just the principal amount borrowed, and neither NRS 604A.425 nor NRS 604A.050 is ambiguous. Accordingly, we reverse the district court's order granting summary judgment.[5]

GIBBONS, C.J., and PICKERING, HARDESTY, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO A.L. AND C.B., MINORS.

KEAUNDRA D., APPELLANT, *v.* CLARK COUNTY DEPARTMENT OF FAMILY SERVICES, RESPONDENT.

No. 63311

November 13, 2014 337 P.3d 758

Appeal from a district court order terminating appellant's parental rights as to the minor children. Eighth Judicial District Court, Family Court Division, Clark County; Robert Teuton, Judge.

The supreme court, PARRAGUIRRE, J., held that, since the finding of intentional abuse was based on an improper failure to admit evidence rebutting statutory presumption that child was in need of protection, new trial was required to determine mother's parental rights.

Reversed and remanded.

David M. Schieck, Special Public Defender, and *Melinda E. Simpkins* and *Deanna M. Molinar*, Deputy Special Public Defenders, Clark County, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Ronald L. Cordes*, Chief Deputy District Attorney, Clark County, for Respondent.

1. INFANTS.

The purpose of Nevada's termination of parental rights statute is not to punish parents, but to protect the welfare of children. NRS 128.105.

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[5]The FID argues that Check City has not exhausted its administrative remedies and that this matter does not present a justiciable case or controversy. We disagree. Exhaustion is not required where, as here, the only issue is the interpretation of a statute. *Malecon Tobacco, LLC v. Dep't of Taxation*, 118 Nev. 837, 839, 59 P.3d 474, 475-76 (2002). Additionally, the possibility of a license suspension—a consequence Check City might have faced if it failed to comply with the FID's interpretation of NRS 604A.425—may constitute irreparable harm for the purpose of granting a preliminary injunction, see *Dep't of Bus. & Indus., Fin. Insts. Div. v. Nev. Ass'n Servs., Inc.*, 128 Nev. 362, 369-70, 294 P.3d 1223, 1228 (2012), which would be sufficient to form a justiciable case or controversy, *see Doe v. Bryan*, 102 Nev. 523, 525, 728 P.2d 443, 444 (1986).

2. Infants.
Party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists. NRS 128.105.
3. Infants.
Because the termination of parental rights is an exercise of awesome power that is tantamount to imposition of a civil death penalty, a district court's order terminating parental rights is subject to close scrutiny. NRS 128.105.
4. Infants.
Termination of parental rights must be based on clear and convincing evidence. NRS 128.105.
5. Appeal and Error.
The supreme court reviews the district court's findings of fact for substantial evidence and reviews questions of law de novo.
6. Infants.
To rebut the statutory presumption that termination of parental rights serves the children's best interests, the parent must establish by a preponderance of the evidence that the alleged parental fault does not exist and termination is not in the children's best interests. NRS 128.109.
7. Infants.
Statutory presumption that a child is in need of protection is raised when an expert testifies in a civil proceeding that an injury to a child would not have occurred absent negligence or a deliberate but unreasonable act or failure to act by the person responsible for the welfare of the child. NRS 432B.450.
8. Appeal and Error.
The State confessed error by failing to respond to appellant's argument on appeal. NRAP 31(d).
9. Infants.
In termination of parental rights proceeding, the district court's findings of parental fault, specifically failure of parental adjustment, unfitness, and token efforts, were all premised on mother's failure to comply with a portion of her case plan requiring her to admit to intentionally abusing her child, and, since the finding of intentional abuse was based on an improper failure to admit evidence rebutting statutory presumption that child was in need of protection, a new trial was required to determine mother's parental rights. NRS 128.105, 128.109, 432B.450.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

In this appeal from a district court order terminating parental rights, we are asked to decide whether the district court erred in relying on a juvenile court's determination that a minor child's injury was not accidental, but rather was caused by appellant, the child's birth mother. We conclude that respondent confessed error on this issue. We therefore reverse and remand for a new trial as to appellant's parental rights.

FACTS

Appellant Keaundra D. is the mother of A.L. and C.B., the minor children who are the subject of this proceeding. In April 2010, respondent, the Clark County Department of Family Services (DFS), received an anonymous call through its child abuse hotline alleging that the children's safety was at risk because the parents used illegal drugs, domestic violence was ongoing, and C.B.'s face had recently been burned. At the time, A.L. was six years old and C.B. was one year old.

During an interview with a DFS investigator, Keaundra stated that she was the only adult at home when C.B. was burned. According to Keaundra's trial testimony, A.L. and C.B. were in the master bedroom while she was preparing for work in the attached bathroom. She had recently ironed her clothes and had placed the iron on her dresser. She heard the iron fall and came out to investigate. A.L. told her that C.B. had tried to kiss the iron.

Following this initial contact with DFS, Keaundra moved her family to Louisiana, where her stepfather was stationed with the U.S. Air Force. DFS characterized the move as a flight in an attempt to hide the children from DFS. Upon learning that Keaundra had moved to Louisiana, DFS sought help from U.S. Air Force authorities to gain protective custody of the children. The children were removed from Keaundra, and C.B. was taken to see Dr. Neuman, a physician in Louisiana.

In May 2010, DFS filed a petition for protective custody of C.B. and A.L. under NRS Chapter 432B, alleging that Keaundra had either physically abused or negligently supervised C.B. At a subsequent adjudicatory hearing, the hearing master took testimony from Dr. Mehta, a medical examiner who had reviewed photographs of C.B.'s injuries. Dr. Mehta gave her opinion that the shape of the injury was inconsistent with an accident and that the iron was deliberately held to C.B.'s face. Keaundra offered a report by C.B.'s treating physician, Dr. Neuman, to rebut Dr. Mehta's testimony. The hearing master excluded the report on the ground that the report was not a certified copy. The hearing master found that Keaundra physically abused C.B. and recommended sustaining the abuse and neglect petition on that ground; the allegations concerning drug use and domestic violence were dropped. The juvenile court affirmed the hearing master's recommendation and concluded that the injury was nonaccidental.

In light of these findings, Keaundra received a case plan that required her to maintain stable housing and income, keep in contact with DFS, and complete parenting classes. She was also required to complete a physical abuse assessment and "be able to articulate in dialogue with the Specialist and therapist(s) the sequence of events which result[ed] in physical abuse, as sustained by the Court, and how he/she will be able to ensure that no future physical abuse to [C.B.] occurs." One month after giving Keaundra the case plan, DFS recommended termination of parental rights as the goal for the children. DFS followed this recommendation with a petition to terminate Keaundra's parental rights as to C.B. and A.L.

At her six-month review, DFS reported that Keaundra had completed her parenting classes, maintained housing, held regular jobs, and completed both her assessment and therapy. At that point, the children had been placed with their maternal grandmother in Louisiana, where Keaundra was also living. DFS stated that it was satisfied with Keaundra's progress but nevertheless maintained its recommendation to terminate her parental rights because she had not admitted that she abused C.B., and the case plan required such an admission. DFS later stated at trial that, with such an admission, it would not have sought termination of parental rights.

At the next six-month review, DFS again noted that Keaundra had completed her case plan in all other regards and that she acknowledged that negligence and improper supervision caused C.B.'s injury. Again, DFS maintained its recommendation to terminate parental rights due to Keaundra's refusal to admit that she held the iron to C.B.'s face.

In the meantime, Keaundra moved to South Carolina and was referred to a new therapist, who was in regular contact with a DFS caseworker. At the parental termination trial, the new therapist testified that therapy resulted in a marked change in Keaundra's behavior and demeanor. The therapist saw no signs that she would expect to see in an abusive parent. She noted that despite signs of depression and anxiety at the start of therapy, Keaundra's demeanor had substantially changed over the course of treatment and her risk to reoffend was low.

Following the trial, the district court issued a decision terminating Keaundra's parental rights as to C.B. and A.L. The district court relied on the hearing master's findings, as affirmed by the juvenile court, that Keaundra was at fault for C.B.'s injuries and that his injuries were not accidental. Because Keaundra was unable to remedy the circumstances, conduct, or conditions leading to C.B.'s removal, the district court terminated her parental rights based on token efforts, failure of parental adjustment, and unfitness. The district court further found that termination was in the children's best interests. Keaundra now brings this appeal.

DISCUSSION

On appeal, Keaundra argues that the hearing master erred in excluding evidence proffered to rebut a statutory presumption and that the district court improperly relied on the hearing master's resulting findings in terminating her parental rights.[1]

[Headnotes 1-5]

"The purpose of Nevada's termination statute is not to punish parents, but to protect the welfare of children." *In re Termination of Parental Rights as to N.J.*, 116 Nev. 790, 801, 8 P.3d 126, 133 (2000). "A party petitioning to terminate parental rights must establish by clear and convincing evidence that (1) termination is in the child's best interest, and (2) parental fault exists." *In re Parental Rights as to A.J.G.*, 122 Nev. 1418, 1423, 148 P.3d 759, 762 (2006). Because the termination of parental rights "is 'an exercise of awesome power' that is 'tantamount to imposition of a civil death penalty,'" a district court's order terminating parental rights is subject to close scrutiny. *Id.* at 1423, 148 P.3d at 763 (quoting *In re N.J.*, 116 Nev. at 795, 8 P.3d at 129). Termination of parental rights must be based on clear and convincing evidence. *In re N.J.*, 116 Nev. at 795, 8 P.3d at 129. This court reviews the district court's findings of fact for substantial evidence. *Id.* We review questions of law de novo. *Awada v. Shuffle Master, Inc.*, 123 Nev. 613, 618, 173 P.3d 707, 711 (2007).

[Headnote 6]

NRS 128.105 provides that a district court may terminate parental rights if it finds that "[t]he best interests of the child would be served by the termination of parental rights" and the parent is unfit, failed to adjust, or only made token efforts to "support or communicate with the child," "prevent neglect of the child," "avoid being an unfit parent," or "eliminate the risk of serious physical, mental or emotional injury to the child." The district court found that DFS established presumptions of token efforts under NRS 128.109(1)(a) and that termination of parental rights was in the best interests of the children under NRS 128.109(2). To rebut NRS 128.109's presumptions, the parent must establish by a preponderance of the evidence that the alleged parental fault does not exist and termination is not in the children's best interests. *In re Parental Rights as to J.D.N.*, 128 Nev. 462, 472, 283 P.3d 842, 849 (2012). According to the district court, Keaundra did not rebut these presumptions. The district court also found clear and convincing evidence of unfitness and failure of parental adjustment. Each of these findings was ultimately derived from the district court's reliance on the hearing master's finding of abuse.

[Headnote 7]

According to NRS 432B.450, a presumption that a child is in need of protection is raised when an expert testifies in a civil pro-

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[1]Keaundra also argues that the district court's sole basis for terminating her parental rights was her refusal to admit intentionally harming her child and that this requirement violated her Fifth Amendment right against self-incrimination. We do not reach this issue because it is not necessary to dispose of this matter.

ceeding that an injury to a child would not have occurred absent "negligence or a deliberate but unreasonable act or failure to act by the person responsible for the welfare of the child." During the NRS Chapter 432B proceedings, Keaundra attempted to rebut the presumption raised by Dr. Mehta's report (concluding that the iron burn was nonaccidental) by introducing the report of Dr. Neuman, who had personally examined C.B. in Louisiana. The hearing master barred admission of this report on the ground that it was not a certified copy.

[Headnote 8]

Keaundra asserts that Dr. Neuman's report was improperly excluded in the juvenile court proceedings, leading the district court to find abuse without hearing material rebuttal evidence. DFS does not address Keaundra's argument on appeal. We conclude, therefore, that DFS has confessed error on this issue. NRAP 31(d); *see also Bates v. Chronister*, 100 Nev. 675, 681-82, 691 P.2d 865, 870 (1984) (concluding that respondent confessed error by failing to respond to appellant's argument).

[Headnote 9]

The district court's findings of parental fault—specifically, failure of parental adjustment, unfitness, and token efforts—were all premised on Keaundra's failure to comply with a portion of her case plan requiring her to admit to intentionally abusing her child. Since the finding of intentional abuse was based on a concededly improper failure to admit evidence rebutting a statutory presumption, a new trial is required to determine Keaundra's parental rights. *See In re N.J.*, 116 Nev. at 804, 8 P.3d at 135 (concluding the district court's refusal to admit evidence rebutting a statutory presumption constituted grounds for a new trial); *see generally In re A.B.*, 128 Nev. 764, 771, 291 P.3d 122, 127 (2012) (holding that a district court may review a hearing master's findings de novo or "may rely on the master's findings when the findings are 'supported by credible evidence and [are] not, therefore, clearly erroneous'" (alteration in original) (quoting *Wenger v. Wenger*, 402 A.2d 94, 97 (Md. Ct. Spec. App. 1979))).

Accordingly, we reverse the district court's termination order as to Keaundra, and we remand this matter for a new trial.[2]

Gibbons, C.J., and Pickering, Hardesty, Douglas, Cherry, and Saitta, JJ., concur.

[2]The district court's order also terminated Christopher B.'s parental rights. He has not filed an appeal in this matter; therefore, our consideration of the issues in this case is limited solely to the termination of Keaundra's parental rights.

IN RE: CAY CLUBS.

DAVID B. CLARK; ANN CLARK; DONALD W. GILLIS; NELL C. GILLIS; PETER GILLIS; MARY PISCITELLI; THOMAS TEDESCO; KENNETH B. RITCHEY; DEBRA A. RITCHEY; MICHAEL GIANFORTE; KYLE SMITH; NANCY HELGESON; RAYMOND D. REED, II; BRYAN SOPKO; CHRISTOPHER T. WILSON; JAY JADEJA; KETAN PATEL; RAJESH PATEL; PARESH SHUKLA; ROSANNO DELARA; RANDALL J. GOYETTE; RITA M. GOYETTE; JOHN THOMPSON; MICHAEL ZARI; MICHAEL CROUCH; ALEX ARRIAGA; MARIUS SMOOK; JAMES MCNEIL; SUZAN MCNEIL-TUSSON; LOLITA ALVAREZ; AND DOLORES CERALVO, APPELLANTS, *v.* JDI LOANS, LLC; JDI REALTY, LLC; AND JEFFREY AEDER, RESPONDENTS.

No. 58176

IN THE MATTER OF CAY CLUBS.

DAVID B. CLARK; ANN CLARK; DONALD W. GILLIS; NELL C. GILLIS; PETER GILLIS; MARY PISCITELLI; THOMAS TEDESCO; KENNETH B. RITCHEY; DEBRA A. RITCHEY; MICHAEL GIANFORTE; KYLE SMITH; NANCY HELGESON; RAYMOND D. REED, II; BRYAN SOPKO; CHRISTOPHER T. WILSON; JAY JADEJA; KETAN PATEL; RAJESH PATEL; PARESH SHUKLA; ROSANNO DELARA; RANDALL J. GOYETTE; RITA M. GOYETTE; JOHN THOMPSON; MICHAEL ZARI; MICHAEL CROUCH; ALEX ARRIAGA; MARIUS SMOOK; JAMES MCNEIL; SUZAN MCNEIL-TUSSON; LOLITA ALVAREZ; AND DOLORES CERALVO, APPELLANTS, *v.* JDI REALTY, LLC; JDI LOANS, LLC; AND JEFFREY AEDER, RESPONDENTS.

No. 59751

December 4, 2014 340 P.3d 563

Petition for en banc reconsideration of a panel opinion in consolidated appeals from a district court summary judgment certified as final under NRCP 54(b) and an order awarding costs. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Condominium purchasers brought action against approximately 40 defendants, including developer and its alleged joint venture partners and their manager, to recover for liability under the partnership-by-estoppel statute, fraudulent misrepresentation about conversion to luxury resort, securities violations, deceptive trade practices, civil conspiracy, and fraudulent conveyances of money. The district court granted in part and denied in part defendants' motions for summary judgment. Purchasers appealed. On petition for reconsideration en banc, the supreme court, SAITTA, J., held in a case of first impression that: (1) partnership by estoppel can arise where the subject of the representation is joint venture, rather than partnership; (2) consent to representation as partner may be manifested either by one's express words or one's conduct; (3) giving credit to actual or apparent partnership is not limited to extension of financial credit, but means giving credence to representation of a partnership by detrimentally relying on the representation; (4) liability based on partnership by estoppel requires a transaction between the claimants and the purported partnership; (5) reliance on representation of partnership or joint venture must be reasonable; (6) claim of partnership by estoppel is not limited to contract claims; (7) factual issues precluded summary judgment for developer and related entities; but (8) manager was not liable on partnership by estoppel theory.

