleged without the State's consent, we turn next to his assertion that the State explicitly or implicitly consented to his nonconforming guilty plea, which stands on similarly shaky ground. He first claims that the prosecutors in this case agreed to let him enter his plea fully understanding that he had not admitted guilt to each theory of murder alleged in the indictment. This contention is belied by the record. As the district court found, the transcript does not capture the miscommunication that occurred due to the nonverbal interaction initiated by Righetti's attorney—an interaction the prosecutor did not see. Substantial evidence supports this finding.

Righetti next presses us to hold the State implicitly consented to the nonconforming plea by not timely objecting, whether because the prosecutors were inattentive during the plea canvass or because they did not recognize the legal consequences of his plea. But this rewards and thus incentivizes less than forthright advocacy. Rather than squarely present his untested legal position to the district court and the agents of the State, so it could be developed and argued on the law and the facts, Righetti gave every indication before the plea canvass that he intended to plead guilty to the charges as alleged. Even assuming that the State should have been more alert to his maneuvering, Righetti provides no authority suggesting that a lawyer for a party has a duty to object to a nonverbal interaction he did not observe, and we decline to create one.

Regardless, we agree with the State that there was *no reason* to object because Righetti necessarily admitted that he committed a willful, deliberate, and premeditated murder when he pleaded guilty. Righetti places undue emphasis on the statements he made (or did not make) when asked to give a factual basis for his plea. Soliciting a factual basis is simply one of several ways for a district court to ensure that a defendant is pleading guilty voluntarily and intelligently; it does not operate to limit the charges or theories to which a defendant is admitting his guilt. *State v. Gomes*, 112 Nev. 1473, 1480-81,

930 P.2d 701, 706 (1996) (explaining that although it is "preferable" for the district court to elicit from a defendant an admission that he committed the charged offense, the defendant need only have an understanding of the nature of the charges alleged). Rather, a defendant who pleads guilty without the benefit of a negotiated agreement *necessarily* admits all of the factual and legal elements included in the charging document. *United States v. Broce*, 488 U.S. 563, 570 (1989) ("A guilty plea is more than a confession which admits that the accused did various acts. It is an admission that he committed the crime charged against him." (internal quotations and citations omitted)); *accord United States v. Allen*, 24 F.3d 1180, 1183 (10th Cir. 1994) ("[A] defendant who makes a counseled and voluntary guilty plea admits both the acts described in the indictment and the legal consequences of those acts." (footnote omitted)).

Righetti's contention is similar to one considered and rejected in *United States v. Brown*, 164 F.3d 518 (10th Cir. 1998). In *Brown*, the defendant was charged with offenses relating to conduct that he claimed took place in Germany. *Id*. at 520. He pleaded guilty without a plea agreement and, during his plea canvass, purposefully did not say where he committed the crimes. *Id*. at 521. On appeal, he pointed to his intentional omission and argued that the trial court lacked jurisdiction because he committed his crimes in Germany. *Id*. at 520-21. The Tenth Circuit rejected his argument, explaining that "the indictment alleged his criminal activity occurred within the United States and he admitted as much when he pleaded guilty unconditionally." *Id*. at 521. Here, the indictment alleged that Righetti committed murder under three theories—torture murder, felony-murder, and willful, deliberate, and premeditated murder—and Righetti pleaded guilty to the murder charge alleged in the indictment. Despite his carefully choreographed statements during the plea canvass, Righetti necessarily admitted that he committed the charge as alleged in the indictment by pleading guilty. *See id.* (holding that although "Brown was 'very careful' not to admit any conduct occurred within the United States . . . the strategy failed to realize the unconditional plea admitted all material allegations *already contained*" in the charging document); *see also Broce*, 488 U.S. at 570.

D.

Because Righetti purported to enter a nonconforming guilty plea without the State's consent, express or implicit, the district court lacked the authority to accept it. *See generally Sandy*, 113 Nev. at 440, 935 P.2d at 1150-51; *Cox v. State*, 412 So. 2d 354, 356 (Fla. 1982) (holding that a guilty plea was invalid where state statute precluded a trial court from accepting a plea to a lesser-included offense without the consent of the prosecuting attorney). And, as

Righetti disavows having had any intention of pleading guilty to premeditated murder when he offered his plea, the district court should have rejected it on that basis as well. *See generally Gomes*, 112 Nev. at 1480, 930 P.2d at 706 ("In order to be constitutionally valid, a plea of guilty or nolo contendere must have been knowingly and voluntarily entered." (internal quotation marks omitted)). Thus, the district court acted appropriately when it revoked its acceptance of Righetti's guilty plea before his penalty hearing. *See People v. Bartley*, 393 N.E.2d 1029, 1029 (N.Y. 1979) (recognizing a court's power to revoke its improper acceptance of a plea before sentencing); *People v. Clark*, 70 Cal. Rptr. 324, 326 (Ct. App. 1968) (same); *see also United States v. Britt*, 917 F.2d 353, 358 (8th Cir. 1990) (recognizing that manifest necessity may permit a court to set aside a guilty plea over a defendant's objection).

E.

The question remains whether a trial on charges to which Righetti has already pleaded guilty violates constitutional and statutory provisions prohibiting double jeopardy, entitling Righetti to writ relief. *Compare Jackson v. State*, 128 Nev. 598, 604, 291 P.3d 1274, 1278 (2012) (recognizing that the Double Jeopardy Clause protects a defendant from being prosecuted a second time after a conviction or acquittal), *with Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 701, 220 P.3d 684, 692 (2009) ("A writ of prohibition [may] issue to interdict retrial in violation of a defendant's constitutional right not to be put in jeopardy twice for the same offense."). We hold that it does not, because double jeopardy principles are only implicated where jeopardy has attached, *see Martinez v. Illinois*, 572 U.S. 833, 839 (2014), and jeopardy does not attach where, as here, a defendant's guilty plea is found to be defective, *see People v. Massie*, 967 P.2d 29, 38 (Cal. 1998) (citing authority which holds that jeopardy does not attach to a null and unlawful plea); *Cox*, 412 So. 2d at 356 (holding that jeopardy did not attach where the district court lacked authority to accept the plea).

The Supreme Court's decision in *Ohio v. Johnson*, 467 U.S. 493, 501-02 (1984), is instructive. In *Johnson*, the defendant was charged with offenses ranging from grand theft to murder. *Id*. at 494. Over the State's objection, the trial court accepted guilty pleas to lesser offenses and granted the defendant's motion to dismiss the greater charges based on double jeopardy. *Id*. at 496. The Court held that the Double Jeopardy Clause did not bar the State from pursuing the greater charges, explaining that the Clause's purpose was to protect against "governmental overreaching" and nothing in the text or history of the Clause allowed the defendant to manipulate the plea process and then seek judicial protection. *Id*. at 502 ("Notwithstanding the trial court's acceptance of respondent's guilty pleas, respondent should not be entitled to use the Double Jeopardy Clause as a sword

to prevent the State from completing its prosecution on the remaining charges.").

The Double Jeopardy Clause was designed to protect defendants from harassment and oppression, *id*. at 501-02; *Green v. United States*, 355 U.S. 184, 187-88 (1957), not to shield defendants like Righetti from their decisions to gamble on novel interpretations of law which ultimately prove unsuccessful, *see Ricketts v. Adamson*, 483 U.S. 1, 11 (1987) ("[T]he Double Jeopardy Clause does not relieve a defendant from the consequences of his voluntary choice." (internal quotation marks and ellipses omitted)). The prosecution in this case has not overreached; it has simply charged Righetti with several of the most egregious violations of society's laws and seeks to exercise "its right to one full and fair opportunity" to present its case against him. *Johnson*, 467 U.S. at 502. It is entitled to do so.

We therefore deny Righetti's request for writ relief.

CHERRY, C.J., and DOUGLAS, GIBBONS, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

IN THE MATTER OF FREI IRREVOCABLE TRUST DATED OCTOBER 29, 1996.

STEPHEN BROCK, APPELLANT, *v*. PREMIER TRUST, INC.; LAWRENCE HOWE; AND ELIZABETH MARY FREI, RESPONDENTS.

No. 68029

March 2, 2017 390 P.3d 646

Appeal from a district court order allowing payments to be made from a beneficiary's interest in a trust. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

The Law Office of Mike Beede, PLLC, and *Michael N. Beede* and *Zachary Clayton*, Las Vegas, for Appellant.

Gerrard Cox & Larsen and *Douglas D. Gerrard* and *Richard D. Chatwin*, Henderson, for Respondent Premier Trust, Inc.

Hutchison & Steffen, LLC, and *Michael K. Wall*, Las Vegas, for Respondents Lawrence Howe and Elizabeth Mary Frei.

Before the Court EN BANC.[1]

[1]THE HONORABLE LIDIA S. STIGLICH, Justice, did not participate in the decision of this matter.

OPINION

By the Court, CHERRY, C.J.:

In this opinion, we address whether an irrevocable spendthrift trust may be modified by the survivor of two settlors and interested beneficiaries. NRS Chapter 166, which governs spendthrift trusts, does not address this issue. We have, however, allowed modification of irrevocable trusts in certain circumstances. *See, e.g.*, *Ambrose v. First Nat'l Bank of Nev.*, 87 Nev. 114, 119, 482 P.2d 828, 831 (1971) (holding that a sole beneficiary to an irrevocable trust could terminate the trust when the spendthrift clause was not valid and termination did not frustrate the purpose of the trust). Moreover, Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959) provides that an irrevocable trust may be amended by a settlor and beneficiary as long as any nonconsenting beneficiaries' interests are not prejudiced. We adopt Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959) and hold that an irrevocable trust, spendthrift or not, may be modified with the consent of the surviving settlor(s) and any beneficiaries whose interests will be directly prejudiced.

FACTS AND PROCEDURAL HISTORY

Emil Frei, III, and his wife, Adoria, created the Frei Irrevocable Trust in 1996 (1996 Trust). Emil and Adoria each had five children from prior relationships, and all ten children were named equal beneficiaries under the 1996 Trust. The 1996 Trust contained a restraint on alienation clause, making it a spendthrift trust. Shortly after Adoria died in 2009, her son, Stephen Brock, successfully petitioned to modify the trust with Emil's consent (2009 modification). The petition proposed to alter the language controlling distribution of the trust property, granting any beneficiary the right to compel distribution of his or her share of the trust. Specifically, the proposed language provided in pertinent part:

> Upon an election in writing by any child of ours delivered to our Trustee, the trust share set aside for such child shall forthwith terminate and our Trustee shall distribute all undistributed net income and principal to such child outright and free of the trust.

All of Stephen's siblings and step-siblings were notified of the modification petition, and none objected. Because no interested party objected, the district court granted Stephen's petition to modify the trust. Subsequently, Premier Trust, Inc., became the co-trustee of the 1996 Trust.

In 2010, Stephen settled several lawsuits that Emil and his children had brought against him for alleged mismanagement of an alternate family trust (2010 settlement). Before agreeing to the settlement, Stephen conferred with counsel and responded to the district court's oral canvassing. In the settlement, Stephen denied

any wrongdoing, but he agreed to pay $415,000 through monthly payments to the alternate family trust. Stephen also agreed to pledge his interest in the 1996 Trust as security for his payment obligation. Stephen made only one $5,000 payment to the alternate family trust.

After Emil died in 2013, the other nine beneficiaries requested and received their shares of the 1996 Trust funds. Stephen was the only beneficiary who did not receive his share. The trustees of the alternate trust demanded that Premier use Stephen's share of the 1996 Trust to pay his 2010 settlement debt. Premier made three $100,000 payments before Stephen demanded that it stop. Stephen then filed the underlying petition to construe the terms of the 1996 Trust, compel repayment of the $300,000 Premier paid out on his behalf, and to remove Premier as trustee. The district court denied Stephen's petition, finding that: (1) Stephen was the only beneficiary whose interest was affected; (2) the initial intent of the two settlors was to treat their children as equal beneficiaries, and to allow Stephen to renege on his promise would disadvantage the other nine children; (3) the settlement money was to repay money that would benefit the other beneficiaries of the 1996 Trust; and (4) Emil and the other children relied upon Stephen's promise in the 2010 settlement when dismissing the various lawsuits against Stephen.[2]

DISCUSSION

Standard of review

In a probate matter, we "defer to a district court's findings of fact and will only disturb them if they are not supported by substantial evidence." *Waldman v. Maini*, 124 Nev. 1121, 1129, 195 P.3d 850, 856 (2008). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (quoting *Winchell v. Schiff*, 124 Nev. 938, 944, 193 P.3d 946, 950 (2008)). We review legal questions, including matters of statutory interpretation, de novo. *Waldman*, 124 Nev. at 1129, 195 P.3d at 856.

The 2009 modification was a valid modification of the 1996 Trust, and the 2010 settlement is valid

On appeal, Stephen argues that the district court's finding that the 2009 modification and the 2010 settlement were valid modifications of the 1996 Trust was erroneous because irrevocable trusts cannot be terminated and the death of a settlor precludes modification of the trust. In response, respondents argue that the trust modifications

[2]The district court also concluded that Nevada's spendthrift provisions prevent third-party creditors from reaching the funds in trust but do not similarly prevent the settlor or other beneficiaries from reaching the funds. Because we affirm on the grounds that the 1996 Trust was modified in 2009 and the modification invalidated the spendthrift provisions, we do not reach this issue.

were effective and a spendthrift clause becomes invalid once a beneficiary is entitled to compel distribution of his or her share of the trust.

Nevada law does not categorically preclude the modification of an irrevocable trust

Stephen first argues that the word "irrevocable" in an "irrevocable trust" should be interpreted literally so that irrevocable trusts can never be terminated or modified. We disagree.

"A trust is irrevocable by the settlor except to the extent that a right to amend the trust or a right to revoke the trust is expressly reserved by the settlor." NRS 163.004(2); *see also* NRS 163.560 (stating that irrevocable trusts shall not be construed as revocable merely because the settlor is also a beneficiary). We have also held, however, that irrevocable trusts may be amended or terminated in certain circumstances. *See, e.g.*, *Ambrose v. First Nat'l Bank of Nev.*, 87 Nev. 114, 119, 482 P.2d 828, 831 (1971) (holding that a sole beneficiary to an irrevocable spendthrift trust may terminate the trust when the spendthrift clause was invalid and termination did not frustrate the purpose of the trust). Accordingly, as Nevada law provides for modification of irrevocable trusts in limited circumstances, Nevada law does not categorically preclude modifying an irrevocable trust.

Nevada law does not provide that the death of a settlor precludes modification

Stephen also argues that any modification of the 1996 Trust after Adoria's death was categorically forbidden because all settlors must consent to a modification. We disagree.

This is an issue of first impression in Nevada because neither the state's statutes nor this court's caselaw explicitly define when and by whom an irrevocable trust may be modified or if the death of one of several settlors precludes modification altogether.

A trust may be modified, without regard to its original purpose, if the settlor and all beneficiaries consent. Restatement (Second) of Trusts § 338(1) (Am. Law Inst. 1959);[3] *see also In re Green Valley Fin. Holdings*, 32 P.3d 643, 646 (Colo. App. 2001); *Hein v. Hein*, 543 N.W.2d 19, 20 (Mich. Ct. App. 1995). Even if all beneficiaries do not consent, those who desire modification may, together with the settlor, modify the trust unless the nonconsenting beneficiaries' interests will be prejudiced. Restatement (Second) of Trusts § 338(2) (1959); *see also Musick v. Reynolds*, 798 S.W.2d 626, 630 (Tex. App. 1990).

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[3]In the absence of controlling law, we often look to the Restatements for guidance. *See, e.g.*, *In re Aboud Inter Vivos Trust*, 129 Nev. 915, 922, 314 P.3d 941, 945 (2013).