Petition granted; affirmed in part, reversed in part, and remanded.

Lemons, Grundy & Eisenberg and *Alice Campos Mercado* and *Robert L. Eisenberg*, Reno; *Gerard & Associates* and *Robert B. Gerard* and *Ricardo R. Ehmann*, Las Vegas, for Appellants.

Lionel Sawyer & Collins and *Charles H. McCrea, Jr.*, and *Lynda Sue Mabry*, Las Vegas, for Respondents.

Morris Law Group and *Steve L. Morris*, Las Vegas, for Amici Curiae.

1. Appeal and Error.
Arguments concerning issues of statutory interpretation are reviewed de novo.
2. Appeal and Error.
Arguments concerning grant of a summary judgment are reviewed de novo.
3. Statutes.
The supreme court's ultimate goal in interpreting statute is to effectuate Legislature's intent.
4. Statutes.
The supreme court interprets a clear and unambiguous statute pursuant to its plain meaning by reading it as a whole and giving effect to each word and phrase.
5. Statutes.
The supreme court does not look to other sources, such as legislative history, unless a statutory ambiguity requires the court to look beyond the statute's language to discern the legislative intent.
6. Joint Ventures.
A joint venture is a collaboration for profit similar to a partnership, but the collaboration is limited to a specific business objective rather than an ongoing business.
7. Joint Ventures; Partnership.
Statutory partnership by estoppel can arise where the subject of the representation is a joint venture, rather than a partnership. NRS 87.160(1).

8. Partnership.

A partnership by estoppel is created when a person consents to being held out as a partner, or represents himself or herself as a partner, even though no such partnership exists; the term "consent," under statute on partnership by estoppel, may be manifested either by one's express words or one's conduct from which consent can be reasonably implied. NRS 87.160(1).

9. Partnership.

The phrase "given credit," in statute on partnership by estoppel, means giving credence to representation of a partnership by detrimentally relying on the representation, which may include, but is not limited to, the act of extending financial credit to the purported partnership or venture. NRS 87.160(1).

10. Partnership.

Liability based on partnership by estoppel requires a transaction between the claimants and the purported partnership for the claimants to have "given credit" to actual or apparent partnership on faith of representation about status as partner in existing partnership. NRS 87.160(1).

11. Joint Ventures; Partnership.

Liability based on a partnership by estoppel requires that reliance on representation of partnership or joint venture must be reasonable, and the party asserting the partnership-by-estoppel claim is under a duty to ascertain the veracity of the representation. NRS 87.160(1).

12. Partnership.

Partners' joint and several liability for injuries caused by a partner's actions within the ordinary course of partnership's business or with the authority of other partners extends to tortious acts such as fraud. NRS 87.160(1).

13. Partnership.

Application of partnership-by-estoppel statute does not turn on whether the cause of action sounds in contract, but applies to claims based on reliance upon the representations of a partnership or a joint venture and is not limited to contract claims. NRS 87.160(1).

14. Appeal and Error.

In determining whether the district court erred in granting summary judgment, the supreme court resolves whether genuine issues of material fact remain, such that a rational trier of fact could return verdict for the nonmoving party.

15. Judgment.

The party who moves for summary judgment has the burden of showing the absence of genuine issues of material fact.

16. Judgment.

If party moving for summary judgment lacks the burden of persuasion at trial, he or she may satisfy this burden by pointing to an absence of evidence to support the nonmoving party's case.

17. Judgment.

To defeat a motion for summary judgment, the nonmoving party must generally submit admissible evidence to show a genuine issue of material fact.

18. Appeal and Error.

When a party does not object to the inadmissibility of evidence in connection with a summary judgment motion, the issue is waived and otherwise inadmissible evidence can be considered.

19. Evidence.

Parol evidence rule precludes the admission of extrinsic evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous and the contracting parties agree that the written agreement is the final statement of the agreement, but does not bar extrinsic evidence that is offered to explain matters on which the contract is silent so long as the evidence does not contradict the agreement's terms.

20. Evidence; Judgment.

Condominium purchasers' evidence of partnership by estoppel based on representations of a partnership or joint venture was not prohibited by parol evidence rule and could be considered in opposition to summary judgment motion by developer and related entities; although integration clause stated that purchasers did not rely on representations about the property, the language was silent about a partnership. NRS 87.160(1).

21. Judgment.

Luxury resort developer's multiple representations of profit-oriented relationship in marketing materials and website describing relationship with related entities created genuine issue of material fact as to a partnership, or at least a joint venture and, thus, precluded summary judgment on condominium purchasers' claim of partnership by estoppel.

22. Judgment.

Genuine issue of material fact about whether entities related to luxury resort developer consented to representations of a partnership or joint venture precluded summary judgment on condominium purchasers' claim of partnership by estoppel.

23. Judgment.

Genuine issue of material fact as to whether credit was given to purported partnership when condominium purchasers transacted with entity that appeared to be one of many limited liability companies that made up luxury resort development precluded summary judgment on condominium purchasers' claim of partnership by estoppel.

24. Judgment.

Genuine issue of material fact about condominium purchasers' reasonable reliance on the representations of partnership relationship between luxury resort developer and the related entities precluded summary judgment on purchasers' claim of partnership by estoppel.

25. Joint Ventures; Partnership.

Manager of limited liability companies that allegedly were part of partnership by estoppel was not liable to condominium purchasers on partnership-by-estoppel theory in absence of representations of a partnership or joint venture with manager involving conversion of apartment complex into luxury resort. NRS 87.160(1).

Before the Court En Banc.[1]

OPINION

By the Court, Saitta, J.:

On March 6, 2014, a panel of this court issued an opinion examining the partnership-by-estoppel doctrine and affirming in part, reversing in part, and remanding a district court order that determined on summary judgment that the doctrine did not apply. Because this case involves a substantial precedential and public

[1]The Honorable Kristina Pickering, Justice, voluntarily recused herself from participation in the decision of this matter.

policy issue, we now grant en banc reconsideration to consider an issue that the prior opinion did not directly address: whether the partnership-by-estoppel doctrine must be based on a transaction between the complainant and the purported partnership. NRAP 40A(a). We thus withdraw the March 6 opinion and issue this opinion in its place. After considering the necessity of a transaction and the other aspects of establishing a partnership-by-estoppel claim, we affirm in part, reverse in part, and remand.[2]

After purchasing condominiums at a resort named Las Vegas Cay Club, the appellants (hereinafter the purchasers) filed suit against approximately 40 defendants, including Cay Clubs and respondents Jeffrey Aeder; JDI Loans, LLC; and JDI Realty, LLC. The purchasers alleged that: (1) Cay Clubs ran Las Vegas Cay Club, (2) Cay Clubs inflated the condominiums' value by advertising that it would develop Las Vegas Cay Club into a luxury resort, (3) Cay Clubs' marketing materials represented that it was in a partnership with JDI Loans and JDI Realty (collectively, the JDI entities), and (4) the purchasers bought condominiums and engaged in other transactions on the belief that the purported partnership provided the expertise and resources to execute Las Vegas Cay Club's transformation. They claimed that Cay Clubs and others engaged in actionable wrongdoings while abandoning the plan to improve Las Vegas Cay Club and leaving the purchasers with "worthless property." The purchasers asserted that Aeder and the JDI entities were liable for these actionable wrongdoings under NRS 87.160(1)—a statute that codifies the partnership-by-estoppel doctrine. However, Aeder and the JDI entities prevailed on a motion for summary judgment with respect to their liability under NRS 87.160(1) and the other claims asserted against them.

Provided that other conditions are met, NRS 87.160(1) imposes partnership liability on a party where, with the party's "consent[ ]," there is a representation that the party is a "partner" and another party has "given credit" to the purported "partnership." In addressing these consolidated appeals, we clarify the meaning and application of NRS 87.160(1).[3] We conclude that the statute may impose partnership liability where there is a representation of a joint venture rather than a partnership, that the consent required for partnership by estoppel may be manifested expressly or may be fairly implied from the liable party's conduct, that the meaning of the statute's

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[2]MGM Resorts International filed an amicus curiae brief in support of the petition for en banc reconsideration, which the Las Vegas Metropolitan Chamber of Commerce joined.

[3]We also considered NRS 87.4332(1), a similar statute that appears to codify the partnership-by-estoppel doctrine, but because the parties' contentions operate on the implied premise that NRS 87.160(1) is the statute that is applicable to this matter, and because we find that the application of NRS 87.4332(1) would not change the disposition of this opinion, we do not address it further.

phrase "given credit" is not limited to the extension of financial credit, and that the reliance on the representation of a partnership or joint venture must be reasonable. Moreover, the statute may impose partnership liability with respect to any claims that implicate the element of reasonable reliance on which the partnership-by-estoppel doctrine is based. In light of these clarifications, we conclude that the district court erred in granting the JDI entities summary judgment as to their liability under NRS 87.160(1).

FACTS AND PROCEDURAL HISTORY

Based on the purchasers' evidence and allegations below, Cay Clubs appears to be a business that developed and sold condominiums at a resort called Las Vegas Cay Club. As indicated in the purchasers' allegations and Aeder's deposition testimony, Aeder created and managed the JDI entities, which extended financial support for the development of Cay Clubs' properties. The purchasers alleged that they entered into purchase agreements for Las Vegas Cay Club condominiums and engaged in related transactions with Flamingo Palms Villas, LLC, which Cay Clubs allegedly created and controlled. According to their allegations and supporting affidavits, the purchasers engaged in these transactions (1) after reviewing marketing materials, which advertised that Las Vegas Cay Club would be improved and developed into a luxury resort and which represented a partnership between Cay Clubs and the JDI entities; and (2) on the belief that the partnership relationship between Cay Clubs and the JDI entities provided the experience and financial wherewithal to develop the advertised luxury resort.

Believing that Cay Clubs disingenuously abandoned the plan to improve Las Vegas Cay Club and fraudulently took the purchasers' money, the purchasers filed suit against approximately 40 defendants, including Cay Clubs, Aeder, and the JDI entities. The claims included, but were not limited to, fraudulent misrepresentation, securities violations, deceptive trade practices, civil conspiracy, and fraudulent conveyances of money. Additionally, the purchasers pleaded that the JDI entities and Aeder were liable under NRS 87.160(1), Nevada's partnership-by-estoppel statute, for the wrongdoings of Cay Clubs.

After answering the complaint, Aeder and the JDI entities filed a motion for summary judgment. They contended that there was an absence of evidence to support the complaint and that the parol evidence rule and the purchase agreements prevented the purchasers from relying on evidence of representations of a partnership. They maintained that NRS 87.160(1) did not apply to the purchasers' tort-based claims because the statute imposed liability only for claims sounding in contract. They also argued that the statute did not apply to any of the claims because it conditioned liability on the extension of financial credit, which was not extended by the purchasers. Moreover, they maintained that NRS 87.160(1) could not be used to impose liability against Aeder and the JDI entities because the purchasers transacted solely with Flamingo Palms Villas and not with the purported partnership between Cay Clubs, Aeder, and the JDI entities on which their partnership-by-estoppel claim was based.

The purchasers opposed the motion. Submitting additional evidence in support of their complaint, they argued that issues of fact remained with respect to Aeder's and the JDI entities' liability, especially with respect to their liability under NRS 87.160(1). We reserve a more detailed discussion of the purchasers' evidence for our analysis of whether genuine issues of material fact remained with respect to Aeder's and the JDI entities' liability under NRS 87.160(1).

After a hearing, the district court granted the motion for summary judgment in favor of the JDI entities and Aeder upon finding that no genuine issues of material fact remained as to their liability for any of the asserted claims, including the partnership-by-estoppel claim under NRS 87.160(1). In so doing, it specifically noted that a "reference to a 'strategic partner'" in the marketing materials was insufficient for partnership by estoppel.

The order granting summary judgment was later certified as final under NRCP 54(b). In addition, the district court awarded costs to the JDI entities and Aeder. These consolidated appeals followed. A panel of this court issued an opinion affirming in part, reversing in part, and remanding a district court order granting summary judgment. After the panel denied the JDI entities' petition for rehearing, the JDI entities petitioned for reconsideration.

DISCUSSION

The parties' argument on appeal

The parties dispute whether the district court erred in granting summary judgment in favor of Aeder and the JDI entities regarding their liability as putative partners with Cay Clubs under NRS 87.160(1). Modeled after section 16 of the 1914 version of the Uniform Partnership Act (UPA), NRS 87.160(1) codifies the common law partnership-by-estoppel doctrine. *See* 1931 Nev. Stat., ch. 74, § 1, at 112, 116; *see also Facit-Addo*, *Inc. v. Davis Fin. Corp.*, 653 P.2d 356, 359-60 (Ariz. Ct. App. 1982) (providing that Arizona's partnership-by-estoppel statute—which is substantially identical to NRS 87.160(1)—codifies the partnership-by-estoppel doctrine). As long as other conditions are met, NRS 87.160(1) provides that a person may incur partnership liability where there is a holding out of that person as a partner, with the consent of that person being held out, and another person gives credit to the purported partnership upon believing in the representation:

> When a person, by words spoken or written or by conduct, represents himself or herself, or *consents* to another representing him or her to any one, as a partner in an existing partnership or with one or more persons not actual partners, the person is liable to any such person to whom such representation has been made who has, on the faith of such representation, *given credit* to the actual or *apparent partnership*, and if the person has made such representation or consented to its being made in a public manner the person is liable to such person, whether the representation has or has not been made or communicated to such person so giving credit by or with the knowledge of the apparent partner making the representation or consenting to its being made.

(Emphases added.) The parties offer different interpretations of this statute. In so doing, they disagree on the meaning of "partnership," what type of consent must be manifested for liability under the statute, and the meaning of "given credit." Aeder and the JDI entities maintain that NRS 87.160(1) requires a reasonable reliance on the representation of a partnership. They also dispute the statute's applicability to claims that do not sound in contract. Under dissimilar interpretations of NRS 87.160(1), the parties necessarily disagree over whether genuine issues of material fact precluded the district court's grant of summary judgment with respect to Aeder's and the JDI entities' liability under NRS 87.160(1).

[Headnotes 1, 2]

Prior to this appeal, this court lacked the chance to address in any significant depth the partnership-by-estoppel doctrine or NRS 87.160(1)'s meaning. We do so now. Because the arguments concern issues of statutory interpretation and the grant of a summary judgment, we engage in de novo review of the matters raised on appeal. *Cromer v. Wilson*, 126 Nev. 106, 109, 225 P.3d 788, 790 (2010).

NRS 87.160(1)'s meaning

[Headnotes 3-5]

In interpreting NRS 87.160(1), our ultimate goal is to effectuate the Legislature's intent. *Cromer*, 126 Nev. at 109, 225 P.3d at 790. We interpret a clear and unambiguous statute pursuant to its plain meaning by reading it as a whole and giving effect to each word and phrase. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012). We do not look to other sources, such as legislative history, unless a statutory ambiguity requires us to look beyond the statute's language to discern the legislative intent. *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 294, 995 P.2d 482, 485 (2000). Moreover, our interpretation of NRS 87.160(1) is guided by the following rules that the Legislature set out: (1) the law of estoppel applies to NRS 87.160(1), (2) this court is not to apply "[t]he rule that statutes in derogation of the common law are to be strictly construed," and (3) the statutory scheme that contains NRS 87.160(1) "must be interpreted and construed as to effectuate its general purpose to make uniform the law of those states which enact it." NRS 87.040(1)-(2), (4).

The term "partnership" in NRS 87.160(1)

When arguing about the absence or presence of genuine issues of material fact, the parties implicitly raise an issue about the meaning of the statute's term "partnership." They appear to disagree about what type of relationship must be represented for partnership by estoppel: a partnership or a less formal but collaborative profit-oriented relationship, such as a joint venture. Their arguments about the nature of the purported relationship between Cay Clubs, Aeder, and the JDI entities urge us to answer whether partnership by estoppel can be found under NRS 87.160(1) when the subject of the actionable representation is a joint venture rather than a partnership.