A spendthrift clause, in and of itself, does not prevent modification. Restatement (Second) of Trusts § 338 cmts. d, h (Am. Law Inst. 1959); *see also Hein*, 543 N.W.2d at 20. Moreover, "[t]he restraint on the alienation of the interest by the beneficiary can be removed by the consent of the beneficiary and of the settlor." Restatement (Second) of Trusts § 338 cmt. h (Am. Law Inst. 1959). After considering the parties' arguments and the authorities above, we adopt the Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959), including comments d and h, governing trust modification.

In this case, Emil and Stephen, on their own, and on Adoria's behalf,[4] affirmatively consented to the 2009 modification. Stephen and Emil later consented to the 2010 settlement. Stephen pledged his interest in the 1996 Trust to secure his debt from the 2010 settlement with Emil, the sole surviving settlor. Most importantly, in this case, no other beneficiaries' interests under the 1996 Trust were prejudiced when Stephen modified the 1996 Trust in 2009 and entered into the 2010 settlement.[5] Accordingly, we conclude that both the 2009 modification and the 2010 settlement were valid.[6]

The spendthrift clause became invalid upon modification in 2009

Premier argues that a spendthrift clause becomes invalid once the beneficiary is entitled to compel distribution of his or her share of the trust and that is precisely what happened in the 2009 modification. We agree.

A spendthrift trust is a trust containing a "*valid* restraint on the voluntary and involuntary transfer of the interest of the beneficiary." NRS 166.020 (emphasis added). A settlor does not need any specific language to create a spendthrift trust as long as the intent to do so

[4]Stephen claimed to act through Adoria's power of attorney when he declared that the proposed modification was consistent with her wishes in 2009.

[5]During oral argument, the subject of contingent and unascertained beneficiaries was discussed. Because the parties' briefs and the district court orders addressed only the named beneficiaries of the 1996 Trust, we do not reach the issue of whether unascertained or contingent beneficiaries need to consent prior to modification. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (stating that nonjurisdictional issues not raised in the trial court are waived); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that we need not consider claims not cogently argued in the parties' briefs).

[6]Restatement (Second) of Trusts § 338 (Am. Law Inst. 1959) does not address the material purposes of a trust. Accordingly, we decline to address Stephen's claim that the spendthrift clause was a material purpose of the 1996 Trust. To the extent that Stephen relies upon NRS 164.940(2) to suggest that a settlement agreement is void if it violates a material purpose of a trust, we decline to consider NRS 164.940(2) and its effect on this case, if any, because NRS 164.940(2) was enacted by the 2015 Legislature and does not govern the 2009 modification or the 2010 settlement. *See* 2015 Nev. Stat., ch. 524, § 61, at 3550; S.B. 484, 78th Leg. (Nev. 2015).

is clear in the writing. NRS 166.050. If the spendthrift provisions are valid, neither the beneficiary nor the beneficiary's creditors may reach the property within the trust. NRS 166.120(1).[7] Furthermore, the beneficiary cannot dispose of trust income or pledge the trust estate in any legal process. NRS 166.120(3).

Once a beneficiary is entitled to have the trust principal conveyed to him or her, however, any spendthrift protection becomes invalid. Restatement (Second) of Trusts § 153(2) (Am. Law Inst. 1959). The beneficiary does not need to actually exercise the right of distribution, only possess it. *See In re Estate of Beren*, 321 P.3d 615, 622 (Colo. App. 2013).

In this case, the 2009 modification did not place any limitation on the ability of a beneficiary to compel the distribution of his or her share of the principal and income. Thus, as of the 2009 modification, Stephen and the other beneficiaries possessed an immediate right to compel distribution, and any spendthrift protections became invalid. Accordingly, the spendthrift protection became invalid in 2009, and Stephen's agreement to use his share of the 1996 Trust as security for payment in the 2010 settlement constituted consent to using his portion of the trust corpus to pay his debt in the event he failed to make payments pursuant to the 2010 settlement.

The district court properly determined that Stephen was estopped from arguing that he lacked the power to modify the trust in this case

Stephen also argues that the district court erred in applying judicial estoppel. The district court concluded that judicial estoppel prevented Stephen from arguing that the terms of the 1996 Trust forbade him from using his share to secure the 2010 settlement. Stephen argues that judicial estoppel should not apply because he only adopted his prior position due to a mistake and because his 2010 attorney forced him to agree to the settlement agreement. We are not persuaded by Stephen's argument.

Judicial estoppel is a principle designed to "guard the judiciary's integrity," and "a court may invoke the doctrine at its own discretion." *Marcuse v. Del Webb Communities, Inc.*, 123 Nev. 278, 287, 163 P.3d 462, 469 (2007). It is a doctrine that applies "when a party's inconsistent position [arises] from intentional wrongdoing or an attempt to obtain an unfair advantage." *Id.* at 288, 163 P.3d at 469 (internal quotation marks omitted). "Whether judicial estoppel applies is a question of law that we review de novo." *Deja Vu Showgirls v. State, Dep't of Taxation*, 130 Nev. 711, 716, 334 P.3d 387, 391 (2014).

[7]The 2009 Legislature amended NRS 166.120 to remove an exception to the spendthrift rule allowing voluntary alienation in specific circumstances inapplicable to this case. *See* 2009 Nev. Stat., ch. 215, § 59, at 802; S.B. 287, 75th Leg. (Nev. 2009).

"[O]ne of [judicial estoppel's] purposes is to prevent parties from deliberately shifting their position to suit the requirements of another case concerning the same subject matter." *Vaile v. Eighth Judicial Dist. Court*, 118 Nev. 262, 273, 44 P.3d 506, 514 (2002). "[A] party who has stated an oath in a prior proceeding, as in a pleading, that a given fact is true may not be allowed to deny the same fact in a subsequent action." *Id.* (internal quotation marks omitted).

When considering a claim of judicial estoppel, Nevada's courts look for the following five elements:

> (1) the same party has taken two positions; (2) the positions were taken in judicial or quasi-judicial administrative proceedings; (3) the party was successful in asserting the first position (i.e., the tribunal adopted the position or accepted it as true); (4) the two positions are totally inconsistent; and (5) the first position was not taken as a result of ignorance, fraud, or mistake.

Marcuse, 123 Nev. at 287, 163 P.3d at 468-69 (internal quotation marks omitted). All five elements are necessary to sustain a finding of judicial estoppel. *Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009).[8]

The first four elements of judicial estoppel are not at issue. First, Stephen has clearly adopted two different positions regarding his ability to modify the trust after Adoria's death. Second, Stephen asserted his prior position in a judicial proceeding with his 2009 petition. Third, Stephen successfully asserted his prior position because the district court approved his 2009 petition. Fourth, Stephen's two positions are entirely inapposite—first he asserted that the trust could be modified after Adoria's death, and now he asserts that it cannot. Accordingly, the judicial estoppel claim turns on the fifth factor: whether Stephen was acting under ignorance, fraud, or mistake when he took his first position in the 2009 petition for modification, and again in the 2010 settlement when he agreed to use his portion of the 1996 Trust corpus as security.

A client who relies on bad legal advice from otherwise competent counsel does not satisfy the burden of demonstrating a mistake to defeat an estoppel claim. *See Cannon-Stokes v. Potter*, 453 F.3d 446, 449 (7th Cir. 2006) (citing *United States v. Boyle*, 469 U.S. 241 (1985)); *see also Something More, LLC v. Weatherford News, Inc.*, 310 P.3d 1106, 1108 (Okla. Civ. App. 2013). The remedy for detrimentally relying on bad legal advice is a malpractice suit against the attorney, rather than trying to invalidate an agreement with a prior adversary. *Cannon-Stokes*, 453 F.3d at 449.

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[8]*Delgado* invalidated the provision in *Mainor v. Nault*, 120 Nev. 750, 765, 101 P.3d 308, 318 (2004), which indicated that it was unnecessary to satisfy all five elements of judicial estoppel, and the provision in *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 668, 918 P.2d 314, 317 (1996), which indicated that changing one's position is all that is necessary.