[Headnotes 6, 7]

Joint ventures and partnerships are similar but not identical. *Hook v. Giuricich*, 108 Nev. 29, 31, 823 P.2d 294, 296 (1992). "[A] partnership is an association of two or more persons to carry on as co-owners a business for profit . . . ." NRS 87.060(1). A joint venture is a similar collaboration for profit, but the collaboration is limited to a specific business objective rather than an ongoing business. *Hook*, 108 Nev. at 31, 823 P.2d at 296. Despite the distinction, Nevada caselaw provides that the principles of partnership law apply to joint ventures. *Radaker v. Scott*, 109 Nev. 653, 658, 855 P.2d 1037, 1040 (1993). Other jurisdictions have concluded the same, and they have applied the partnership-by-estoppel doctrine to impose liability for the representation of a joint venture. *See, e.g.*, *Daynard v. Ness, Motley, Loadholt, Richardson & Poole, P.A.*, 290 F.3d 42, 56 (1st Cir. 2002) (indicating that partnership by estoppel applies to joint ventures); *John's, Inc. v. Island Garden Ctr. of Nassau, Inc.*, 269 N.Y.S.2d 231, 236 (Dist. Ct. 1966) (concluding that the rules that apply to partnerships, including partnership by estoppel, apply to joint ventures), *aff'd sub nom. C.J. Zonneveld & Sons, Inc. v. Island Garden Ctr., Inc.*, 280 N.Y.S.2d 34, 34 (App. Term 1967); *Allan Constr. Co. v. Parker Bros. & Co.*, 535 S.W.2d 751, 754-55 (Tex. Civ. App. 1976) (applying partnership by estoppel to conclude that a party was liable as a joint venturer). Likewise, we conclude that the partnership-by-estoppel doctrine, as defined by NRS 87.160(1), applies where the subject of the representation is a joint venture rather than a partnership.

The term "consents" in NRS 87.160(1)

[Headnote 8]

Partnership by estoppel may arise where a party, "by words spoken or written or by conduct, represents himself or herself, or consents to another representing him or her to any one, as a partner . . . with one or more persons not actual partners." NRS 87.160(1). As to the term "consents," the parties disagree over the extent to which NRS 87.160(1) requires a manifestation of consent. Whereas Aeder and the JDI entities argue as though the statute requires an explicit communication of consent, the purchasers argue that consent may be found where it can be implied from one's conduct.

Consent may be "express[ed]" by words or "implied" by conduct. *Black's Law Dictionary* 323 (8th ed. 2004). Also, the comment to the UPA rule on which NRS 87.160(1) is based explains consent by directing the reader to caselaw which provides that consent may be implied when the facts make the implied conclusion reasonable. Unif. P'ship Act § 16, 6 U.L.A. 661-62 cmt. (1914) (explaining consent by citing to *Morgan v. Farrel*, 20 A. 614, 615-16 (1890) (indicating that consent may be reasonably implied)); *see also Anderson Hay & Grain Co. v. Dunn*, 467 P.2d 5, 7 (N.M. 1970) (concluding that the consent to being represented as a partner may be implied by conduct if the conduct would lead a reasonable person to that conclusion). Thus, we conclude that consent under NRS 87.160(1) may be manifested either by one's express words or one's conduct from which consent can be reasonably implied.

The phrase "given credit" in NRS 87.160(1)

[Headnote 9]

The parties disagree on the type of credit that must be extended for partnership by estoppel. The purchasers contend that NRS 87.160(1)'s phrase "given credit" means a claimant's belief in and detrimental reliance on the representation of a partnership's existence. Aeder and the JDI entities respond that this statutory language conditions partnership liability on the extension of financial credit to the purported partnership.

"Credit" has been defined as the "[b]elief" or "trust" in another person, the "availability of funds . . . under a letter of credit," or the "ability to borrow money." *Black's Law Dictionary* 396 (8th ed. 2004). Hence, because it lends itself to more than one reasonable interpretation, the term "credit" presents an ambiguity that invites us to refer to other authorities to resolve the statute's meaning. *See State Farm*, 116 Nev. at 294, 995 P.2d at 485. Unfortunately, NRS 87.160(1) lacks legislative history that addresses the meaning of "given credit." However, because the Legislature directed this court to construe NRS 87.160(1) in uniformity with other jurisdictions that have adopted the UPA, we look to other jurisdictions for guidance. *See* NRS 87.040(4).

Aeder and the JDI entities direct this court to one salient authority, *Bertin Steel Processing, Inc. v. U.S. Steel Corp.*, No. 1:02 CV 1669, 2005 WL 2205332, at *14 (N.D. Ohio Sept. 6, 2005), wherein the phrase "given credit" was limited to financial credit.[4] But numerous jurisdictions have either rejected that limited reading of the phrase or have read "given credit" to mean giving credence to a representation of a partnership by detrimentally relying on the representation. *See, e.g.*, *Pinnacle Port Cmty. Ass'n v. Orenstein*, 872 F.2d 1536, 1540-41 (11th Cir. 1989) (providing that Florida courts have not limited partnership by estoppel to matters involving financial credit and construing credit to mean detrimental reliance on the purported partnership); *Glazer v. Brookhouse*, 471 F. Supp. 2d 945, 948-49 (E.D. Wis. 2007) (concluding that the Wisconsin Supreme Court has not limited the phrase "given credit" to financial credit and that the phrase means to detrimentally rely on the representation of a partnership); *see also McElwee v. Wharton*, 19 F. Supp. 2d 766, 772 (W.D. Mich. 1998) (construing Michigan's partnership-by-estoppel statute to apply to a party who detrimentally relies on a representation of a partnership by contracting with the purported partnership); *Four Star Capital Corp. v. Nynex Corp.*, 183 F.R.D. 91, 105-06 (S.D.N.Y. 1997) (acknowledging that federal and New York courts have interpreted "given credit" to mean financial credit or a reliance on the existence of a represented partnership); *Sitchenko v. DiResta*, 512 F. Supp. 758, 761-62 (E.D.N.Y. 1981) (holding that one gave credit to a purported partnership by entering into an employment agreement in reliance on the representation of a partnership). These authorities indicate that the phrase "given cred-

[4]Aeder and the JDI entities also rely on the following authorities and unpublished decisions for their contention that the phrase "given credit" is limited to the extension of financial credit, but they overlook that none of these authorities expressly articulates such a limited definition of the phrase: *Milano ex rel. Milano v. Freed*, 64 F.3d 91, 98 (2d Cir. 1995) (without defining the phrase "given credit," concluding that there was an absence of evidence to show that the plaintiffs relied on a representation of a partnership); *Stochastic Decisions, Inc. v. DiDomenico*, 995 F.2d 1158, 1169 (2d Cir. 1993) (without defining the phrase "given credit," concluding that claimant failed to assert a viable partnership-by-estoppel argument for failure to assert that any credit was given); *Barmes v. IRS*, 116 F. Supp. 2d 1007, 1014 n.4 (S.D. Ind. 2000) (without defining the phrase "given credit," concluding that credit was not given); *Davies v. Gen. Tours, Inc.*, No. CV 970057425S, 1999 WL 712917, at *2 (Conn. Super. Ct. Aug. 31, 1999) (not defining "given credit" but determining that the facts did not show "any sort of credit" was given), *aff'd*, 774 A.2d 1063, 1072-73, 1078 (Conn. App. Ct. 2001); *Howick v. Lakewood Vill. Ltd. P'ship*, No. 10-08-20, 2009 WL 1110829, at *8 (Ohio Ct. App. Apr. 27, 2009) (not defining "given credit" but using a definition of credit to which the parties agreed).

it" is one that is reasonably understood as not being limited to the extension of financial credit.

In arguing that the phrase "given credit" only concerns extension of financial credit, Aeder and the JDI entities emphasize that the revised 1997 version of the UPA replaced the phrase "given credit" with "enter[ ] into a transaction." Unif. P'ship Act § 308(a), 6 U.L.A. 128 (1997). They contend that this revision *expands* the UPA's partnership-by-estoppel language to matters that do not involve financial credit, such that NRS 87.160(1)—which was based on the pre-1997 version of the UPA—must be construed to apply only to matters that involve financial credit. However, a comment to this revision suggests otherwise, as it explains that the revised language "*continues* the basic principles of partnership by estoppel from UPA Section 16." Unif. P'ship Act § 308(a), 6 U.L.A. 128, 129 cmt. (1997) (emphasis added). Thus, the revision does not expand but, instead, clarifies and continues the partnership-by-estoppel principles that the drafters attempted to encapsulate. *See id.* Additionally, it provides indicia of the drafters' understanding that the partnership-by-estoppel doctrine applies to matters beyond those that implicate the extension of financial credit. *See id.*

To adopt Aeder's and the JDI entities' construction of the phrase "given credit" would severely limit who could utilize the partnership-by-estoppel doctrine. Under their interpretation, NRS 87.160(1) would only benefit claimants with the financial resources and expertise to extend financial credit to a purported partnership. There are claimants beyond this cohort that face the risk of incurring an actionable injury because of the representation of a purported partnership. *See, e.g.*, *Sitchenko*, 512 F. Supp. at 760-62. Thus, we do not read NRS 87.160(1)'s phrase "given credit" to only mean the extension of financial credit. Rather, as it appears in NRS 87.160(1), "given credit" means giving credence to the representation of a partnership by detrimentally relying on the representation, which may include, but is not limited to, the act of extending financial credit to the purported partnership or venture.

[Headnote 10]

However, although there need not be an extension of credit for the partnership-by-estoppel doctrine to apply, there must nonetheless be a transaction between the claimants and the purported partnership. This transaction requirement is illustrated by the 1997 version of the UPA, which replaces "given credit" with "enter[ ] into a transaction." As stated above, the revised language of the 1997 version of the UPA merely clarifies and continues the partnership-by-estoppel principles encapsulated in previous versions of the UPA, on which NRS 87.160(1) was based. *See* Unif. P'ship Act § 308(a), 6 U.L.A.

128, 129 cmt. (1997). Thus, NRS 87.160(1) requires a transaction between the claimants and the purported partnership for the claimants to have "given credit" under the statute. The existence of or nature of any transaction between the purchasers and the purported partnership is a factual question to be resolved by the court below.

The reasonable reliance requirement

We now turn to a prerequisite for partnership by estoppel that is not explicitly stated in NRS 87.160(1). Generally, jurisdictions provide that the partnership-by-estoppel doctrine conditions liability on the plaintiff having reasonably relied on the representation of partnership, which often involves an exercise of due diligence to ascertain the facts. *See, e.g.*, *Bragg v. Johnson*, 229 A.2d 497, 498 (Del. Super. Ct. 1966) (providing that plaintiff must have reasonably believed in the existence of a partnership to prevail on a partnership-by-estoppel claim); *Anfenson v. Banks*, 163 N.W. 608, 620-21 (Iowa 1917) (collecting cases where the common law definition of partnership by estoppel included the requirement of an exercise of due diligence to know the truth regarding the existence of a partnership); *Gamle Robinson Co. v. Carousel Props.*, 688 P.2d 283, 288 (Mont. 1984) (explaining Montana's partnership-by-estoppel statute—which resembles NRS 87.160(1)—and concluding that it requires one to have reasonably relied on the representation of a partnership by making a reasonable inquiry about the representation's veracity); *Wis. Tel. Co. v. Lehmann*, 80 N.W.2d 267, 270 (Wis. 1957) (indicating that the reliance on the representation of a partnership must be reasonable for partnership by estoppel). Because Nevada caselaw lacks a significant discussion of the partnership-by-estoppel doctrine, it has not addressed the reasonable reliance requirement that other jurisdictions uphold.

[Headnote 11]

However, the Legislature has provided that the law of estoppel applies to NRS 87.160(1). NRS 87.040(2). Moreover, in a similar matter, we extended equitable estoppel's reasonable reliance requirement to a party's claim that the apparent authority of an agent was the basis for forming a contract. *Great Am. Ins. Co. v. Gen. Builders, Inc.*, 113 Nev. 346, 352, 934 P.2d 257, 261 (1997). Likewise, we conclude that the reasonable reliance requirement, including the performance of due diligence to learn the veracity of the representation of partnership, that other jurisdictions impose for partnership by estoppel is one that NRS 87.160(1) includes as well. As indicated by its language, NRS 87.160(1) seeks to afford relief to those who incur an injury upon believing and detrimentally relying on the representation of a partnership. Without the reasonable reliance requirement, the partnership-by-estoppel doctrine would lack an objective limitation to prevent it from being abused by people who knew, or reasonably should have known, that the representation of the partnership or joint venture was untrue. This factual determination remains to be considered on remand.

NRS 87.160(1)'s applicability to claims that do not sound in contract

The parties disagree about whether partnership-by-estoppel liability under NRS 87.160(1) may be imposed where the claim for which that theory of liability is pleaded does not sound in contract. Aeder and the JDI entities argue that NRS 87.160(1) imposes partnership liability only for causes of action that sound in contract. The purchasers respond that the statute imposes liability for any cause of action that conditions liability on the reliance upon the representation of a partnership.

[Headnote 12]

In a partnership, the partners are jointly and severally liable for injuries caused by a partner's actions within the ordinary course of the partnership's business or with the authority of other partners. NRS 87.130; NRS 87.150(1). This liability extends to tortious acts such as fraud. *See Radaker v. Scott*, 109 Nev. 653, 658, 660, 855 P.2d 1037, 1040, 1041 (1993) (providing that in the context of a joint venture—governed by the laws of partnerships—a joint venturer is liable for another joint venturer's fraudulent act that is completed within the scope of the joint venture's enterprise). We recognize that even though the partnership-by-estoppel doctrine provides for the same liability that would arise from a partnership, which would include tort liability, other jurisdictions have concluded that the doctrine only imposes liability under claims that sound in contract. *See, e.g.*, *Roethke v. Sanger*, 68 S.W.3d 352, 360 (Ky. 2001) (providing in dicta that its partnership-by-estoppel statute only provides for contractual liability); *Pruitt v. Fetty*, 134 S.E.2d 713, 717 (W. Va. 1964) (concluding the same).

Generally, the premise relied on for concluding that the partnership-by-estoppel doctrine is limited to contract claims is that the doctrine's reliance element exists in contractual matters, in which a party relies on the existence of a partnership in entering into a contract, but does not exist in tortious matters, in which a victim often does not rely on a partnership's existence in sustaining an injury. *See Pruitt*, 134 S.E.2d at 717; *see also* Thomas Erickson, Recent Decision, 55 Mich. L. Rev. 1190, 1191 (1957) (noting that the reliance element for partnership by estoppel is often present in contract-based causes of action). This premise is poor, as reliance on a partnership or joint venture's existence may arise in claims that do not sound in contract. *See* Erickson, *supra*, at 1191 (concluding that partnership by estoppel applies to "tort actions involving reliance"). For example, "[i]n cases of fraud or misrepresentation, where one is induced to buy from those misrepresenting, . . . relying on their holding out of a partnership, he [or she] may sue them as partners and hold them estopped to deny the relation." *Id.*; *see also Frye v. Anderson*, 80 N.W.2d 593, 603 (Minn. 1957) (determining that the partnership-by-estoppel doctrine is applicable to tort-based causes of action).

[Headnote 13]

Accordingly, we conclude that the application of NRS 87.160(1) does not turn on whether the cause of action sounds in contract. Instead, it turns on whether the claim implicates the reliance element that is required for partnership by estoppel. Thus, NRS 87.160(1) applies to the purchasers' claims that are based on their reliance upon the representations of a partnership or a joint venture and are not limited to contract claims.

A review of our determinations about NRS 87.160(1)'s meaning

Thus, to review, NRS 87.160(1)—Nevada's partnership-by-estoppel statute—imposes partnership liability on a party where, with the party's "consent[ ]," there is a representation that the party is a "partner," and another party has "given credit" to the purported "partnership." Partnership by estoppel may arise under this statute where the subject of the representation is a joint venture. Consent to the representation may be reasonably implied from one's conduct. The phrase "given credit" does not limit the statute's application to matters where financial credit is extended to the purported partnership or joint venture; rather, the phrase concerns the credence that is given to the representation when one detrimentally relies on it in conducting a transaction with the purported partnership, which may but is not required to include the extension of financial credit. The claimant who seeks to prevail on a partnership-by-estoppel claim must have reasonably relied on the representation of a partnership or joint venture, which entails the effort to learn the veracity of the representation. Finally, NRS 87.160(1) may impose partnership liability with respect to claims that implicate the reliance element that is required for partnership by estoppel, and such claims are not limited to those sounding in contract.

The summary judgment in favor of Aeder and the JDI entities

Having clarified NRS 87.160(1)'s meaning, we now consider whether genuine issues of material fact remained with respect to Aeder's and the JDI entities' liability under NRS 87.160(1).