Stephen claims that he was previously mistaken about whether he and Emil could modify the 1996 Trust after Adoria's death. He also claims that the alleged mistake was made in good faith. The record demonstrates, however, that Stephen was represented by competent counsel when petitioning to amend the trust in 2009 and when securing the 2010 settlement with his interest in the trust. Furthermore, before Stephen was allowed to assent to the settlement in 2010, the trial judge orally canvassed him. The canvas demonstrates that Stephen understood the terms of the settlement agreement. The record also indicates that after reaching the 2010 settlement setting forth installment payments, Stephen made only the initial payment before failing to meet his remaining obligation. Thus, Stephen's argument that he acted based on a mistake, much less a good-faith mistake, is unpersuasive. Instead, it appears that Stephen was attempting to obtain an unfair advantage over parties to the 2010 settlement by using his interest in the 1996 Trust as security, failing to make payments, and then arguing that a modification he sought was invalid in an attempt to escape the consequences of his failure to make payments under the 2010 settlement.

Stephen's claim that estoppel should not apply because he entered into the settlement under duress is also unpersuasive. Stephen took the same position (that he could modify the 1996 Trust despite Adoria's passing) in 2009 as he did in 2010, and he does not claim that he was under duress in 2009. Moreover, if Stephen's 2010 attorney was truly abusive, that is not a reason to deny his siblings their bargained-for benefit of the 2010 settlement.

In this case, all five elements required to sustain a claim of judicial estoppel are satisfied. Stephen is not permitted to amend the 1996 Trust when it suits him, pledge his interest to repay his siblings for his alleged misconduct, and later change his position when his share is used to cover his failure to pay as he had previously agreed. Accordingly, we affirm the district court's use of judicial estoppel in this case.[9]

The district court properly determined that Premier did not breach its fiduciary duty

Stephen finally argues that Premier breached its fiduciary duty when it used Stephen's share of the trust to pay his settlement debt

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[9]The district court cited the invalidated language in *Mainor* in its order but reached the correct result anyway; therefore, we will nonetheless affirm its conclusion. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

The district court also erroneously cited *Vaile* for the proposition that the mistake element only applies to mistakes of law. We, however, did not address the five-element test in *Vaile*, nor did we distinguish between mistakes of fact and mistakes of law. 118 Nev. 262, 286, 44 P.3d 506, 522 (2002). Again, this incorrect interpretation did not lead to an inappropriate conclusion; therefore, we nonetheless affirm the result.

without first obtaining a judgment or even receiving legal process. Stephen further claims that Premier owed him a duty to prevent enforcement of the 2010 settlement because it violated the terms of the 1996 Trust. We disagree.

"[A] 'fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation.'" *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (quoting Restatement (Second) of Torts § 874 cmt. a (1979)). A claim for breach of fiduciary duty "*seeks damages for injuries* that result from the tortious conduct of one who owes a duty to another by virtue of the fiduciary relationship." *Id.* (emphasis added).

In the context of a spendthrift trust, a trustee's ability to make payments from the trust is extremely limited. NRS 166.120(2). A trustee may not make payments to an assignee of the beneficiary, even if that assignment is voluntary, without first commencing an action in court. *Id.* Furthermore, "[t]he trustee of a spendthrift trust is required to disregard and defeat every assignment or other act, voluntary or involuntary, that is attempted contrary to the provisions of this chapter." NRS 166.120(4). In an action under the spendthrift act, however, a beneficiary must "show by clear and convincing evidence that the [trustee] acted . . . knowingly and in bad faith" and "directly caused the damages suffered by the [beneficiary]." NRS 166.170(5).

Because we have already concluded that the spendthrift provisions were invalidated in 2009, Stephen's claim for breach of a fiduciary duty must fail because there was no valid restraint on alienation when Premier made the three payments at issue. Even if the spendthrift clause remained valid, however, Stephen's claim would still fail because he is unable to demonstrate bad faith as Premier relied on the district court's 2009 modification order and the district court's 2010 order approving the settlement when it made the payments at issue.

CONCLUSION

The district court correctly determined that the 2009 modification and 2010 settlement were valid. The district court also correctly determined that Stephen was estopped from arguing to the contrary and that Premier did not breach its duty. Accordingly, we affirm the judgment of the district court.

Douglas, Gibbons, Pickering, Hardesty, and Parraguirre, JJ., concur.

GENEVA M. SIMMONS, INDIVIDUALLY, APPELLANT, *v.*
JESUS MANUEL BRIONES, RESPONDENT.

No. 69060

March 2, 2017 390 P.3d 641

Appeal from a district court order denying a petition for judicial review of an administrative agency determination refusing to suspend a driver's license for failure to pay a judgment. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Bailey Kennedy and *Sarah E. Harmon, Dennis L. Kennedy*, and *Amanda L. Stevens*, Las Vegas; *GEICO Staff Counsel* and *Eric A. Daly*, Henderson, for Appellant.

Cliff W. Marcek, P.C., and *Cliff W. Marcek*, Las Vegas, for Respondent.

Thomas & Springberg, P.C., and *Andrew Thomas*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before HARDESTY, PARRAGUIRRE and PICKERING, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we are asked to determine whether a judgment for attorney fees and costs against an insured driver in an action that arises out of a motor vehicle accident is a "judgment" for purposes of the NRS Chapter 485[1] nonpayment of judgment statutes. Although respondent successfully sued appellant for damages arising out of a motor vehicle accident, he failed during a trial de novo to obtain an award that sufficiently surpassed the amount of damages that he was previously awarded in arbitration; as a result, appellant's attorney fees and costs were assessed against him. We are now asked to determine whether the judgment for these penalty attorney fees and costs constitutes a "judgment . . . upon a cause of action" arising out of the use of a motor vehicle, such that its nonpayment may result in the suspension of driving privileges under NRS 485.302. We conclude that it does not and we thus affirm.

[1]NRS Chapter 485 was amended in 2015 to change the word "accident" to "crash" throughout. 2015 Nev. Stat., ch. 317, § 150.5, at 1621. Because the underlying action was initiated in 2011, we use the language of the statutes as they existed at that time.

FACTS AND PROCEDURAL HISTORY

In August 2010, appellant Geneva Simmons and respondent Jesus Manuel Briones were involved in a motor vehicle accident. Briones filed a complaint against Simmons as a result, asserting negligence and claiming personal injury and property damages. The action was diverted to the mandatory court-annexed arbitration program. The arbitrator found in favor of Briones but reduced Briones' damages award by half, finding Briones 50 percent negligent. Briones requested a trial de novo.

The case was placed in the short trial program, where a jury found in favor of Briones and awarded him damages. The jury also found Briones 50 percent negligent, and his award was reduced by half. Because Briones' award failed to exceed the arbitration award by 20 percent, Briones was liable for Simmons' attorney fees and costs under NAR 20(B)(2)(a) (providing that when "the party requesting the trial de novo fails to obtain a judgment that exceeds the arbitration award by at least 20 percent of the award, the non-requesting party is entitled to its attorney's fees and costs associated with the proceedings following the request for trial de novo").

The short trial judge offset the damages and attorney fees and costs awards and entered a net judgment in favor of Simmons (the Simmons Judgment). After Briones failed to pay the judgment, Simmons notified the Nevada Department of Motor Vehicles (DMV) and requested that Briones' driving privileges be suspended until the judgment was satisfied pursuant to NRS 485.302. The DMV suspended Briones' driving privileges.

Briones then requested an administrative hearing to contest the suspension, arguing that NRS 485.302 did not apply because he was never an uninsured driver and the Simmons Judgment was not for personal injury or property damages. The administrative law judge (ALJ) agreed and dismissed and rescinded the suspension. Simmons then filed a petition for judicial review of the decision. The district court denied the petition, agreeing with the ALJ that NRS 485.302 did not pertain to judgments against insured drivers for attorney fees and costs. Simmons appeals, arguing that Briones' driving privileges should have remained suspended because a judgment for attorney fees and costs is within the scope of NRS 485.302.