The purchasers contend that Aeder and the JDI entities did not show the absence of genuine issues of material fact with respect to their liability under NRS 87.160(1) when they moved for summary judgment. The purchasers assert that their evidence revealed that they relied on and gave credence to a purported partnership between Cay Clubs, Aeder, and the JDI entities when purchasing condominiums and engaging in related transactions on their reasonable belief that the purported partnership provided the financial strength to create the advertised luxury resort. Further, they contend that the evidence showed that Aeder and the JDI entities consented to the representation of a partnership with Cay Clubs. Last, they argue that the district court placed undue emphasis on the word "strategic" in concluding that the marketing materials' use of the phrase "strategic partnership" was insufficient for establishing partnership-by-estoppel liability.

Aeder and the JDI entities respond that the parol evidence rule barred the purchasers from relying on their evidence of a purported partnership because the purchase agreements contained an integration clause and identified Flamingo Palms Villas, and not a partnership, as the seller of the Las Vegas Cay Club condominiums. They also argue that the purchasers did not give any credit to the purported partnership between Cay Clubs, Aeder, and the JDI entities because the purchasers' transactions and agreements were with Flamingo Palms Villas, which was not represented as being in a partnership with anyone.

[Headnotes 14-18]

In determining whether the district court erred in granting summary judgment, we resolve whether genuine issues of material fact remained with respect to partnership by estoppel under NRS 87.160(1), such that "a rational trier of fact could return a verdict for the nonmoving party." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005). The party who moves for summary judgment has the burden of showing the absence of genuine issues of material fact. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). If that party lacks the burden of persuasion at trial, he or she may satisfy this burden by pointing to " 'an absence of evidence to support the nonmoving party's case.' " *Id.* at 602-03, 172 P.3d at 134 (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). Generally, to defeat the motion for summary judgment, the nonmoving party must submit admissible evidence to show a genuine issue of material fact. *Id.* at 603, 172 P.3d at 134. But when a party does not object to the inadmissibility of evidence below, the issue is waived and otherwise inadmissible evidence can be considered. *See Whalen v. State*, 100 Nev. 192, 195-96, 679 P.2d 248, 250 (1984) (considering otherwise inadmissible evidence with respect to a summary judgment because the issue of admissibility was waived for lack of an objection).

The parol evidence rule and the purchasers' evidence

[Headnote 19]

Aeder and the JDI entities argue that no admissible evidence was proffered to contest their motion for summary judgment because the evidence on which the purchasers relied was barred by the parol evidence rule. The parol evidence rule precludes the admission of extrinsic "evidence that would change the contract terms when the terms of a written agreement are clear, definite, and unambiguous." *Ringle v. Bruton*, 120 Nev. 82, 91, 86 P.3d 1032, 1037 (2004). It applies only when the contracting parties agree that the written agreement is the "final statement of the agreement." 11 Richard A. Lord, *Williston on Contracts* § 33:14 (4th ed. 2012). The rule does *not* bar extrinsic evidence that is offered to explain matters on which the contract is *silent* "so long as the evidence does not contradict the [agreement's] terms." *Ringle*, 120 Nev. at 91, 86 P.3d at 1037. For example, in a matter regarding partnership by estoppel, the Minnesota Supreme Court held that the parol evidence rule did not bar extrinsic evidence to help resolve uncertainties about a partnership's existence when the contract did not address a partnership or preclude its possibility. *Blumberg v. Palm*, 56 N.W.2d 412, 415-16 (Minn. 1953).

[Headnote 20]

Aeder and the JDI entities rely on the following language of a purchase agreement in asserting that the parol evidence rule barred the purchasers' evidence for partnership by estoppel:

> This Agreement, such documents and all addenda and exhibits attached hereto reflect the entire and exclusive agreement of the Parties regarding the construction of the Residence, the purchase and sale of the Property, representations, warranties and duties of Seller related to the Property and the materials and workmanship used in construction of the Property. No salesperson, agent or employee of Seller has the authority to make any representations that contradict or alter any terms of this Agreement . . . . Except as expressly set forth in this Agreement and such documents, Buyer has not relied upon any representations . . . with respect to any aspect of the Property. This Agreement is intended by Buyer and Seller as the final expression and the complete and exclusive statement of their agreement . . . , and any prior or contemporaneous oral or written agreements or understandings which may contradict, explain or supplement these terms are hereby superseded . . . .

This language suggests the intent to integrate the purchase agreement. Although the language provides that the purchasers did not rely on any representations about the "Property," this language on which Aeder and the JDI entities rely for their parol evidence argument was silent about a partnership. Thus, the parol evidence rule did not prohibit evidence regarding the representations of a partnership or a joint venture.

The genuine issues of material fact

Although some of the purchasers' evidence may have been inadmissible if objected to, Aeder and the JDI entities made no objections about the admissibility of the evidence beyond their assertion of the parol evidence rule. Thus, all of the evidence before the district court can be considered for determining whether genuine issues of material fact remained. *See Whalen*, 100 Nev. at 195-96, 679 P.2d at 250.

When moving for summary judgment, Aeder and the JDI entities averred that there was an *absence* of evidence for the purchasers' partnership-by-estoppel claim. At that time, the purchasers had not yet proffered evidence of actual representations of a partnership or joint venture. As a result, Aeder and the JDI entities satisfied their initial burden of showing the absence of genuine issues of material fact. But in contesting the motion, the purchasers submitted additional evidence that demonstrated genuine issues of material fact.

[Headnote 21]

The purchasers submitted evidence of Cay Clubs' marketing materials. These materials included Cay Clubs' website, which stated that Cay Clubs was "a partnership of . . . professionals" and that its "strategic partner[s]" included the JDI entities. The marketing materials described the relationship with the JDI entities as a "partnership in excellence," identified the JDI entities as part of Cay Clubs' development team, and often used JDI Realty's logo alongside Cay Clubs' logo. Although the district court determined that a single use of the term "strategic" undermined the partnership-by-estoppel theory of liability, the multiple representations of a profit-oriented relationship between Cay Clubs and the JDI entities created a genuine issue of material fact as to whether these marketing materials represented a partnership, or at least a joint venture, between them.

[Headnote 22]

The purchasers' evidence also established a genuine issue of material fact about whether JDI consented to the representations of a partnership or joint venture. In a deposition, Aeder stated that he reviewed Cay Clubs' marketing materials and did not doubt, but could not recall, that a reference was made to the JDI entities. Aeder also declared that he was the manager for the JDI entities. Hence, there was evidence of Aeder's potential knowledge of any actionable representations. There was also evidence which indicated that Aeder, through his LLCs, had supported Cay Clubs' development of other properties in the past and with respect to Las Vegas Cay Club. Therefore, there was evidence of a working relationship between Cay Clubs and Aeder and thus evidence of the same between Cay Clubs and Aeder's JDI entities. Accordingly, the totality of the evidence, especially the evidence of Aeder's knowledge of the marketing materials and his history of using his LLCs to extend support to Cay Clubs, indicated a genuine issue of material fact about whether Aeder, on behalf of the JDI entities, permitted Cay Clubs to make the actionable representations in the marketing materials.

[Headnote 23]

With respect to the credit given to any actionable representations, multiple purchasers submitted affidavits wherein they stated that they relied on the representations of a partnership when purchasing their condominiums and engaging in related transactions with Cay Clubs. In those affidavits, they stated their beliefs that the partnership with the JDI entities provided the financial strength and experience to manage their money and perform the promised improvements to their property. Aeder and the JDI entities contend that the purchasers did not give any credit to the purported partnership between Cay Clubs and the JDI entities because the purchasers only transacted with Flamingo Palms Villas. However, the purchasers submitted to the district court an auditor's report that indicated that Cay Clubs appeared to be made of various LLCs that were created for each of its properties. Moreover, the district court had before it a deed of trust that related to a Las Vegas Cay Club property that was signed by the Flamingo Palms Villas' manager, who was identified in other documents as forming and being involved in other Cay Clubs properties. Thus, the evidence indicates that there remains a genuine issue of material fact as to whether credit was given to the purported partnership when the purchasers transacted with Flamingo Palms Villas, an entity that appeared to be one of many LLCs that made up Cay Clubs, and therefore whether the JDI entities may be held liable as Cay Club partners. The various parties' relationships and representations, if any, must be determined on remand.

[Headnote 24]

As to the reasonable reliance requirement for partnership by estoppel, the evidence indicated a genuine issue of material fact about the purchasers' reasonable reliance on the representations of the relationship between Cay Clubs and the JDI entities. The marketing materials repeatedly emphasized a profit-oriented relationship between the two. Moreover, the affidavits of multiple purchasers provided that they attended sales and marketing presentations where such representations were made and that their belief in such representations was reinforced when reviewing marketing materials and Cay Clubs' website. Hence, the evidence established the indicia of an effort to follow up on the representations of a partnership or joint venture between the JDI entities and Cay Club.

[Headnote 25]

Accordingly, the district court erred in granting summary judgment to the JDI entities with respect to their liability under NRS 87.160(1). Under this statute, the JDI entities may be liable as partners for the wrongdoings of others that are raised in the purchasers' claims that implicate their purported reasonable reliance on the representations of a partnership or joint venture between Cay Clubs and the JDI entities.[5] However, as to Aeder's liability under partnership by estoppel, the purchasers' briefing and analysis have only directed this court to evidence of partnership by estoppel with respect to the JDI entities. They have not analyzed or directed this court to evidence of representations of a partnership or joint venture with Aeder. Therefore, absent an analysis of such evidence, we conclude that the district court did not err in granting summary judgment in Aeder's favor regarding his liability under NRS 87.160(1).

CONCLUSION

Because of the genuine issues of material fact above, the district court erred in granting summary judgment to the JDI entities with regard to their liability under the partnership-by-estoppel doctrine that NRS 87.160(1) codifies. We conclude that partnership by estoppel may be found under NRS 87.160(1) where the subject of the

[5]In reaching our determinations above regarding the genuine issues of material fact, we acknowledge that although multiple purchasers submitted affidavits that indicated their reasonable reliance on the representations of the profit-oriented relationship between Cay Clubs and the JDI entities, not all of the purchasers submitted such affidavits. We also acknowledge that the JDI entities and Aeder assert the following argument, which lacks merit: only three purchasers could show reasonable reliance because only three purchasers entered into their purchase agreements before Flamingo Palms Villas engaged in the partnership-type activity of a loan transaction with another JDI entity. This argument overlooks that NRS 87.160(1) conditions liability on the claimant's reasonable reliance on the *representation*—not on the existence and activity—of a partnership or joint venture. Moreover, the record indicates that the purchasers were primarily similarly situated plaintiffs. Given these unique circumstances, the evidence showed that genuine issues of material fact remained as to the JDI entities' partnership-by-estoppel liability. Thus, the district court's determination that the JDI entities lacked liability under NRS 87.160(1) must be reversed. To the extent that the JDI entities want to dispute their liability as to each purchaser on a plaintiff-by-plaintiff basis, we leave that matter to the parties and the district court on remand.

actionable representation is a partnership or a joint venture, that the consent required for partnership by estoppel can be express or implied from one's conduct, that the statute's phrase "given credit" means giving credence to the representation by detrimentally relying on it to engage in a transaction with the purported partnership, and that the claimant who seeks to prevail on the partnership-by-estoppel claim must have reasonably relied on the representation of partnership or joint venture. Moreover, we conclude that NRS 87.160(1) may impose partnership liability with respect to claims that implicate the reliance element that is required for partnership by estoppel—such claims are not limited to causes of action that sound in contract.

Therefore, we reverse the order granting summary judgment in favor of the JDI entities with respect to their liability under NRS 87.160(1) and remand this matter to the district court for further proceedings that are consistent with this opinion. In addition, we reverse the award of costs that was predicated on the grant of summary judgment to the JDI entities.[6]

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

SIERRA PACIFIC POWER COMPANY AND NEVADA POWER COMPANY, JOINTLY DOING BUSINESS AS NV ENERGY, APPELLANTS, *v.* THE STATE OF NEVADA DEPARTMENT OF TAXATION; AND CLARK COUNTY, RESPONDENTS.

No. 61193

December 4, 2014 338 P.3d 1244

Appeal from a district court order granting in part and denying in part a petition for judicial review of an administrative order that denied a use tax refund. Second Judicial District Court, Washoe County; Janet J. Berry, Judge.

Electricity producer taxpayer brought judicial review action challenging administrative decision denying taxpayer's request for refund of use taxes paid on coal purchases. The district court found exemption statute unconstitutional but refused to award refund. Taxpayer appealed. The supreme court, HARDESTY, J., held that: (1) challenged provision of Sales and Use Tax Act was unconstitutional, as violating Commerce Clause, in its entirety rather than severable, but (2) use tax as actually assessed did not discriminate

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[6]We have considered the remaining contentions on appeal and conclude that they lack merit.

against interstate commerce, and therefore due process did not require that taxpayer receive refund.

Affirmed.

[Rehearing denied February 6, 2015]

John S. Bartlett, Carson City, for Appellants.

Catherine Cortez Masto, Attorney General, and *Gina C. Session*, Chief Deputy Attorney General, Carson City, for Respondent State of Nevada Department of Taxation.

Steven B. Wolfson, District Attorney, and *Paul D. Johnson*, Deputy District Attorney, Clark County, for Respondent Clark County.

Norman J. Azevedo, Carson City; *Jones Day* and *Charles C. Read*, Los Angeles, California, for Amicus Curiae Southern California Edison Company.

Reese Kintz Brohawn, LLC, and *Ryan W. Herrick*, Incline Village, for Amicus Curiae Council on State Taxation.

1. Commerce.

Violations of the dormant Commerce Clause are remedied by compensating for the negative impact to the claimant as measured by the unfair advantage provided to the claimant's competitors. U.S. Const. art. 1, § 8, cl. 3.

2. Administrative Law and Procedure.

The supreme court reviews administrative decisions under the same standard of review as the district court.

3. Administrative Law and Procedure.

On appeal of a district court decision on a judicial review action, the supreme court decides purely legal questions de novo.

4. Statutes.

Portion of Sales and Use Tax Act, which violated the dormant Commerce Clause in its provision for tax exemption for gross receipts from sale of, and storage, use, or other consumption in state of proceeds of mines that were subject to taxes levied pursuant to other statutory chapter, was unconstitutional in its entirety rather than severable from final clause "which are subject to taxes levied pursuant to [other statutory chapter]"; severance would have undermined purpose of statute, which was to prevent double taxation of proceeds of mines in state that were already subject to net proceeds tax in other statutory chapter. U.S. Const. art. 1, § 8, cl. 3; NRS 372.270.

5. Statutes.

The severability doctrine obligates the judiciary to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions. NRS 0.020(1).

6. Statutes.

Before language of an unconstitutional provision can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent; for the latter reason, voter initiatives and enacted ballot measures undergo additional scrutiny before statutory language may be severed, as the court must consider the effect of severance on the purpose of a voter-enacted statute.

7. COMMERCE; CONSTITUTIONAL LAW.

State courts have the duty of determining the appropriate relief for Commerce Clause violations, and, to satisfy due process requirements, courts must provide meaningful backward-looking relief to correct taxes paid pursuant to an unconstitutional scheme. U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. amend. 14.

8. COMMERCE; CONSTITUTIONAL LAW; TAXATION.

Use tax as actually assessed did not discriminate against interstate commerce, and therefore, even though the district court held in electric utility taxpayer's judicial review action that exemption to use tax violated dormant Commerce Clause, due process did not require that taxpayer receive refund; taxpayer did not pay any higher tax than did its competitors, and no competitor gained a competitive advantage under the discriminatory tax scheme. U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. amend. 14; NRS 372.270.

9. CONSTITUTIONAL LAW.

As required by due process, meaningful backward-looking relief operates to place a taxpayer who has suffered an unconstitutional deprivation in the same position as its competitors who were favored by a corresponding, but unlawful, tax exemption; such relief may take various forms, including refunding the difference between the tax paid by the claimant and the tax that would have been assessed had the claimant been granted the unlawful exemption, the assessment of taxes against those who had previously been favored by the exemption to put them on equal footing with those who had been discriminated against, or a combination of a partial refund and a partial retroactive assessment. U.S. CONST. amend. 14.