DISCUSSION

"When reviewing a district court's denial of a petition for judicial review of an agency decision, this court engages in the same analysis as the district court." *Rio All Suite Hotel & Casino v. Phillips*, 126 Nev. 346, 349, 240 P.3d 2, 4 (2010). Specifically, we "review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an

abuse of the agency's discretion." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993). However, issues of statutory construction are questions of law reviewed de novo. *Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013).

Pursuant to NRS 485.301(1),

> [w]henever any person fails within 60 days to satisfy any judgment that was entered as a result of an accident involving a motor vehicle, the judgment creditor or the judgment creditor's attorney may forward to the [DMV] immediately after the expiration of the 60 days a certified copy of the judgment.

Upon receipt of the judgment, the DMV must "suspend the license [and] all registrations . . . of any person against whom the judgment was rendered . . . ." NRS 485.302(1). For purposes of these statutes,

> "[j]udgment" means any judgment which shall have become final by expiration without appeal of the time within which an appeal might have been perfected, or by final affirmation on appeal rendered by a court of competent jurisdiction of any state or of the United States, upon a cause of action arising out of the ownership, maintenance or use of any motor vehicle for damages, including damages for care and loss of services because of injury to or destruction of property, including the loss of use thereof, or upon a cause of action on an agreement of settlement for such damages.

NRS 485.035.

Despite this definition, the parties disagree as to what qualifies as a "judgment" for purposes of the nonpayment of judgment statutes, NRS 485.301 through NRS 485.305. Simmons argues that the nonpayment of judgment statutes unambiguously provide that a "judgment" is any judgment that is causally connected to a motor vehicle accident, including judgments for attorney fees and costs. Therefore, Simmons argues, the DMV was required to suspend Briones' driving privileges for nonpayment of the Simmons Judgment because the Simmons Judgment was entered as a result of the motor vehicle accident cause of action between Simmons and Briones.

Briones argues that the plain language and structure of NRS Chapter 485 indicate that judgments for attorney fees and cost are not within the scope of that chapter, and the purpose behind those laws is to compel payment of damages for injury to person or property caused by uninsured drivers. Therefore, Briones argues, the Simmons Judgment is not a "judgment" within the meaning of the statute because Simmons was awarded attorney fees and costs under arbitration rules and Briones was an insured driver at all times relevant to this case. We agree with Briones.

The Simmons Judgment is not a judgment subject to NRS Chapter 485

"It is well established that when the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). Whether statutory terms are plain or ambiguous depends both on the language used and on the context in which that language is used. *Nev. Dep't of Corr. v. York Claims Servs.*, 131 Nev. 199, 203-04, 348 P.3d 1010, 1013 (2015); *see also Banegas*, 117 Nev. at 229, 19 P.3d at 250 ("[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation.").

Reading NRS Chapter 485 as a whole and considering the purpose of the nonpayment of judgment statutes and the language of NRS 485.035, it becomes apparent that "judgment," for NRS Chapter 485 purposes, does not include judgments entered against plaintiffs exclusively for attorney fees and costs. Rather, a "judgment" is one that is entered based on damages awarded for injury to person or property as a consequence of tortiously maintaining or operating a motor vehicle. NRS Chapter 485 is entitled the Motor Vehicle Insurance and Financial Responsibility Act, NRS 485.010, and it is divided into nine sections, three of which provide sources of indemnification for injured motorists. NRS 485.185 to NRS 485.187 are titled "Insurance Required," and they mandate that all motor vehicle owners and operators must maintain liability insurance for the purpose of paying tort liabilities arising from the use of motor vehicles. NRS 485.190 to NRS 485.300 are titled "Security Following Accident" and require security deposits from uninsured motorists involved in car accidents, penalizing any failure to deposit the required security through the suspension of licenses and registrations. Finally, NRS 485.301 through NRS 485.305, the statutes at issue in this case, are titled "Nonpayment of Judgment" and permit the suspension of driving privileges for the nonpayment of judgments entered as a result of a motor vehicle accident.

We previously examined the purpose and function of the "Insurance Required" and "Security Following Accident" statutes in *State, Department of Motor Vehicles v. Lawlor*, 101 Nev. 616, 707 P.2d 1140 (1985). In *Lawlor*, we explained that the "Insurance Required" statutes operate as a "compulsory insurance law." *Id*. at 618, 707 P.2d at 1141. The purpose of a compulsory insurance law "is to assure that motor vehicles have continuous liability insurance" that is "sufficient to satisfy tort liabilities from the maintenance or use of motor vehicles." *Id*. The "Security Following Accident" statutes, however, operate as a "financial responsibility law." *Id*. at 619, 707 P.2d at 1142. The purpose of a financial responsibility law is not to mandate continuous liability insurance, but rather to ensure financial

coverage for any damages for injuries incurred in past and future accidents, or in other words, to "create[ ] leverage when uninsured drivers are involved in accidents." *Id*. at 619-20, 707 P.2d at 1142.

Although we did not examine the nonpayment of judgment statutes in *Lawlor*, we conclude that these statutes also operate as a financial responsibility law with the purpose of creating leverage when uninsured drivers are involved in accidents and fail to pay judgments entered against them as a result of such accidents. First, NRS 485.301(1) allows a judgment creditor to forward a certified copy of the judgment to the DMV if the judgment debtor fails to satisfy the judgment after 60 days. NRS 485.301(2) provides "[i]f the *defendant* named in any certified copy of a judgment" is a nonresident, the DMV must transmit the judgment to "the state in which the *defendant* is a resident." (Emphases added.) Thus, NRS 485.301 does not contemplate transmission of judgments to the DMV that are entered against a plaintiff.

Second, under NRS 485.304, the judgment is deemed satisfied for NRS Chapter 485 purposes when an amount equaling the Nevada insurance requirements has been paid, even if the amount of the judgment exceeds those limits. *Compare* NRS 485.3091(1) *with* NRS 485.304. As noted above, insurance is generally required in an amount deemed sufficient to cover tort liabilities arising from the use of a motor vehicle.

Finally, NRS 485.302(1) provides that the DMV must suspend a judgment debtor's driver's license upon receipt of the judgment, unless certain conditions provided in NRS 485.302(2) or NRS 485.305 are met. NRS 485.302(2) provides that, if the judgment creditor consents, the judgment debtor may be allowed to retain his driving privileges if he furnishes proof of financial responsibility.[2] Alternatively, NRS 485.305 provides that the DMV shall not suspend a driver's license or registration following the nonpayment of a judgment if the judgment debtor (1) gives proof of financial responsibility, (2) obtains an order permitting the payment of the judgment in installments, and (3) does not fail to pay any installment as specified by such an order.

Thus, in the context of the nonpayment of judgment statutes, proof of financial responsibility is a prerequisite for a judgment debtor to retain or recoup his driving privileges. Furthermore, the nonpayment of judgment statutes provide a mechanism through which judgment creditor plaintiffs who have been injured by uninsured drivers can compel payment from judgment debtor defendants. Therefore, we

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[2]NRS 485.308(1) provides, in part, that

> [p]roof of financial responsibility may be furnished by filing with the [DMV] the written certificate of any insurance carrier authorized to do business in this State certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility.

conclude that, similar to the security following accident statutes, the nonpayment of judgment statutes operate, generally in the context of uninsured drivers, "to insure that damages from accidents are satisfied before driving and registration privileges are restored." *Lawlor*, 101 Nev. at 619, 707 P.2d at 1142.

As explained, NRS Chapter 485 provides several methods of insuring compensation for injuries caused by the tortious use of a motor vehicle. Thus, under the nonpayment of judgments statutes, NRS 485.035 plainly addresses only final judgments for damages "upon a cause of action arising out of the . . . use of any motor vehicle." For example, in a motor vehicle negligence case like this, the damages judgment to which NRS 485.035 refers must be based on the proven cause of action for negligence, that is, a judgment for damages awarded to compensate for the injury caused by the negligent use of a motor vehicle. As attorney fees and costs awarded as a penalty under the arbitration rules cannot be considered damages for negligent use of a motor vehicle, *see, e.g.*, *Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 955-56, 35 P.3d 964, 968-69 (2001) (explaining "the difference between attorney fees as a cost of litigation and attorney fees as an element of damage"), *receded from on other grounds as stated in Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007), NRS 485.035 does not include such judgments entered against plaintiffs exclusively for attorney fees and costs.

Here, Briones was not a judgment debtor for damages awarded as a result of negligent injury to person or property based on his use of a motor vehicle. Rather, Simmons was awarded attorney fees and costs for Briones' failure to obtain a jury award sufficiently higher than the arbitration award pursuant to NAR 20(B)(2)(a). Therefore, Simmons recovered attorney fees and costs pursuant to Nevada's arbitration rules, not as a measure of damages for injuries incurred as the result of a motor vehicle accident. Consequently, we conclude that the Simmons Judgment was not a "judgment" for purposes of NRS 485.035 and its nonpayment cannot be used to suspend Briones' driving privileges under NRS 485.302.

CONCLUSION

Because we conclude that the Simmons Judgment for attorney fees and costs is not a "judgment" for NRS Chapter 485 purposes, as defined in NRS 485.035, the DMV was not required to suspend Briones' driving privileges upon receipt of the Simmons Judgment. Accordingly, we further conclude that the district court properly upheld the ALJ's decision and we thus affirm the district court's order denying the petition for judicial review.

PARRAGUIRRE and PICKERING, JJ., concur.

WESTERN CAB COMPANY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE LINDA MARIE BELL, DISTRICT JUDGE, RESPONDENTS, AND LAKSIRI PERERA; IRSHAD AHMED; AND MICHAEL SARGEANT, INDIVIDUALLY AND ON BEHALF OF OTHERS SIMILARLY SITUATED, REAL PARTIES IN INTEREST.

No. 69408

March 16, 2017 390 P.3d 662

Original petition for a writ of mandamus or prohibition challenging the constitutionality and applicability of Nevada's minimum wage constitutional amendment.

Petition denied.

[Rehearing denied May 18, 2017]

Hejmanowski & McCrea, LLC, and *Malani L. Kotchka*, Las Vegas, for Petitioner.

Leon Greenberg Professional Corporation and *Leon Greenberg*, Las Vegas, for Real Parties in Interest.

Mark R. Thierman, Joshua D. Buck, Michael Balaban, and *Christian Gabroy*, Reno, for Amicus Curiae Nevada National Employment Lawyers Association.

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

Before the Court EN BANC.[1]

OPINION[2]

By the Court, CHERRY, C.J.:

Article 15, Section 16 of the Nevada Constitution, commonly known as the Minimum Wage Amendment (MWA), 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. The MWA itself defines health benefits, and the applicable Nevada Administrative Code provisions define health insurance.

[1]THE HONORABLE LIDIA S. STIGLICH, Justice, did not participate in the decision of this matter.

[2]On June 2, 2016, a panel of this court granted petitioner's motion for a stay of the proceedings below pending resolution of this petition. We now lift that stay upon the filing of this opinion.

In this petition for extraordinary relief, petitioner Western Cab Company (Western) asks this court to consider whether the MWA is federally preempted by either the National Labor Relations Act (NLRA) or the Employee Retirement Income Security Act of 1974 (ERISA) and whether the MWA is unconstitutionally vague. We hold that the MWA is not preempted by the NLRA because the MWA does not usurp the function of the National Labor Relations Board (Labor Board), nor does it intrude upon areas that the United States Congress intended to leave open to the free market, as minimum wage laws are within a state's police powers. The MWA is similarly not preempted by ERISA because it neither references nor connects with ERISA for preemption purposes. Further, the MWA is not unconstitutionally vague because an employer is sufficiently on notice of what benefits it must provide to qualify for the lower wage and the MWA does not promote arbitrary or discriminatory enforcement. Accordingly, we conclude that the MWA is valid and deny the instant petition for a writ of mandamus or prohibition.

FACTS AND PROCEDURAL HISTORY

In 2004 and 2006, the people of Nevada passed Question 6 to amend the Nevada Constitution, adding the MWA. The MWA requires employers to pay their employees one of two possible wage rates, depending on whether the employer offers qualifying health benefits. Nev. Const. art. 15, § 16(A). The MWA allows for an exception to both of these requirements, however, if the employer and employees agree to a lower wage in clear and unambiguous terms through collective bargaining. Nev. Const. art. 15, § 16(B).

In 2012, petitioner Western began requiring its drivers to pay for fuel directly instead of deducting fuel costs from the drivers' paychecks. Real parties in interest Laksiri Perera, Irshad Ahmed, and Michael Sargeant, who formerly drove cabs for Western, filed a complaint against Western alleging, among other things, that when the fuel costs are considered, drivers' wages fall below the constitutionally mandated minimum. Western moved to dismiss the complaint. It claimed, among other things, that not only should fuel costs not be considered when calculating the minimum wage, but the MWA itself is invalid because it (1) is preempted by the NLRA, (2) is preempted by ERISA, and (3) is unconstitutionally vague. The district court denied Western's motion on each of the aforementioned grounds, and Western now petitions this court for extraordinary writ relief.

DISCUSSION

The issues that we are asked to address are as follows: (1) whether the NLRA preempts the MWA; (2) whether ERISA preempts the MWA; (3) whether the MWA is void for vagueness; and (4) wheth-

er, assuming the MWA is valid, fuel costs should be factored into calculating minimum wage compliance. After concluding that our immediate review is warranted, we exercise our discretion to address the validity of the MWA and conclude that it is valid under all three challenges. We decline to exercise our discretion regarding the fuel-calculation issue because that issue depends upon facts that must be developed in the district court.

Considering the facial challenges to the MWA serves the interests of judicial economy and streamlines this case, along with other MWA-related cases currently pending in the district courts

"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." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (footnote omitted); *see* NRS 34.160. "A writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction." *Manuela H. v. Eighth Judicial Dist. Court*, 132 Nev. 1, 5, 365 P.3d 497, 500 (2016); *see* NRS 34.320. The decision to entertain an extraordinary writ petition lies "within this court's discretion." *Libby v. Eighth Judicial Dist. Court*, 130 Nev. 359, 363, 325 P.3d 1276, 1278 (2014). This court generally refuses to issue an extraordinary writ when there is a "plain, speedy and adequate remedy in the ordinary course of law." *Oxbow Constr., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 867, 872, 335 P.3d 1234, 1238 (2014) (internal quotation marks omitted); *see* NRS 34.170; NRS 34.330.

"Generally, we will not exercise our discretion to consider writ petitions challenging district court orders denying motions to dismiss, unless pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action . . . or an important issue of law requires clarification." *Moseley v. Eighth Judicial Dist. Court*, 124 Nev. 654, 658, 188 P.3d 1136, 1140 (2008) (internal quotation marks omitted). The policy behind our hesitation to entertain writ petitions that challenge such orders is to promote judicial economy and avoid "piecemeal appellate review." *Wells Fargo Bank, N.A. v. O'Brien*, 129 Nev. 679, 680, 310 P.3d 581, 582 (2013). As a general principle, we practice judicial restraint, avoiding legal and constitutional issues if unnecessary to resolve the case at hand. *Miller v. Burk*, 124 Nev. 579, 588-89, 188 P.3d 1112, 1118-19 (2008). We may, however, use our discretion to consider writ petitions "when . . . judicial economy is served by considering the writ petition." *Renown Reg'l Med. Ctr. v. Second Judicial Dist. Court*, 130 Nev. 824, 828, 335 P.3d 199, 202 (2014).

The instant petition seeks reversal of a denial of a motion to dismiss. Although we typically deny such petitions, considering this

petition would serve judicial economy and clarify an important issue of law. Three of the four substantive issues in the petition deal with invalidating the MWA. If the MWA is invalid, then the drivers (along with plaintiffs in many other pending cases) have no cause of action.