10. COMMERCE; CONSTITUTIONAL LAW.

A tax refund is generally not merited, pursuant to the Due Process Clause, based on a dormant Commerce Clause violation when there has been no actual injury; a party injured by a dormant Commerce Clause violation must actually have a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy. U.S. CONST. art. 1, § 8, cl. 3; U.S. CONST. amend. 14.

11. COMMERCE.

For a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between the substantially similar entities. U.S. CONST. art. 1, § 8, cl. 3.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, J.:

Appellants Sierra Pacific Power Company and Nevada Power Company, doing business jointly as NV Energy, bring coal into Nevada to produce electricity. Pursuant to NRS Chapter 372, NV

Energy pays a use tax for its coal consumption. NRS 372.270 exempts from the use tax the sale, storage, or use of the proceeds of Nevada mines. The district court found, and the parties do not dispute on appeal, that NRS 372.270's tax exemption for locally mined minerals violates the dormant Commerce Clause of the United States Constitution, which prevents states from unlawfully discriminating against interstate commerce. We therefore do not consider the lawfulness of the statute as a whole, but instead limit our review to the two primary issues raised in this appeal—whether the offending language in NRS 372.270 is severable and whether NV Energy is entitled to a remedy.

[Headnote 1]

We conclude that NRS 372.270 is not severable because it is clear that the legislative intent of the statute was to protect local mines, and thus, the district court properly refused to extend the exemption to all mine and mineral proceeds. Violations of the dormant Commerce Clause are remedied by compensating for the negative impact to the claimant as measured by the unfair advantage provided to the claimant's competitors. *See McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 31, 40-41 (1990). But because no interstate discrimination actually occurred here and NV Energy demonstrated no deprivation as a result of the statute's enforcement, we further conclude that NV Energy is not entitled to a refund.

FACTS AND PROCEDURAL HISTORY

NV Energy owns and operates electricity-generating plants in Nevada, two of which are at issue, and both of which it fuels with coal. If NV Energy had obtained the coal it needed from Nevada mines, the coal would have been subject to taxation under NRS Chapter 362, which governs the taxation of Nevada mine and mineral proceeds and would be exempted from Nevada's sales and use tax under NRS 372.270.[1] Indeed, Article 10, Section 5 of the Nevada Constitution bans additional taxation of the proceeds of Nevada mines. Because Nevada coal mines do not supply the necessary quantity or quality of coal, however, NV Energy obtains all of its coal from mines outside Nevada. Accordingly, NV Energy pays a use tax on the coal used at its electricity plants. *See* NRS 372.185 (imposing an excise tax on the use or consumption of personal property that is purchased in another state for use in Nevada).

Arguing that the NRS 372.270 exemption for locally produced mine and mineral proceeds discriminates against interstate com-

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[1] In the same manner, NRS 374.275 exempts Nevada mine and mineral proceeds from the local school support taxes imposed by NRS Chapter 374.

merce in violation of the dormant Commerce Clause and that the exemption should therefore apply broadly to all such proceeds, regardless of the location of their extraction, NV Energy petitioned respondent State of Nevada Department of Taxation for a $25,932,735 refund for the use taxes NV Energy paid on coal purchased between April 2002 and October 2006. The Department denied NV Energy's request. NV Energy administratively appealed the Department's denial, but the administrative law judge and later the Nevada Tax Commission upheld the denial.

NV Energy petitioned the district court for judicial review of the administrative decision denying its requests for a refund. Before the district court,[2] NV Energy argued that to remedy the interstate discrimination the Department would have to pay NV Energy a full refund. NV Energy also maintained that the court should sever only the unconstitutional language from NRS 372.270 rather than strike the statutory exemption in its entirety. The district court reversed the decision of the administrative law judge, concluding that the exemption violated the Commerce Clause, and struck the statute in its entirety. The court refused, however, to award NV Energy any refund because there were no similarly situated competitors that received the tax exemption, and therefore no injury to redress.

NV Energy appeals.

DISCUSSION

[Headnotes 2, 3]

The primary issues on appeal are, first, whether the offending language of NRS 372.270 can be severed, and second, whether the district court erred in denying NV Energy a refund. We review administrative decisions under the same standard of review as the district court. *Garcia v. Scolari's Food & Drug*, 125 Nev. 48, 56, 200 P.3d 514, 519-20 (2009). Thus, like the district court, we decide these purely legal questions de novo. *Id.*

The district court correctly struck NRS 372.270 in its entirety

[Headnote 4]

NRS 372.270 provides that "[t]here are exempted from the taxes imposed by this chapter the gross receipts from the sale of, and the storage, use or other consumption in this State of, the proceeds of mines which are subject to taxes levied pursuant to chapter 362 of NRS." The district court struck NRS 372.270 in its entirety, rather than sever the offending language. The contested language is the final clause: "which are subject to taxes levied pursuant to chapter

[2]The district court found that NV Energy had standing to challenge the statute as facially unconstitutional, even though NV Energy failed to show the presence of any competitor who benefited from the tax exemption.

362 of NRS." NV Energy argues that judicial preference is to uphold legislation and, thus, the district court should have severed only the final clause. The Department argues that the proper remedy for a facially unconstitutional statute is to strike the statute as per se invalid, and that the Nevada Constitution prohibits statutes approved by referendum, like NRS 372.270, from being "amended, annulled, repealed, set aside, suspended or in any way made inoperative except by the direct vote of the people." Nev. Const. art. 19, § 1(3).

[Headnote 5]

The severability doctrine obligates the judiciary "to uphold the constitutionality of legislative enactments where it is possible to strike only the unconstitutional provisions." *Rogers v. Heller*, 117 Nev. 169, 177, 18 P.3d 1034, 1039 (2001) (internal quotations omitted). This preference in favor of severability is set forth in NRS 0.020(1), which charges courts with preserving statutes to the extent they "can be given effect without the invalid provision or application."

[Headnote 6]

But a preference is not a mandate, and not all statutory language is severable. Before language can be severed from a statute, a court must first determine whether the remainder of the statute, standing alone, can be given legal effect, and whether preserving the remaining portion of the statute accords with legislative intent. *Cnty. of Clark v. City of Las Vegas*, 92 Nev. 323, 336-37, 550 P.2d 779, 788-89 (1976). For the latter reason, voter initiatives and enacted ballot measures undergo additional scrutiny before statutory language may be severed, as the court must consider the effect of severance on the purpose of a voter-enacted statute. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 515-18, 217 P.3d 546, 555-57 (2009) (discussing the severability of a voter-enacted statute and the importance of the components and purpose behind the statute).

There is no question that NRS 372.270 could be given legal effect if severed. The statute would continue to provide an exemption, albeit for all mine proceeds regardless of the mine's location. We therefore turn to whether severance would undermine the purpose of the statute.

Mineral taxation in Nevada is governed by NRS Chapter 362, NRS Chapter 372, and Article 10, Section 5 of the Nevada Constitution. NRS Chapter 362 imposes a property tax on the net proceeds of minerals extracted within Nevada. Meanwhile, NRS Chapter 372 imposes a use tax on consumers of tangible personal property purchased from another state and used within Nevada. Thus, proceeds from Nevada mines are subject to Chapter 362's net proceeds tax, while proceeds of minerals purchased out-of-state and used in

Nevada are subject to Chapter 372's use tax. Article 10, Section 5 of the Nevada Constitution prevents the Department from imposing any additional taxes on minerals that are subject to NRS Chapter 362's net proceeds tax (minerals that are mined in Nevada) until those proceeds lose their identity as proceeds. Accordingly, NRS 372.270 expressly exempts minerals subject to Chapter 362's net proceeds tax from also being taxed under Chapter 372's sales and use tax.[3]

The Sales and Use Tax Act, of which NRS 372.270 is a part, was enacted by the Legislature in 1955 and approved by voter referendum in 1956. Although there is little legislative history concerning the enactment of the statute that is now known as NRS 372.270, it is apparent that the Legislature originally enacted the exemption statute to avoid taxing the proceeds of mines already subject to the net proceeds tax. For example, during the drafting process, the Legislature deliberately changed the statutory language to include the now contested language. *See* S.B. 171, 47th Leg., § 52 (Nev. 1955) (initial version of statute that is now known as NRS 372.270); A. Journal, 47th Leg., 605-06 (1955) (revising the statute to include the language now being contested in this appeal). Moreover, in an attorney general opinion published at the time the statute was enacted in 1955, it was noted that the exemption was specifically limited to minerals already subject to taxation under Nevada's tax for net proceeds of minerals, and that minerals not subject to the net proceeds tax were not exempt. 55-76 Op. Att'y Gen. 120 (1955).

Because the legislative history clarifies that the narrowness of the exemption is essential to the purpose of the statute, we conclude that NRS 372.270 is not severable. Were the district court to strike only the offending language, the resulting statute would exempt all sales, storage, and use of the proceeds of mines from taxation under Chapter 372, regardless of where the minerals are mined. Because NRS 372.270 was enacted to prevent double taxation of the proceeds of Nevada mines already subject to the net proceeds tax in Chapter 362—not to exempt entire categories from taxation—such a result would not be in accord with the Legislature's intent in enacting the exemption. Thus, for purposes of resolving this case, the district court did not err in striking NRS 372.270 in its entirety.

The district court did not err in refusing to award NV Energy a refund

[Headnotes 7-9]

State courts have the duty of determining the appropriate relief for Commerce Clause violations, and, to satisfy due process re-

[3]Because the tax rates imposed by the sales and use tax are higher than the rates imposed by the net proceeds tax, and because the two taxes are measured differently, the district court determined that NRS 372.270 violated the dormant Commerce Clause.

quirements, courts must provide "meaningful backward-looking relief" to correct taxes paid pursuant to an unconstitutional scheme. *McKesson Corp. v. Div. of Alcoholic Beverages & Tobacco, Dep't of Bus. Regulation of Fla.*, 496 U.S. 18, 31 (1990); *see also Am. Trucking Ass'ns v. Smith*, 496 U.S. 167, 176 (1990) (stating that state courts are "entrusted . . . . with the initial duty of determining appropriate relief" for Commerce Clause violations); *Tyler Pipe Indus. v. Wash. Dep't of Revenue*, 483 U.S. 232, 252-53 (1987) (same). Such relief dictates that taxpayers not only have a fair opportunity to challenge the validity of an imposed tax, "but also a 'clear and certain remedy.'" *McKesson*, 496 U.S. at 39 (quoting *Atchison, T. & S.F.R. Co. v. O'Connor*, 223 U.S. 280, 285 (1912)). This process ensures that the tax, as actually imposed on the taxpayer, does not violate the dormant Commerce Clause by taxing in a way that discriminates against interstate commerce. *McKesson*, 496 U.S. at 43.[4]

NV Energy argues that this court must award a refund because that is the only appropriate remedy for taxes paid pursuant to a scheme that violates the dormant Commerce Clause, citing to *Worldcorp v. State, Department of Taxation*, 113 Nev. 1032, 1038, 944 P.2d 824, 828 (1997) ("When a tax statute is determined to be unconstitutional, the taxpayer is entitled to refund." (citing *Iowa-Des Moines Nat'l Bank v. Bennett*, 284 U.S. 239, 247 (1931))). We disagree. It has long been held that a refund is merely one remedy; other remedies will equally satisfy due process. *See Iowa-Des Moines Nat'l Bank*, 284 U.S. at 247; *McKesson*, 496 U.S. at 40-41.[5]

[Headnote 10]

More importantly, however, a refund is generally not merited when there has been no actual injury. *See McKesson*, 496 U.S. at 31 (stating that due process obligates states to provide relief when the claimant has suffered an "unconstitutional deprivation"). The Commerce Clause is grounded in actual harms and "real injuries." *Gregg Dyeing Co. v. Query*, 286 U.S. 472, 481 (1932). "[E]qual-

[4]As required by due process, "meaningful backward-looking relief" operates to place a taxpayer who has suffered an unconstitutional deprivation in the same position as its competitors who were favored by a corresponding—but unlawful—tax exemption. *McKesson*, 496 U.S. at 31; *Chapman v. Comm'r of Revenue*, 651 N.W.2d 825, 839 (Minn. 2002). Such relief may take various forms, including refunding "the difference between the tax paid by the [claimant] and the tax that would have been assessed had the [claimant] been granted the unlawful exemption," the assessment of taxes against those who had previously been favored by the exemption "to put them on equal footing with those who had been discriminated against," or "a combination of a partial refund and a partial retroactive assessment." *Chapman*, 651 N.W.2d at 839-40 (citing *McKesson*, 496 U.S. at 40-41).

[5]For example, the United States Supreme Court has stated that "[t]he right invoked is that to equal treatment; and such treatment will be attained if either their competitors' taxes are increased or their own reduced." *Iowa-Des Moines Nat'l Bank*, 284 U.S. at 247.

ity for the purposes of competition and the flow of commerce is measured in dollars and cents, not legal abstractions." *Halliburton Oil Well Cementing Co. v. Reily*, 373 U.S. 64, 70 (1963). Thus, as in both *McKesson* and *Iowa-Des Moines National Bank*, a central consideration is whether, under the tax scheme as actually imposed, competitors are treated equally or whether the tax scheme effects actual discrimination. *McKesson*, 496 U.S. at 40-42; *Iowa-Des Moines Nat'l Bank*, 284 U.S. at 244-46. Implicit in *McKesson* and other similar Supreme Court opinions is a requirement that the party injured by a dormant Commerce Clause violation must actually have a competitor who benefited from the discriminatory tax scheme for the injured party to merit a monetary remedy. *See McKesson*, 496 U.S. at 40, 42; *Iowa-Des Moines Nat'l Bank*, 284 U.S. at 247. If a tax, as actually assessed, does not discriminate against interstate commerce, the tax is lawful and does not violate due process. *See McKesson*, 496 U.S. at 31, 41.

[Headnote 11]

Here, NV Energy has failed to show that the tax, as actually assessed, discriminates against interstate commerce. Specifically, NV Energy did not pay any higher tax than did its competitors—all paid the same tax.[6] No competitor gained a competitive advantage under the discriminatory tax scheme, nor did NV Energy suffer any actual disadvantage. And, although the exemption to the use tax violates the dormant Commerce Clause, the use tax itself is not unconstitutional. *See Great Am. Airways v. Nev. State Tax Comm'n*, 101 Nev. 422, 428, 705 P.2d 654, 658 (1985). Thus, the tax of which NV Energy complains was lawfully assessed. In essence, NV Energy would have this court grant it a refund of tax dollars it rightfully paid pursuant to NRS Chapter 372 because NRS 372.270 would have unconstitutionally exempted a hypothetical competitor from paying this same tax. We decline to do so. Because NV Energy did not have any competitors who received the tax benefit[7] and, as a result, the tax scheme did not actually discriminate against interstate commerce, a

[6]NV Energy's competitors also purchased coal out of state and paid use tax pursuant to NRS 372.185.

[7]Even if NV Energy had alleged the presence of a competitor, we would have to answer the threshold question of whether the competitor is a "substantially similar entit[y]" before determining whether NV Energy was entitled to a monetary remedy as a result of a dormant Commerce Clause violation. *See Gen. Motors Corp. v. Tracy*, 519 U.S. 278, 298-99 (1997). For a dormant Commerce Clause violation to exist, the claimed discrimination must create a competitive advantage between the "substantially similar entities." *Id.* However, competitive markets are generally narrowly drawn. *See Gen. Motors*, 519 U.S. at 301-03 (concluding that natural gas marketers did not serve the same market as local distribution companies, even though similarly situated geographically); *Alaska v. Arctic Maid*, 366 U.S. 199, 204 (1961) (drawing a distinction between salmon caught and frozen in Alaska but canned somewhere else, and salmon freshly canned in Alaska).

refund—or any other remedy—is not necessary to satisfy due process. Thus, the district court did not err if refusing to award a refund to NV Energy.

Accordingly, we affirm the district court's order.

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

NEVADA ASSOCIATION SERVICES, INC.; AND PECCOLE RANCH COMMUNITY ASSOCIATION, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE SUSAN SCANN, DISTRICT JUDGE, RESPONDENTS, AND ELSINORE, LLC, ON BEHALF OF ITSELF AND AS REPRESENTATIVE OF THE CLASS DEFINED HEREIN; AND G.J.L., INCORPORATED, REAL PARTIES IN INTEREST.

No. 62748

December 4, 2014 338 P.3d 1250

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss and a district court order denying a motion for summary judgment in a real property action.