The petition also asks this court to interpret the MWA and determine whether fuel costs may be deducted from drivers' wages when checking for compliance with the MWA. However, this issue depends upon facts that are not in the record, particularly whether Western and its drivers agreed to the fuel payment system. If so, the collective bargaining exception in the MWA may apply, such that the fuel payment system cannot result in a violation of the MWA. Accordingly, we conclude that unresolved factual matters preclude consideration of the fuel-calculation issue at this stage.

Resolution of the constitutional and preemption issues raised in the petition could dispose of the litigation below along with other MWA cases, and those issues require no additional fact-finding. Accordingly, we will exercise our discretion and consider the constitutional and preemption issues.

The NLRA does not preempt the MWA because minimum wage laws are part of the State's police powers

Western claims that the purpose of the MWA is to help unions and unionized employers compete with nonunionized employers, and therefore, it violates the equitable bargaining process protected by the NLRA, resulting in NLRA preemption. We disagree.

We review whether a federal law preempts a state law de novo because it is a question of law. *Cervantes v. Health Plan of Nev., Inc.*, 127 Nev. 789, 792-93, 263 P.3d 261, 264 (2011). "[P]re-emption should not be lightly inferred [under the NLRA], since the establishment of labor standards falls within the traditional police power of the State." *Fort Halifax Packing Co., Inc. v. Coyne*, 482 U.S. 1, 21 (1987).

Although the NLRA contains no express preemption clause, the Supreme Court of the United States has articulated two types of implied preemption. *Metro. Life Ins. Co. v. Massachusetts*, 471 U.S. 724, 747-48 (1985). The first type is known as *Garmon* preemption, which protects the Labor Board's priority right to initially determine what is or is not regulated under the NLRA. *Id.* at 748 (citing *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236 (1959)).

> "When it is clear or may fairly be assumed that the activities which a State purports to regulate are protected by § 7 of the National Labor Relations Act, or constitute an unfair labor practice under § 8, due regard for the federal enactment requires that state jurisdiction must yield. To leave the States free to regulate conduct so plainly within the central aim of federal

> regulation involves too great a danger of conflict between power asserted by Congress and requirements imposed by state law."

Rosner v. Whittlesea Blue Cab Co., 104 Nev. 725, 726 n.1, 766 P.2d 888, 888 n.1 (1988) (quoting *Garmon*, 359 U.S. at 244). Since *Garmon*, we have recognized that

> "[t]he critical inquiry . . . is not whether the State is enforcing a law relating specifically to labor relations or one of general application but whether the controversy presented to the state court is identical to . . . or different from . . . that which could have been, but was not, presented to the Labor Board."

Id. at 727, 766 P.2d at 889 (quoting *Sears, Roebuck & Co. v. San Diego Dist. Council of Carpenters*, 436 U.S. 180, 197 (1978)). In summary, unless a complaint is the kind that a worker should present to the Labor Board, it is not preempted under *Garmon*. *Id.* The other type of NLRA preemption, known as *Machinists* preemption, prohibits states from regulating conduct that Congress intended to leave open for the free market to determine. *Metro. Life Ins.*, 471 U.S. at 750 (citing *Lodge 76, Int'l Ass'n of Machinists & Aerospace Workers v. Wis. Emp't Relations Comm'n*, 427 U.S. 132 (1976)).

"When a state law establishes a minimal employment standard not inconsistent with the general legislative goals of the NLRA, it conflicts with none of the purposes of the Act." *Fort Halifax Packing*, 482 U.S. at 21 (quoting *Metro. Life Ins.*, 471 U.S. at 757). Such laws do not compel or preclude negotiation, but merely provide a "backdrop" for negotiations. *Id.* (internal quotation marks omitted). The Supreme Court has concluded that

> the mere fact that a state statute pertains to matters over which the parties are free to bargain cannot support a claim of preemption, for "there is nothing in the NLRA . . . which expressly forecloses all state regulatory power with respect to those issues . . . that may be the subject of collective bargaining."

Id. at 21-22 (quoting *Malone v. White Motor Corp.*, 435 U.S. 497, 504-05 (1978)). Minimum wage laws are an authorized use of a state's police power, *MGM Grand Hotel-Reno, Inc. v. Insley*, 102 Nev. 513, 518, 728 P.2d 821, 824 (1986), and thus are not preempted under the NLRA. Because the MWA neither requires nor prohibits collective bargaining or any other activities protected under the NLRA, we conclude that the MWA is not preempted under *Garmon*.

The MWA is not preempted under *Machinists* either. As the Supreme Court of the United States stated in *Metro Life Insurance*, and we recognized in *MGM Grand Hotel-Reno*, minimum wage laws, such as the MWA, are within a state's police powers. Moreover,

the MWA allows employers and employees to collectively bargain around the minimum wage requirements, therefore, as in *Fort Halifax Packing*, the case for validity here is strong. Not only does the MWA not enter a field occupied by the NLRA, it explicitly allows the NLRA priority.[3] Because the MWA neither intrudes upon collective bargaining nor areas intentionally left unregulated, it is not preempted by the NLRA.

ERISA does not preempt the MWA because the MWA does not affect the types of benefits an employer must provide or force employers to provide benefits at all

Western argues that ERISA was designed to cover the field of employee benefits and, therefore, any state regulation of benefits or anything related thereto is preempted. We disagree.

When starting an ERISA preemption analysis, courts should presume "that Congress [did] not intend to supplant state law." *N.Y. State Conference of Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 514 U.S. 645, 654 (1995). ERISA's purpose is to protect employee benefit plan participants and set forth specific judicial remedies if necessary. *Cervantes*, 127 Nev. at 793, 263 P.3d at 264-65. ERISA contains a preemption clause that makes clear that regulation of employee benefit plans must remain an exclusively federal matter. *Id.* at 793-94, 263 P.3d at 265. ERISA's preemption clause provides that, with limited exceptions, its provisions "shall supersede any and all State laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a) (2009).

Although the Supreme Court of the United States once held that ERISA's preemption clause was "deliberately expansive," *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987), it has since narrowed the scope, holding that to preempt every law that incidentally mentions ERISA plans would be too far overreaching. *See Travelers*, 514 U.S. at 655 ("If 'relate to' were taken to extend to the furthest stretch of its indeterminacy, then for all practical purposes pre-emption would never run its course . . . ."). A court should look

[3]Western cites numerous cases as examples of NLRA preemption, but each of those cases dealt with laws that actually affected rights under the NLRA. *See, e.g.*, *Chamber of Commerce of the U.S.A. v. Brown*, 554 U.S. 60, 62, 66 (2008) (holding that California law prohibiting employers that received state funds from using those funds to either promote or deter union organization was preempted by NLRA); *Golden State Transit Corp. v. City of L.A.*, 475 U.S. 608, 619 (1986) ("[A] city cannot condition a franchise renewal in a way that intrudes into the collective-bargaining process."); *Chamber of Commerce of the U.S. v. Bragdon*, 64 F.3d 497, 502 (9th Cir. 1995) (holding that ordinance that set "specific minimum wages and benefits to be paid to" employees of individual crafts or job types impermissibly affected the bargaining process). None of these examples are applicable in this case because, unlike the MWA, they all dealt with laws that had an actual effect on collective bargaining. The MWA, however, creates a minimum wage standard that applies to all employers.

to ERISA's objectives to determine whether a state law is the type that Congress intended to preempt. *Id.* at 656. A court should also look "to the nature of the effect of the state law on ERISA plans." *Cal. Div. of Labor Standards Enf't v. Dillingham Constr., N.A., Inc.*, 519 U.S. 316, 325 (1997). As a result, the Supreme Court has explained, and we have recognized, that "relates to" means that a state law "has a connection with or . . . reference to" an ERISA plan. *Cervantes*, 127 Nev. at 795, 263 P.3d at 266 (quoting *Dillingham*, 519 U.S. at 324).

"It is well settled that wages are a subject of traditional state concern, and are not included in ERISA's definition of employee welfare benefit plan. Thus, regulation of wages per se is not within ERISA's coverage." *WSB Elec., Inc. v. Curry*, 88 F.3d 788, 791 (9th Cir. 1996) (internal quotation marks omitted). A minimum wage law could, however, be preempted by ERISA if the law "refers to, or has a connection with, employee welfare benefit plans." *Calop Bus. Sys., Inc. v. City of L.A.*, 984 F. Supp. 2d 981, 1002 (C.D. Cal. 2013).