Planned community and its agent sought a writ of mandamus or prohibition challenging order of the district court denying a motion to dismiss counterclaims by landowner against community association and agent. The supreme court, SAITTA, J., held that: (1) landowner failed to provide any evidence to demonstrate that arbitration was not a reasonable alternative to paying association's lien, and (2) landowner did not demonstrate that it paid association the property's assessments in defense of property.

Petition granted in part and denied in part.

[Rehearing denied March 23, 2015]

Holland & Hart LLP and *Patrick J. Reilly* and *Nicole E. Lovelock*, Las Vegas, for Petitioner Nevada Association Services, Inc.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Michael J. Lemcool, Don Springmeyer*, and *Gregory P. Kerr*, Las Vegas, for Petitioner Peccole Ranch Community Association.

Adams Law Group and *James R. Adams*, Las Vegas, for Real Party in Interest Elsinore, LLC.

Johns & Durrant, LLP, and *Lance W. Johns*, Las Vegas, for Real Party in Interest G.J.L., Incorporated.

1. Payment.

The voluntary payment doctrine is a long-standing doctrine of law, which provides that one who makes a payment voluntarily cannot recover it on the ground that there was no legal obligation to make the payment.

2. Payment.

The voluntary payment doctrine precludes recovery of a voluntary payment unless the party can demonstrate that it meets an exception to the doctrine.

3. Mandamus.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.

4. Prohibition.

A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction.

5. Mandamus.

Because a writ is an extraordinary remedy, the supreme court will exercise its discretion to consider such a petition only when there is no plain, speedy, and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration; therefore, the supreme court generally will not exercise its discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.

6. Mandamus; Prohibition.

The supreme court would exercise its discretion to entertain the merits of a petition for writ of mandamus or prohibition challenging dismissal of landowner's counterclaims against community association and its agent, where the petition involved significant unsettled questions of law regarding the application of the voluntary payment doctrine, and, thus, presented an important issue of law requiring clarification, which could be significant to other litigation involving common-interest community assessments.

7. Payment.

The word "voluntary," in the voluntary payment doctrine, does not entail the mere payment of the bill or fee; instead, it considers the willingness of a person to pay a bill without protest as to its correctness or legality.

8. Payment.

The voluntary payment doctrine serves to promote the policy goals of certainty and stability in transactions.

9. Payment.

The voluntary payment doctrine is a valid affirmative defense.

10. Payment.

Defendant bears the burden of proving applicability of the voluntary payment doctrine.

11. Payment.

Once a defendant shows that a voluntary payment was made, the burden shifts to the plaintiff to demonstrate that an exception to the voluntary payment doctrine applies.

12. Payment.

If an exception to the voluntary payment doctrine applies, a plaintiff is not precluded from recovering a payment that it made without protest.

13. Payment.

The voluntary payment doctrine applied to claims of lead plaintiffs in class action by real property owners against planned community and its agent, when they made a voluntary payment and did not argue that the payment was made under protest or without knowledge of the facts.

14. Payment.

Payee's improper conduct exception to the voluntary payment doctrine applies when the improper conduct induces the payee's mistake of law.

15. Payment.

The coercion or duress exception to the voluntary payment doctrine applies when: (1) one side involuntarily accepted the terms of another, (2) circumstances permitted no other alternative, and (3) circumstances were the result of coercive acts of the opposite party.

16. Payment.

Business necessity constituting duress, as an exception to the voluntary payment doctrine, occurs when the payor has only a single commercially reasonable course of action, despite the fact that the action involves a choice, in some limited sense.

17. Payment.

When a party has other reasonable alternatives to payment, its decision to pay is not made under duress, so as to constitute a defense to the voluntary payment doctrine.

18. Trial.

Arguments of counsel are not evidence and do not establish the facts of the case.

19. Payment.

Landowner failed to provide any evidence to demonstrate that arbitration was not a reasonable alternative to paying community association's lien or demonstrate that paying was its only commercially reasonable course of action, as required for duress exception to the voluntary payment doctrine, when landowner failed to demonstrate that arbitration was too slow or expensive for its business model, and thus, failed to demonstrate that paying association was its only commercially reasonable course of action.

20. Payment.

Landowner did not demonstrate that it paid community association the property's assessments in defense of property, as required for application of defense of property exception to the voluntary payment doctrine, although association had a lien against the property, where lien was not subject to ongoing or imminent foreclosure proceedings, and thus, landowner's payment of the lien was voluntary.

21. Liens.

While a lien creates a security interest in property, a lien right alone does not give the lienholder right and title to property; instead, title, which constitutes the legal right to control and dispose of property, remains with the property owner until the lien is enforced through foreclosure proceedings.

Before the Court En Banc.[1]

[1]The Honorable Mark Gibbons, Chief Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, Saitta, J.:

[Headnotes 1, 2]

"The voluntary payment doctrine is a long-standing doctrine of law, which clearly provides that one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment." *Best Buy Stores v. Benderson-Wainberg Assocs.*, 668 F.3d 1019, 1030 (8th Cir. 2012) (internal quotations omitted). This doctrine precludes recovery of a voluntary payment unless the party can demonstrate that it meets an exception to the doctrine.

At issue here is whether the voluntary payment doctrine applies in Nevada to bar a property owner from recovering fees that it paid to a community association and, if so, whether the property owner demonstrated an exception to this doctrine by showing that the payments were made under business compulsion or in defense of property. We hold that the doctrine is valid in Nevada and that the property owner did not show an exception which would preclude its application in the present case.

FACTUAL AND PROCEDURAL HISTORY

Real party in interest Elsinore, LLC, purchased a property located within the Peccole Ranch planned community at a foreclosure auction. Prior to the foreclosure and sale, petitioner Peccole Ranch Community Association placed a lien on the property for unpaid community-association assessments. After purchasing the property, Elsinore sent a letter to Peccole Ranch requesting an accounting statement regarding the property's assessments and stating that it would not pay any assessments or fees that were not authorized by NRS 116.3116. Real party in interest G.J.L., Incorporated, d.b.a. Pro Forma Lien and Foreclosure Services, an agent of Peccole Ranch, responded with a letter to Elsinore demanding payment of outstanding association dues and advising Elsinore that a lien was in place on its property. Elsinore paid the demand and then sold the property.

Nearly three years after it sold the property, Elsinore filed a complaint against Peccole Ranch with the Nevada Real Estate Division (NRED) on behalf of itself and a class of similarly situated property owners. It alleged that Peccole Ranch had made excessive lien demands in violation of NRS 116.3116 and the Peccole Ranch covenants, conditions, and restrictions (CC&Rs). Elsinore and Peccole Ranch unsuccessfully mediated the NRED complaint and disputed whether they were mediating only Elsinore's claims or all of the purported class's claims.

Subsequently, Peccole Ranch filed a district court action against Elsinore, seeking declaratory relief regarding the application of NRS 116.3116 to its CC&Rs. Elsinore answered and filed a counterclaim for declaratory relief and damages on behalf of itself and the class identified in the NRED complaint. The district court certified the class and appointed Elsinore's attorneys as class counsel. Peccole Ranch filed a motion to dismiss the class members' unmediated and unarbitrated counterclaims, which the district court denied. Peccole Ranch then filed a third-party complaint against petitioner Nevada Association Services (NAS), another agent of Peccole Ranch, seeking indemnification and contribution for any damages that Elsinore and the class of property owners recovered from Peccole Ranch.

NAS filed a motion for summary judgment, which Peccole Ranch joined, arguing that the voluntary payment doctrine bars Elsinore's and the class members' claims for damages. The district court denied the motion for summary judgment, concluding that the voluntary payment doctrine did not apply to Elsinore because Elsinore had paid Peccole Ranch under duress and to save its property.

NAS then filed the current writ petition, which Peccole Ranch also joined, challenging both the district court's denial of Peccole Ranch's motion to dismiss and the denial of NAS and Peccole Ranch's motion for summary judgment.

DISCUSSION

[Headnotes 3-5]

"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) (citations omitted); *see* NRS 34.160. "'A writ of prohibition is appropriate when a district court acts without or in excess of its jurisdiction.'" *Sandpointe Apartments, LLC v. Eighth Judicial Dist. Court*, 129 Nev. 813, 817, 313 P.3d 849, 852 (2013) (quoting *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 907 (2008)). Because a writ is an extraordinary remedy, "we will exercise our discretion to consider such a petition only when there is no plain, speedy and adequate remedy in the ordinary course of law or there are either urgent circumstances or important legal issues that need clarification in order to promote judicial economy and administration." *Cheung v. Eighth Judicial Dist. Court*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005) (internal quotations omitted). "Therefore, 'we generally will not exercise our discretion to consider petitions for extraordinary writ relief that challenge district court orders denying motions for summary judgment, unless summary judgment is clearly required by a statute or rule, or an important issue of law requires clarification.'" *Sandpointe*, 129 Nev. at 818, 313 P.3d at 852 (quoting *ANSE, Inc. v. Eighth Judicial Dist. Court*, 124 Nev. 862, 867, 192 P.3d 738, 742 (2008)).

[Headnote 6]

The present petition involves significant unsettled questions of law regarding the application of the voluntary payment doctrine in Nevada. Thus, the petition presents "'an important issue of law requir[ing] clarification,'" which may be significant to other litigation involving common-interest community assessments. *See id*. (quoting *ANSE, Inc.*, 124 Nev. at 867, 192 P.3d at 742). Additionally, this case is in the early stages of litigation and postponing consideration of this issue would not serve the interests of the parties, judicial economy, nor the wider community. We therefore exercise our discretion to entertain the merits of the writ petition with regard to the application of the voluntary payment doctrine.[2]

The voluntary payment doctrine applies to Elsinore's payments

[Headnotes 7, 8]

The voluntary payment doctrine is an affirmative defense that "provides that one who makes a payment voluntarily cannot recover it on the ground that he was under no legal obligation to make the payment." *Best Buy Stores v. Benderson-Wainberg Assocs.*, 668 F.3d 1019, 1030 (8th Cir. 2012) (internal quotations omitted). "The 'voluntary' in the voluntary payment doctrine does not entail the mere payment of the bill or fee." *Putnam v. Time Warner Cable of Se. Wis.*, 649 N.W.2d 626, 632 (Wis. 2002). Instead, it considers "the willingness of a person to pay a bill *without protest as to its correctness or legality.*" *Id*. at 633. This doctrine serves to promote the "policy goals of certainty and stability" in transactions. *Berrum v. Otto*, 127 Nev. 372, 379 n.5, 255 P.3d 1269, 1273 n.5 (2011).

We have recognized the validity of the voluntary payment doctrine in Nevada since at least 1887, when we applied the rule to reverse a district court order allowing a county to recover for an erroneous overpayment it made to a jailor, observing that "[t]he rule is well settled that money voluntarily paid, with full knowledge of all the facts, although no obligation to make such payment existed, cannot be recovered back." *Randall v. Cnty. of Lyon*, 20 Nev. 35, 38, 14 P. 583, 584 (1887).

Recently, we discussed the voluntary payment doctrine without applying it. In *Berrum*, we discussed that while the voluntary pay-

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[2]We decline to exercise our discretion, however, with regard to the district court's denial of Peccole Ranch's motion to dismiss. *See Cheung*, 121 Nev. at 869, 124 P.3d at 552 (holding that this court has discretion to consider a writ petition).

ment doctrine generally applies to tax payments, it does not apply when a statute gives a taxpayer the right to challenge a voluntary payment. 127 Nev. at 379 n.5, 255 P.3d at 1273 n.5. Thus, we held that the doctrine did not apply in that case because the taxpayers had made the disputed payments while properly challenging the property valuations that were the bases of their tax liabilities. *Id.*

[Headnote 9]

The voluntary payment doctrine remains good law in Nevada. Therefore, we hold that the voluntary payment doctrine is a valid affirmative defense in Nevada.

[Headnotes 10-12]

Because the voluntary payment doctrine is an affirmative defense, the defendant bears the burden of proving its applicability. *See Schwartz v. Schwartz*, 95 Nev. 202, 206 n.2, 591 P.2d 1137, 1140 n.2 (1979) (stating that a defendant bears the burden of proving each element of an affirmative defense). Once a defendant shows that a voluntary payment was made, the burden shifts to the plaintiff to demonstrate that an exception to the voluntary payment doctrine applies. *See Randazzo v. Harris Bank Palatine, N.A.*, 262 F.3d 663, 666 (7th Cir. 2001) (noting that "a plaintiff who voluntarily pays money in reply to an incorrect or illegal claim of right cannot recover that payment unless he can show fraud, coercion, or mistake of fact"). If an exception applies, a plaintiff is not precluded from recovering a payment that it made without protest. *See Ross v. City of Geneva*, 357 N.E.2d 829, 836 (Ill. App. Ct. 1976) (stating that "the mere payment, without protest, . . . does not constitute waiver of a right to recovery" when an exception applies), *aff'd*, 373 N.E.2d 1342, 1347 (Ill. 1978). Therefore, we first address whether petitioners have demonstrated that this affirmative defense applies before considering whether Elsinore established that an exception to the voluntary payment doctrine exists.

NAS and Peccole Ranch demonstrated that the voluntary payment doctrine applies to Elsinore's claims

[Headnote 13]

In its counterclaim, Elsinore admitted that it paid Peccole Ranch's assessment. In addition, NAS submitted documentation of Elsinore's payment. Elsinore did not argue that it made its payment under protest or without knowledge of the facts. Because of Elsinore's admission and the documentation of Elsinore's payment, NAS met its burden of showing that Elsinore made a voluntary payment.

The record does not demonstrate, however, that petitioners presented any evidence to the district court to show that any other class member made a voluntary payment. Therefore, NAS and Peccole

Ranch have not met their burden of showing that the voluntary payment doctrine precludes the remaining class members' claims.

Elsinore has not demonstrated that an exception to the voluntary payment doctrine applies

[Headnote 14]

Elsinore argues that two exceptions to the voluntary payment doctrine preclude its application in the present case. These exceptions are (1) coercion or duress caused by a business necessity and (2) payment in defense of property.[3] We do not address whether other exceptions to the voluntary payment doctrine could apply.

Elsinore has not demonstrated that business necessity caused it to make the payment

[Headnotes 15, 16]

The coercion or duress exception applies when "(1) . . . one side involuntarily accepted the terms of another; (2) . . . circumstances permitted no other alternative; and (3) . . . circumstances were the result of coercive acts of the opposite party." *Emp'rs Ins. of Wausau v. United States*, 764 F.2d 1572, 1576 (Fed. Cir. 1985) (internal quotations omitted). Business necessity can constitute duress for the purposes of this exception. *Randazzo*, 262 F.3d at 669. Business necessity constituting duress occurs when the payor has only a single "commercially reasonable course of action," despite the fact that the action involves a choice, in some limited sense. *Ross*, 357 N.E.2d at 836.

In *Ross*, a municipal power company threatened to terminate electrical service to the plaintiffs' businesses if they failed to pay the power company's disputed charges. *Id*. Because the power company was "the sole provider of electricity to the [plaintiffs'] commercial enterprises" and no formal or statutory mechanism to challenge or protest the charges existed, the plaintiffs' payment of the disputed charges "was the commercially reasonable action under the circumstances." *Id*. As a result, the voluntary payment doctrine did not preclude their claims. *Id*.

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[3]Elsinore also argues that an exception to the voluntary payment doctrine exists for situations that involve a payee's improper conduct. This exception applies, however, where the improper conduct induces the payee's mistake of law. *See, e.g.*, *Time Warner Entm't Co. v. Whiteman*, 802 N.E.2d 886, 889 (Ind. 2004) ("Generally a voluntary payment made under a mistake or in ignorance of law, but with a full knowledge of all the facts, and not induced by any fraud or improper conduct on the part of the payee, cannot be recovered back." (internal quotations omitted)); *cf. Smith v. Prime Cable of Chi.*, 658 N.E.2d 1325, 1329 (Ill. App. Ct. 1995) (stating that a payee's assertion that a claim was illegal does not, by itself, create an exception to the voluntary payment doctrine). Since Elsinore does not allege that a payee's improper conduct caused it to make a mistake of law, this exception is inapplicable in the present case.

[Headnote 17]

When a party has other reasonable alternatives to payment, however, its decision to pay is not made under duress. In *Employers Insurance of Wausau*, an insurance company sought to recover an alleged overpayment that it made in response to the federal government's demand relating to a government contractor's nonpayment of a liability for which the insurance company was a surety. 764 F.2d at 1573-74. The federal government threatened to remove the insurance company from the list of approved sureties for government contracts if it failed to make the alleged overpayment. *Id*. at 1574. In considering the issue of duress, the Federal Circuit Court observed that the insurance company had other alternatives to paying the federal government's demand, such as requesting a delay of the payment as was authorized by federal law. *Id.* at 1576. Thus, the federal government's threat to remove the insurance company from the list of approved sureties for government contracts if it failed to pay or request a delay did not cause duress by business necessity. *Id*. As a result, the voluntary payment doctrine applied and prohibited the insurance company's claim. *Id*.

[Headnotes 18, 19]

Unlike *Ross*, where no other electricity supplier could serve the plaintiffs and there was no mechanism for protest, Elsinore did not meet its burden to demonstrate that it lacked a reasonable alternative to paying the lien. Although Elsinore filed an NRED complaint three years *after* it paid the lien amount, it could have sought NRED arbitration or mediation *prior* to paying the lien. Thus, Elsinore's decision to pay was not made under duress because it had reasonable alternatives at the time of payment. *See Employers Ins. of Wausau*, 764 F.2d at 1575-76; *see also* NRS 38.310 (providing that parties must mediate or arbitrate CC&R-based claims before pursuing civil litigation, thus demonstrating that meditation and arbitration were available to Elsinore). Further, Elsinore did not demonstrate that NRED arbitration or mediation would have been too expensive or too slow to be reasonable. Instead, Elsinore and the class's attorney argued at the summary judgment hearing that arbitration was too slow for Elsinore's business model. "Arguments of counsel[, however,] are not evidence and do not establish the facts of the case," *Jain v. McFarland*, 109 Nev. 465, 475-76, 851 P.2d 450, 457 (1993). Therefore, Elsinore failed to provide any evidence to demonstrate that the NRED arbitration was not a reasonable alternative to paying the lien and, unlike *Ross*, where no other electricity supplier could serve the plaintiffs, Elsinore did not demonstrate that paying Peccole Ranch was its only commercially reasonable course of action. *See Ross*, 357 N.E.2d at 836. Because the record does not support the district court's conclusion that Elsinore paid under duress, the district court erred in finding that Elsinore was under duress caused by a business necessity when it paid the full amount of Peccole Ranch's lien.

Elsinore did not demonstrate that it paid in defense of property

[Headnote 20]

The second exception that Elsinore proffers is the payment in defense of property exception. We recognized this exception in *Cobb v. Osman*, where we stated that "[i]t is well settled that one is not a volunteer or stranger when he pays to save his interest in his property." 83 Nev. 415, 421, 433 P.2d 259, 263 (1967). In *Cobb*, a property seller made payments on a loan secured by a mortgage on the property, even though the buyer had assumed the loan, after the buyer failed to make her loan payments and a notice of default was recorded. *Id*. at 417-20, 433 P.2d at 260-62. Though the seller had no legal duty to make payments on the buyer's loan, the seller retained ownership of two other properties securing the loan, and thus nonpayment of the loan would have subjected the seller's two other properties to foreclosure. *Id*. at 421, 433 P.2d at 263. Because the seller had paid the mortgage to save his interest in the two other properties that secured the mortgage, the *Cobb* court concluded that the voluntary payment doctrine did not prevent the seller from recovering damages from the buyer for her failure to pay the mortgage. *Id*. at 422, 433 P.2d at 263.

The present case is distinct from *Cobb* in at least two significant ways. First, the remedy sought in *Cobb* was against a party who failed to make necessary payments, not against the recipient of a disputed payment. This distinction is important because the exception as applied in *Cobb* does not undermine the voluntary payment doctrine's policy of promoting stability of transactions.

[Headnote 21]

Second, *Cobb* involved a case where the payor risked losing his property interest in foreclosure if he did not pay another's loan. Here, Elsinore did not demonstrate any such risk existed. Although Elsinore demonstrated that Peccole Ranch placed a lien on Elsinore's property, there is no evidence showing that foreclosure proceedings were imminent. "While a lien creates a security interest in property, a lien right alone does not give the lienholder right and title to property. Instead, title, which constitutes the legal right to control and dispose of property, remains with the property owner until the lien is enforced through foreclosure proceedings." *Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 298-99, 183 P.3d 895, 902 (2008) (citations omitted) (internal quotations omitted). Thus, a lien that is not subject to ongoing or imminent foreclosure proceedings does not create a risk of the loss of property. *See id*. (stating that a lien constitutes a monetary encumbrance that does not alter title when foreclosure proceedings have not been initiated on the lien).

Furthermore, where a reasonable legal remedy is available to the payor, a payment made to relieve the lien is voluntary. *See Oxxford Clothes XX, Inc. v. Expeditors Int'l of Wash., Inc.*, 127 F.3d 574, 579 (7th Cir. 1997) (stating that a party was not under duress when it had "an entirely feasible legal remedy"); *see also City of Rochester v. Chiarella*, 448 N.E.2d 98, 102 (N.Y. 1983) (observing that the "imposition of a lien and/or exaction of interest, without more, falls short of what is to be recognized as duress in [the] context" of a payment made to relieve a lien). *But cf. Mercury Mach. Importing Corp. v. City of New York*, 144 N.E.2d 400, 403 (N.Y. 1957) (stating that "[p]ayment after a tax has become a lien is not voluntary, for the menace of the lien *with penalties added for delay* has the effect of rendering it compulsory" (emphasis added) (internal quotations omitted)).

Therefore, Elsinore's payment to release Peccole Ranch's lien does not meet *Cobb*'s defense of property exception to the voluntary payment doctrine. As a result, the district court erred by finding that Elsinore made a payment to defend its interest in the property. Because Elsinore did not present a valid exception to the application of the voluntary payment doctrine, the district court erred by denying NAS and Peccole Ranch's motion for summary judgment with regard to Elsinore's counterclaims for damages.

CONCLUSION

The voluntary payment doctrine provides an affirmative defense to a claim for the recovery of money that a plaintiff voluntarily paid. In the present case, NAS and Peccole Ranch demonstrated that Elsinore made a voluntary payment. Though exceptions to the voluntary payment doctrine exist, Elsinore did not demonstrate that any exception applied to the payment that it made. Thus, the district court erred by denying NAS and Peccole Ranch's motion for summary judgment against Elsinore's counterclaims for damages.

We therefore grant the petition for a writ of mandamus and order the district court to grant petitioners' motion for summary judgment with regard to Elsinore's counterclaims for damages because the voluntary payment doctrine is a complete defense to Elsinore's claims.[4] We decline to consider the remaining issues in the petition and thus deny the remainder of the petition.

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

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[4]Because NAS and Peccole Ranch failed to meet their burden in showing that the voluntary payment doctrine applies to the remaining class members, this summary judgment is limited to Elsinore's claims only.

FEDERAL INSURANCE COMPANY, APPELLANT/CROSS-RESPONDENT, *v.* COAST CONVERTERS, INC., RESPONDENT/CROSS-APPELLANT.

No. 59639

December 24, 2014 339 P.3d 1281

Appeal and cross-appeal from a judgment on a jury verdict finding an insurance company liable for breach of contract and violation of the Nevada Unfair Claims Practices Act. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Plastic bag manufacturer brought action against property insurer to recover for breach of contract by paying claim for defective bags under business interruption/extra expense coverage, not the property damage coverage with $5 million limit. The district court entered judgment on a jury verdict for manufacturer. Appeal and cross-appeal were taken. The supreme court, GIBBONS, C.J., held that: (1) question of coverage under property damage provision or business interruption/extra expense provision was improperly submitted to jury, (2) excess scrap after manufacturer became aware of increase in defects due to electrical problems was covered as extra expense, (3) the excess scrap before manufacturer became aware of the problems was covered under property policy as "finished stock," (4) question of applicable policy limit was improperly submitted to jury, but (5) date of manifestation of manufacturer's loss was question of fact for jury.

Vacated in part, reversed, and remanded.

Lewis Roca Rothgerber LLP and *Daniel F. Polsenberg* and *Joel D. Henriod*, Las Vegas; *Pyatt Silvestri* and *James P.C. Silvestri*, Las Vegas, for Appellant/Cross-Respondent.

Lee, Hernandez, Landrum, Garofalo & Blake, APC, and *David S. Lee* and *Robert A. Carlson*, Las Vegas; *Lemons, Grundy & Eisenberg* and *Robert L. Eisenberg* and *Tiffinay B. Pagni*, Reno, for Respondent/Cross-Appellant.

1. CONTRACTS.
In contract matters, the jury may be charged with deciding any factual disputes.
2. CONTRACTS.
In the absence of ambiguity or other factual complexities, contract interpretation presents a question of law for the district court to decide.
3. APPEAL AND ERROR.
Contract interpretation presenting a question of law is subject to de novo review.
4. INSURANCE.
Issue whether property damage provision or business interruption/ extra expense provision applied to insured's claim arising from increased

scrap in manufacturing of plastic bags was a question of contract interpretation, and thus, a question of law and was improperly submitted to jury in insured's suit against insurer.

5. Appeal and Error.

The supreme court was obligated to make its own independent determinations without deferring to the district court in deciding question of law as to whether property damage provision or business interruption/extra expense provision applied to insured's claim arising from increased scrap in manufacturing of plastic bags.

6. Insurance.

An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties.

7. Insurance.

The supreme court considers an insurance policy as a whole, giving it a reasonable and harmonious reading.

8. Insurance.

If a provision in an insurance contract is unambiguous, a court will interpret and enforce it according to the plain and ordinary meaning of its terms.

9. Insurance.

Whether an insurance policy is ambiguous turns on whether it creates reasonable expectations of coverage as drafted.

10. Insurance.

The supreme court will not rewrite contract provisions that are otherwise unambiguous or increase an obligation to the insured where such was intentionally and unambiguously limited by the parties.

11. Insurance.

Excess scrap produced after plastic bag manufacturer became aware that continued use of machines with voltage fluctuations would increase number of defective bags was "extra expense" within coverage of business interruption and extra expense insurance policy; the defective bags were an expense incurred in attempt to continue operations in order to fulfill customer obligations despite ongoing electrical problems.

12. Insurance.

Excess scrap produced after plastic bag manufacturer became aware that continued use of machines with voltage fluctuations would increase number of defective bags was not covered based on implied requirement of fortuity, and thus, manufacturer's property insurance policy provided no coverage for loss from defective bags after manufacturer became aware of the increased scrap.

13. Insurance.

Insurable loss of or damage to property must be occasioned by a fortuitous, noninevitable, and nonintentional event.

14. Insurance.

A loss occasioned by the insured's own decision to act in a way that will predictably result in a loss is not fortuitous and thus is generally not covered.

15. Insurance.

Fortuity principle applies even if not explicitly written into the insurance contract.

16. Insurance.

Excess scrap before plastic bag manufacturer became aware that continued use of machines with voltage fluctuations would increase number of defective bags was "finished stock" within meaning of manufacturer's policy covering direct physical loss or damage to personal property, defining "business personal property" to include "finished stock" as "goods you have manufactured which are in their completed state and ready for sale," and requiring valuation based on "selling price less the value of discounts and costs"; the defective bags had completed the manufacturing process, were sold, and thus were in their completed state.

17. INSURANCE.

Determining whether $2 million or subsequent $5 million policy limit applied to plastic bag manufacturer's claim for loss due to excess scrap caused by voltage fluctuations in machines presented question of law that should not have been sent to jury in manufacturer's breach of contract action against insurer.

18. INSURANCE.

Determining whether an insurance policy applies to ongoing property damage is decided using the manifestation rule making insurer liable only if the policy was in effect when the loss became manifest.

19. INSURANCE.

Under the "manifestation rule," an insurer is only liable under an insurance policy if the policy was in effect when the loss became manifest at the point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that the notification duty under the policy has been triggered.

20. INSURANCE.

Date of manifestation of plastic bag manufacturer's loss from excess scrap caused by voltage fluctuations was question of fact for jury in suit against property insurer for breach of contract by applying $2 million limit, rather than subsequent $5 million limit.

21. INSURANCE.

Increase in property damage coverage to $5 million did not apply to plastic bag manufacturer's claim for loss caused by excess scrap due to voltage fluctuations in machines, if manufacturer knew or should have known of appreciable property damage prior to increasing coverage to $5 million.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, C.J.:

This case involves a dispute between an insured manufacturer and its insurer. In the present case, electrical problems at a plastic bag manufacturing plant led to damaged machinery and an increased number of defective bags being produced. Following the electrical problems, the manufacturer filed a claim with its insurance company. However, a dispute arose between the parties regarding whether losses associated with the defective bags should be covered under the insurance policy's property damage provision or its business interruption/extra expense provision. The parties further disputed whether a policy limit of $2 million or $5 million should apply to the manufacturer's property loss. The district court submitted both of these issues to the jury. Following trial, the jury awarded the manufacturer $4,005,866 for breach of the insurance contract, impliedly finding that the insured's loss was property damage and that the $5 million property damage policy limit applied.

In this opinion, we first address whether categorizing the insured's loss under the policy presents a question of law or a question of fact. We conclude that categorizing the insured's loss under the policy is a question of law. Second, we address whether determining which policy limit applies to the insured's property loss presents a question of law or a question of fact. We conclude that determining which policy limit applies presents a question of law. Accordingly, we conclude that the district court erred in sending these questions to the jury. We therefore reverse the district court's judgment and remand this matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Respondent/cross-appellant Coast Converters, Inc., manufactured plastic bags in California. In 2003, Coast began moving its plastic bag factory, including machines and equipment, from California to Las Vegas. Corresponding with the move, in June 2003, Coast obtained a commercial package all-risk insurance policy from appellant/cross-respondent Federal Insurance Company. The insurance policy covered up to $2 million in property damage (PD) and up to $1.75 million for business interruptions/extra expenses (BI/EE). On August 27, 2003, Coast requested, and later received, an increase in the PD coverage limit from $2 million to $5 million.

In anticipation of Coast's move to Las Vegas, electrical modifications were made to the Las Vegas facility. However, the modifications were apparently inadequate, causing voltage fluctuations. The voltage fluctuations damaged machinery used in the manufacturing process and also caused the production of a larger-than-normal amount of defective bags, or "scrap."

Coast filed a claim with Federal Insurance, seeking to recover costs related to the damaged machinery and the production of increased scrap. Coast pointed out that the defective bags were often hidden in rolls of otherwise quality bags, rendering the defective bags largely undiscoverable prior to sale. While it was able to pull some of the rolls containing defective bags, Coast claimed that it was not made aware of the defects until several orders were returned. Thus, Coast asserted that it was unable to separate the defective bags from the quality ones, rendering the entire package of bags a total loss.

Upon receiving Coast's claim, Federal Insurance investigated the machine malfunctions and eventually made several payments to Coast. Initially, Federal Insurance did not communicate under which provision, PD or BI/EE, the payments were made. Federal

Insurance later allocated a small portion of the payments—relating to the damaged machinery—to the PD coverage. However, the majority of the payments, including payments for the increased scrap, were made under the BI/EE coverage. Ultimately, Federal Insurance disbursed amounts covering the increased scrap and other losses up to the entire $1.75 million BI/EE policy limit. Coast contended that the increased scrap losses should have been covered under the PD provision. However, Federal Insurance disagreed and refused to make any additional payments under the PD provision. Coast alleges that it ultimately went out of business as a result of Federal Insurance's refusal to pay. Coast then filed a complaint against Federal Insurance.

Both before and after trial, Federal Insurance asked the district court to determine (1) whether Coast's loss fell under the policy's PD provision or the BI/EE provision; and (2) if PD coverage was appropriate, whether the coverage limit was $2 million or $5 million. The district court, however, declined to answer these questions, opting instead to leave them to the jury. After a five-week jury trial, the jury found Federal Insurance liable in the amount of $4,005,866 for breaching the insurance contract and in the amount of $5,048,717 for violating the Nevada Unfair Claims Practices Act (UCPA), NRS 686A.310. The district court offset the judgment by amounts Coast obtained in settlement for its claims against other parties. The district court, however, refused to offset the judgment by the amount already paid on the increased scrap insurance claim, and awarded Coast attorney fees and prejudgment interest.

Federal Insurance now appeals, arguing that (1) the district court erred in refusing to rule, as a matter of law, on the policy coverage and policy limit issues, as well as on the UCPA claims; (2) substantial evidence does not support the jury's findings on the breach of contract and UCPA claims; (3) the jury erred in finding it liable under the UCPA; (4) the district court erred in refusing to offset the judgment by the amount already paid on the claim; and (5) the district court erred in granting attorney fees as special damages. Coast cross-appeals, arguing that the district court erred in offsetting the judgment by amounts obtained in settlements and in its calculation of prejudgment interest.