The MWA does not refer to employee welfare benefit plans for the purposes of ERISA preemption

A state law refers to "an ERISA plan when it 'acts immediately and exclusively upon ERISA plans . . . or where the existence of ERISA plans is essential to the law's operation.'" *Cervantes*, 127 Nev. at 795, 263 P.3d at 266 (quoting *Dillingham*, 519 U.S. at 325). State laws do not refer to ERISA plans for the purposes of preemption, however, when they merely "mention[ ] a covered employee welfare benefit plan" or if the law's "text include[s] the word ERISA." *WSB Elec.*, 88 F.3d at 793.

Regarding minimum wage laws, the United States District Court for the Central District of California recently determined that a two-tiered minimum wage law, strikingly similar to the MWA, does not refer to ERISA plans for preemption purposes. *Calop*, 984 F. Supp. 2d at 1002-03. In *Calop*, an employer claimed that Los Angeles' two-tiered living wage ordinance (LWO) referenced ERISA, therefore, it was preempted. *Id.* at 1000. The court recognized that because the scope of ERISA preemption has become limited to state laws that have an actual effect on ERISA plans, the LWO did not refer to ERISA plans for the purposes of preemption. *Id.* at 1005; *see also WSB Elec.*, 88 F.3d at 793-94 (holding that because California's prevailing wage law mentioned ERISA benefits but did "not force employers to provide any particular employee benefits or plans, to alter their existing plans, or to even provide ERISA plans or employee benefits at all," the law did not refer to ERISA and was, therefore, not preempted by it). We agree with the analysis in *Calop* for the purposes of determining whether the MWA is preempted.

The MWA offers employers a choice of paying a $7.25 minimum wage if it offers qualifying health benefits or an $8.25 minimum

wage if it chooses not to offer them. Like in *Calop*, employers are not forced to provide any benefits at all. Moreover, qualifying benefits may be those "that are generally deductible by an employee on his individual federal income tax return," NAC 608.102(1)(a), or "[p]rovide[ ] health benefits pursuant to a Taft-Hartley trust which . . . [q]ualifies as an employee welfare benefit plan [either]: (I) [u]nder the guidelines of the Internal Revenue Service; [or] (II) [p]ursuant to" ERISA, NAC 608.102(1)(b)(2). Finally, even if the employer chooses to offer benefits and chooses to offer those benefits consistent with ERISA plans, the MWA does not alter what the ERISA plan offers.

Accordingly, neither the MWA nor its regulation pursuant to NAC 608.102(1) has an effect on ERISA plans. Therefore, we conclude that the MWA does not refer to ERISA for preemption purposes.

The MWA does not impermissibly connect with ERISA plans

A state law impermissibly connects with ERISA plans when it "mandate[s] employee benefit structures or their administration." *Cervantes*, 127 Nev. at 796, 263 P.3d at 266 (internal quotation marks omitted). We have adopted the Ninth Circuit's four-factor test to determine "whether a state law has a connection with ERISA plans." *Id.* (internal quotation marks omitted). The four factors are:

> "(1) whether the state law regulates the types of benefits of ERISA employee welfare benefit plans;
>
> (2) whether the state law requires the establishment of a separate employee benefit plan to comply with the law;
>
> (3) whether the state law imposes reporting, disclosure, funding, or vesting requirements for ERISA plans; and
>
> (4) whether the state law regulates certain ERISA relationships, including the relationships between an ERISA plan and employer and, to the extent an employee benefit plan is involved, between the employer and employee."

Id. at 796, 263 P.3d at 266 (quoting *Operating Eng'rs Health & Welfare Tr. Fund v. JWJ Contracting Co.*, 135 F.3d 671, 678 (9th Cir. 1998)).

Like *Calop*, the MWA does not regulate the type of benefits that an employer must provide to qualify for the lower minimum wage, nor does it require an employer to provide benefits at all. The MWA merely provides that to qualify for the lower minimum wage, the employer must provide health insurance at a cost to the employee of no more than ten percent of the employee's gross taxable income. Second, the MWA does not require employers to establish or maintain any benefits plan. Third, the MWA does not impose any reporting requirements on employers. Finally, the ultimate choice of whether to provide benefits rests solely with the employers. Accordingly, because none of the four factors have been offended,

we conclude that the MWA does not impermissibly connect with ERISA plans. Moreover, because it neither connects with nor refers to ERISA plans, we hold that the MWA is not preempted by ERISA.

The MWA is not unconstitutionally vague under the United States Constitution or the Nevada Constitution because health benefits are defined within the text of the amendment itself and the related NAC provisions define health insurance

Western argues that the MWA, along with its related NAC provisions, is void for vagueness because a person of ordinary intelligence cannot understand what conduct is prohibited. We disagree.

We review questions of constitutional interpretation de novo. *Lawrence v. Clark Cty.*, 127 Nev. 390, 393, 254 P.3d 606, 608 (2011). Laws "are presumed to be valid, and the burden is on the challenger to make a clear showing of their unconstitutionality." *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007) (internal quotation marks omitted).

"The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013); *see also Edwards v. City of Reno*, 103 Nev. 347, 350, 742 P.2d 486, 488 (1987) (holding that vague laws violate the Due Process Clauses found in both the United States Constitution and the Nevada Constitution). "Civil laws are held to a less strict vagueness standard than criminal laws 'because the consequences of imprecision are qualitatively less severe.'" *Id.* (quoting *Vill. of Hoffman Estates v. Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 499 (1982)). "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." *Id.* (internal quotations omitted).

The MWA provides persons of ordinary intelligence fair notice of what is prohibited

Under the first test, Western alleges that the term "health benefits" is so vague that a person of ordinary intelligence cannot understand what is prohibited. This argument is unpersuasive because "health benefits" is defined in the text of the MWA itself. The MWA defines "health benefits" as "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." Nev. Const. art. 15, § 16(A).

"'Health insurance,'" while not explicitly defined in the text of the MWA, is defined in the applicable portions of the Nevada

Administrative Code. *See* NAC 608.102(1). To qualify for the lower minimum wage, the health insurance offered must either: (1) "[c]over[ ] those categories of health care expenses that are generally deductible by an employee on his individual federal income tax return" or (2) "[p]rovide[ ] health benefits pursuant to a Taft-Hartley trust." *Id.* With the combined guidance of the MWA and NAC 608.102(1), any employer of ordinary intelligence should have adequate notice of what health benefits qualify it to pay the lower minimum wage. *See In re Discipline of Lerner*, 124 Nev. 1232, 1245, 197 P.3d 1067, 1077 (2008) (even if a term in law is vague when standing alone, we will not invalidate the law when the term's meaning is readily perceptible in light of existing authority). Accordingly, the MWA does not fail the first *Carrigan* test.

The MWA does not authorize or encourage seriously discriminatory enforcement

Under the second *Carrigan* test, the MWA would be vague "if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Carrigan*, 129 Nev. at 899, 313 P.3d at 884. Western has put forth no evidence that determining which employers qualify for the lower-tier minimum wage is likely to be enforced arbitrarily or in a discriminatory manner. There is nothing in the record to indicate that those who enforce the MWA would give unionized employers an unfair advantage over nonunion employers or act in any other discriminatory manner. The state enforcement agency would simply need to compare Western's offerings to those specified in NAC 608.102(1) to determine whether Western qualifies for the lower minimum wage. Western fails to demonstrate that the MWA encourages arbitrary or discriminatory enforcement. Because the MWA does not fail either of the two independent *Carrigan* tests, we conclude that the MWA is not void for vagueness.

CONCLUSION

The MWA is not preempted by either the NLRA or ERISA. The MWA is similarly not void for vagueness. Accordingly, we deny Western's petition for extraordinary relief.

Douglas, Gibbons, Pickering, Hardesty, and Parraguirre, JJ., concur.