DISCUSSION

Categorizing Coast's loss under the policy was a question of law for the district court to decide

Federal Insurance argues that the district court erred in allowing the jury to determine which policy provision, PD or BI/EE, applied to Coast's increased scrap. We agree.

[Headnotes 1-3]

In contract matters, the jury may be charged with deciding any factual disputes. *State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 983, 103 P.3d 8, 15 (2004). But " 'in the absence of ambiguity or other factual complexities,' contract interpretation presents a question of law" for the district court to decide, "with de novo review to follow in this court." *Galardi v. Naples Polaris, L.L.C.*, 129 Nev. 306, 309, 301 P.3d 364, 366 (2013) (quoting *Ellison v. Cal. State Auto. Ass'n*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990)); *see also Farmers Ins. Exch. v. Neal*, 119 Nev. 62, 64, 64 P.3d 472, 473 (2003) (noting that the task of interpreting a contract is a question of law).

[Headnotes 4, 5]

Here, deciding which policy provision, PD or BI/EE, applies to Coast's increased scrap is a question of contract interpretation, and thus, is a question of law. Because categorizing Coast's loss under the policy is a question of law, the district court erred in sending it to the jury. Moreover, because the policy provision dispute is a question of law, "[t]his court is obligated to make its own independent determinations and should not defer to those of the district court." *Musser v. Bank of Am.*, 114 Nev. 945, 947, 964 P.2d 51, 52 (1998); *see also Hartford Accident & Indem. Co. v. Wesolowski*, 305 N.E.2d 907, 909-10 (N.Y. 1973) (interpreting an insurance policy, even though the issue was wrongly sent to the jury below, where the policy was unambiguous and the parties agreed that no extrinsic evidence bearing on the parties' intent existed).

Accordingly, as the parties have fully briefed the legal interpretation issue before this court, we will now address whether the policy's PD provision or the BI/EE provision covered Coast's increased scrap.

Interpretation of the insurance policy

[Headnotes 6-10]

"An insurance policy is a contract that must be enforced according to its terms to accomplish the intent of the parties." *Farmers Ins. Exch.*, 119 Nev. at 64, 64 P.3d at 473. We consider an insurance policy as a whole, giving it a reasonable and harmonious reading. *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014). "If a provision in an insurance contract is unambiguous, a court will interpret and enforce it according to the plain and ordinary meaning of its terms." *Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 162, 252 P.3d 668, 672 (2011); *cf. Grand Hotel Gift Shop v. Granite State Ins. Co.*, 108 Nev. 811, 819, 839 P.2d 599, 604 (1992) (stating that ambiguous or unclear terms in an insurance contract are resolved in favor of the insured). "'[W]hether an insurance policy is ambiguous turns on whether it creates reasonable expectations of coverage as drafted.'" *Powell*, 127 Nev. at 162, 252 P.3d at 672 (quoting *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 684, 99 P.3d 1153, 1157 (2004)). This court "will not rewrite contract provisions that are otherwise unambiguous . . . [or] increase an obligation to the insured where such was intentionally and unambiguously limited by the parties." *Farmers Ins. Grp. v. Stonik ex rel. Stonik*, 110 Nev. 64, 67, 867 P.2d 389, 391 (1994).

Here, prior to determining, as a matter of law, whether Coast's increased scrap is covered by the policy's PD provision or the BI/EE provision, one factual question must be resolved by the jury: on what date did Coast become aware that continued use of its machines would result in the production of an increased amount of scrap? We conclude that increased scrap produced after this date is covered by the policy's BI/EE provision, and increased scrap produced before this date is covered by the policy's PD provision.[1]

The BI/EE provision applies to excess scrap produced after Coast became aware that continued use of its machines would result in the production of an increased amount of defective bags

[Headnote 11]

The parties dispute whether Coast knew that the continued use of its machines would produce an increased number of defective bags. Federal Insurance argues that as of October 2003, Coast was aware of the machinery and electrical problems and decided to continue to use those machines to manufacture bags, despite being aware that scrap would be produced at a higher rate than normal.[2] Coast contends that, while it became aware of electrical problems in September 2003 and of the resulting damaged bags in October 2003, it investigated those issues and only continued production after it was determined that the problems had been fixed. Coast further asserts that it was not until additional damaged bags were returned and additional investigation was conducted that it became aware of the full extent of the damaged machinery and the connection to the defective bags. It is undisputed, however, that Coast continued bag production throughout the relevant period in order to meet its obligations to customers.

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[1]The record indicates that even under normal manufacturing conditions, at least some scrap was produced. Accordingly, coverage under both the BI/EE provision and PD provision will only apply to scrap that is produced in excess of the normal amount.

[2]The record suggests that Coast normally produced around 8% scrap, which increased to upwards of 20% sometime after the electrical problems began.

We conclude that the proper interpretation of the insurance policy is that the BI/EE provision applies to increased scrap produced after Coast became aware that continued use of its machines would result in the production of an increased amount of defective bags. The BI/EE provision applies to increased scrap produced after this date for two reasons.

First, increased scrap produced after this date unambiguously fits the definition of an extra expense under the policy. The policy defines extra expense in relevant part as "necessary expenses you incur: in an attempt to continue operations, over and above the expenses you would have normally incurred." Defective bags produced after the date Coast was aware that continued production would lead to increased scrap fits the definition of an "extra expense," because it was an expense above that associated with normal production, which Coast incurred "in an attempt to continue operations" in order to fulfill customer obligations despite ongoing electrical problems.

[Headnotes 12-15]

Second, scrap produced after this date cannot be categorized as property based on the implied requirement of fortuity; hence, it can only be covered under the policy's BI/EE provision. It is well recognized that insurable loss of or damage to *property* must be occasioned by a fortuitous, noninevitable, and nonintentional event. *See City of Burlington v. Indem. Ins. Co. of N. Am.*, 332 F.3d 38, 47-48 (2d Cir. 2003); *Univ. of Cincinnati v. Arkwright Mut. Ins. Co.*, 51 F.3d 1277, 1281 (6th Cir. 1995) ("The application of the implied requirement of fortuity [to insurance contracts] is universally recognized." (internal quotation omitted)); *see also Avis v. Hartford Fire Ins. Co.*, 195 S.E.2d 545, 547-49 (N.C. 1973). In other words, a loss occasioned by the insured's own decision to act in a way that will predictably result in a loss is not fortuitous; and thus, such a loss is generally not covered. *See, e.g.*, *Univ. of Cincinnati*, 51 F.3d at 1282 ("[C]ourts generally do not recognize deliberate actions that produce predictable and anticipated damages as fortuitous events under all-risk insurance policies."). Further, the fortuity principle applies even if not explicitly written into the insurance contract.[3] Thus, under the implied requirement of fortuity, the PD provision cannot apply to scrap produced as a result of Coast's decision to continue production despite being aware that damaged bags would be produced at a higher rate than normal.

In sum, deciding when Coast became aware that continued production would lead to increased scrap is a factual question for the jury. However, once the jury determines when that occurred, the

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[3]Here, Coast's duties under the policy included "[t]ak[ing] every reasonable step to protect the covered property from further damage."

district court must then apply that fact and conclude, as a matter of law, that increased scrap produced after that date is covered under the insurance policy's BI/EE provision.

The PD provision applies to excess scrap produced before Coast became aware that continued use of its machines would result in the production of an increased amount of defective bags

[Headnote 16]

Here, the PD provision covered "direct physical loss or damage to . . . personal property caused by or resulting from a peril." The policy defines personal property as "all your business personal property; business personal property in which you have an insurable interest; patterns, molds and dies." Included in business personal property is "stock." The policy splits "stock" into four subcategories: (1) raw stock, (2) stock in process, (3) finished stock, and (4) goods held in storage for sale. "Raw stock" is defined as "material in the state in which you receive it for conversion into finished stock." "Stock in process" is defined as "raw stock that has undergone any aging, seasoning, mechanical or other process of manufacture, but which has not become finished stock." Finally, "finished stock" is defined as "goods you have manufactured which are in their completed state and ready for sale."

The policy explicitly defines these terms because the loss payment basis for "finished stock" is different than the loss payment basis for "raw stock" or "stock in process." Specifically, the loss payment basis for "finished stock" is the "selling price less the value of discounts and costs you would have incurred." In contrast, the loss payment basis for "raw stock" is the cash value or replacement value, and the loss payment basis for "stock in process" is the "cost of raw materials and costs expended as of the date of loss or damage." Because of the different loss payment basis, damaged property that is deemed to be "finished stock" may be valued much higher than property deemed to be another type of stock. Based on the evidence presented at trial and the jury's award of more than $4 million for Coast's breach of contract claim, it can be inferred that the jury categorized the increased scrap as not only property, but also as "finished stock."

Federal Insurance argues that even if the increased scrap is covered by the PD provision, it cannot be "finished stock," because the defective bags were not "in their completed state and ready for sale." Federal Insurance argues that the bags were not "completed" because their defects resulted in them being returned. In contrast, Coast argues that the defective bags were "finished stock," because they had completed the manufacturing process and were sold.

First, we conclude that the PD provision applies to excess scrap produced before Coast became aware that continued use of its machines would result in the production of an increased number of defective bags. The PD provision covers "stock" as business personal property. The policy's definition of "stock" refers to the goods Coast produced. Thus, Coast's "stock" included the plastic bags, defective or otherwise, that it was in the business of producing. Accordingly, the defective bags produced by Coast were business personal property covered by the policy's PD provision.

Second, we conclude that the increased scrap that is covered by the PD provision unambiguously fits the definition of "finished stock," which is defined as "goods you have manufactured which are in their completed state and ready for sale." While the bags were ultimately returned to Coast because of defects, the defective bags had *completed* the manufacturing process and were sold to Coast's customers. In other words, the bags were in their "completed state," because there were no additional steps for Coast to take in the manufacturing process prior to sale. *See Merriam-Webster's Collegiate Dictionary* 254 (11th ed. 2007) (defining "complete" as "having all necessary parts, elements, or steps"). Reading the policy as a whole, it is clear that the definition of "finished stock" was intended to include bags that have completed the manufacturing process but are ultimately returned for defects caused by a covered peril. This is evidenced by the fact that the loss payment basis for "finished stock" is the sales price of the goods. The policy provides that Coast be compensated for the sales price of the defective bags because, but for the covered peril—the damaged machinery—the defective bags would not have been returned and Coast would have realized the sales price from its customers.

In sum, we conclude that the PD provision applies to excess scrap produced before Coast became aware that continued use of its machines would result in the production of an increased amount of defective bags. We further conclude that the excess scrap covered by the PD provision must be categorized as "finished stock," and should be valued as such under the terms of the policy.

Determining which PD policy limit applies was a question of law for the district court to decide

[Headnotes 17, 18]

Coast originally had PD coverage of $2 million which it later increased to $5 million. The parties now dispute whether the applicable PD policy limit is $2 million or $5 million. The district court left this decision to the jury. However, in Nevada, determining whether an insurance policy applies to ongoing property damage is decided using the "manifestation rule," a legal principle. *See Jackson v. State Farm Fire & Cas. Co.*, 108 Nev. 504, 509, 835 P.2d 786, 789 (1992). Accordingly, we conclude that determining which PD policy limit applies presents a question of law; and thus, the district court erred in sending the issue to the jury.[4] Because determining which PD policy limit applies presents a question of law, this court will resolve the issue by making our "own independent determinations and [will] not defer to those of the district court." *Musser v. Bank of Am.*, 114 Nev. 945, 947, 964 P.2d 51, 52 (1998).

Legal determination of the PD policy limit

Federal Insurance argues that the district court erred in not adopting a legal rule to govern the question of whether the increased limit applies. Federal Insurance further argues that under applicable law, the $2 million policy limit applies because Coast knew or should have known of ongoing property damage when it applied for the policy limit increase on August 27, 2003. In response, Coast argues that the jury's award of $4,005,866 in breach of contract damages implies that the jury found that the $5 million policy limit applies, and that such a finding is supported by substantial evidence.

[Headnote 19]

In *Jackson v. State Farm Fire & Casualty Co.*, this court adopted the so-called "manifestation rule." 108 Nev. at 509, 835 P.2d at 789. Under the "manifestation rule," an insurer is only liable under an insurance policy if the policy was in effect when the loss became manifest. *Id.* at 506, 835 P.2d at 788. A loss becomes manifest at the "point in time when appreciable damage occurs and is or should be known to the insured, such that a reasonable insured would be aware that his notification duty under the policy has been triggered." *Id.* at 509, 835 P.2d at 790 (internal quotation omitted). Further, "[t]he manifestation date will generally be a question of fact" for the jury; however, a court can decide the manifestation date "where the undisputed evidence establishes that no damage had been discovered before a given date." *Id.*

[Headnotes 20, 21]

Here, the parties dispute when "manifestation" occurred. Because the date of manifestation is "generally . . . a question of fact," we

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[4]The jury was given an instruction vaguely defining the "manifestation rule," but was not instructed on how this legal principle should be applied to its factual findings. Jury instruction No. 27 provided:

> [s]ometimes an event happens that causes continuing damage over time. In such a situation, insurance coverage is provided by the particular insurance in effect at the point in time appreciable damage occurs, and is or should be known to insured such that a reasonable insured would be aware that his notification duty under the policy has been triggered. This is known as the damage manifestation rule.

conclude that determining when "manifestation" occurred is a question of fact for the jury to decide. *See id.* However, once the jury determines when "manifestation" occurred, the district court must then apply that fact to the law and determine which policy limit applies. Specifically, if the jury finds that Coast knew or should have known of "appreciable [property] damage" prior to increasing its PD coverage to $5 million, then the increase in coverage does not apply, and an award for breach of contract based on property damage cannot exceed $2 million. *See id.* (internal quotation omitted). In contrast, if the jury finds that Coast did not know or should not have known of "appreciable [property] damage" prior to increasing the PD coverage to $5 million, then the increase does apply and an award for breach of contract based on property damage cannot exceed $5 million. *See id*. (internal quotation omitted).

Coast's UCPA claim is dependent on a proper interpretation of the contract

At trial, Coast presented evidence suggesting that Federal Insurance violated the UCPA, in part because Federal Insurance incorrectly determined that excess scrap was covered under the policy's BI/EE provision. Thus, Coast's UCPA claim must await the district court's determination of how the excess scrap should be categorized under the policy pending the jury's finding of when Coast became aware that continued production would lead to increased scrap. *FGA, Inc. v. Giglio*, 128 Nev. 271, 280, 278 P.3d 490, 496 (2012) (holding that a verdict cannot stand where one of several "overlapping factual theories support a single theory of recovery" and one of those theories is challenged on appeal). Accordingly, judgment on the jury's verdict regarding Federal Insurance's liability under the UCPA is vacated, and the issue is remanded for a new trial.

CONCLUSION

First, we conclude that because contract interpretation is a question of law, the district court should have decided, as a matter of law, whether Coast's loss was covered under the policy's PD provision or its BI/EE provision. Thus, the district court erred in submitting this question to the jury. We further conclude that under a proper interpretation of the policy, losses incurred *after* Coast became aware that electrical problems would cause increased scrap to be produced are covered under the policy's BI/EE provision. Conversely, we conclude that losses incurred *before* Coast became aware that electrical problems would cause increased scrap to be produced are covered under the policy's PD provision, and should be valued as "finished stock."

Second, we conclude that determining which PD policy limit applies is a question of law for the district court to decide. Specifically, once the jury determines when Coast knew or should have known of "appreciable [property] damage," the district court must then apply the "manifestation rule" and determine which policy limit applies to Coast's property loss. Once the policy limit is established, a breach of contract award based on property damage cannot exceed that amount.

Finally, we conclude that because the jury's verdict on Coast's UCPA claim was influenced by an improper interpretation of the contract, the verdict must be vacated. We therefore vacate in part, and reverse and remand for further proceedings consistent with this opinion.[5]

PICKERING, HARDESTY, PARRAGUIRRE, DOUGLAS, CHERRY, and SAITTA, JJ., concur.

[5]Based upon our holding, we vacate the award of attorney fees and do not address the other issues raised by the parties. Although we could address the remaining issues of law raised, many of these issues depend on the insurance coverage issue. Therefore, we conclude that it is not appropriate to address them at this time.