to justify the lateness of his request. The district court did not abuse its discretion in denying Guerrina's *Faretta* request, which he inexplicably submitted 24 days prior to trial along with a request for a continuance.

We also affirm the *Mendoza v. State* test to determine when evidence is sufficient to simultaneously convict a defendant of robbery and kidnapping from a single course of events. Viewing the evidence in the light most favorable to the prosecution, a rational jury could have found that Guerrina's actions involved restraint substantially in excess of that necessary to effectuate the robbery and substantially increased the risk of harm to the victim. We therefore affirm his dual convictions.

Lastly, we reiterate that to sustain "deadly weapon" charges, the State must produce evidence that a perpetrator's weapon satisfied an applicable definition of "deadly weapon." Because there was insufficient evidence to support this finding, we vacate and reverse Guerrina's deadly weapon sentencing enhancements pursuant to NRS 193.165 and remand to the district court to resentence him for burglary under NRS 205.060(2).

Cherry and Parraguirre, JJ., concur.

CARRINGTON MORTGAGE HOLDINGS, LLC, Appellant, *v.* R VENTURES VIII, LLC, a Nevada Limited Liability Company of the Container R Ventures, LLC, Under NRS 86.296, Respondent.

No. 71437

June 14, 2018 419 P.3d 703

Appeal from a district court order awarding costs and attorney fees in a quiet title action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Reversed.

Akerman LLP and *Natalie L. Winslow, Ariel E. Stern*, and *Tenesa S. Scaturro*, Las Vegas, for Appellant.

Cooper Coons, Ltd., and *Thomas Miskey* and *J. Charles Coons*, Las Vegas, for Respondent.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

OPINION

By the Court, Gibbons, J.:

The solitary issue in this case concerns the proper interpretation and application of former NRS 116.3116(8).[1] Respondent acquired interest in a property pursuant to a homeowners' association foreclosure sale and successfully obtained a judgment quieting title against appellant. Thereafter, respondent requested costs and attorney fees pursuant to NRS 116.3116(8), which the district court granted. NRS 116.3116(8) provided that "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." We conclude that "any action brought under this section" refers to an action by a homeowners' association to enforce its assessment lien, not a quiet title and declaratory judgment action by a third-party purchaser at such a sale. Thus, the district court erred in awarding respondent costs and attorney fees pursuant to NRS 116.3116(8).

BACKGROUND

The facts underlying the instant appeal are undisputed by the parties. Appellant Carrington Mortgage Holdings, LLC, was assigned a deed of trust on a property located in Las Vegas. The former owner of the property became delinquent on her payments to the Southern Terrace Homeowners Association. As a result, the homeowners' association initiated nonjudicial foreclosure proceedings pursuant to NRS 116.3116, which culminated in the property being sold to respondent R Ventures VIII, LLC. Respondent then filed an action to quiet title pursuant to NRS 30.010 *et seq.* against several nonparty entities, claiming that the NRS 116.3116 foreclosure sale at which it acquired title extinguished all junior liens. The parties stipulated to add appellant as a defendant. Both parties filed motions for summary judgment. The district court granted respondent's motion and denied appellant's motion.

Thereafter, respondent requested costs and attorney fees pursuant to NRS 116.3116(8). The district court granted respondent's request on the basis that respondent's claims were brought under NRS 116.3116 and are the type of claims contemplated by NRS 116.3116(8). This appeal followed.

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[1]The 2015 Legislature revised NRS Chapter 116 substantially. Any references in this opinion to statutes codified in NRS Chapter 116 are to the version of the statutes in effect in 2013, when the dispute between the parties arose. The 2015 Legislature retained the costs and attorney fees provision in former NRS 116.3116(8), but it is now codified as NRS 116.3116(12).

DISCUSSION

Appellant argues that the district court erred in awarding respondent costs and attorney fees pursuant to NRS 116.3116(8), asserting that such an award is available only to a party who prevails in an action brought by a homeowners' association to enforce its assessment lien. Respondent argues that NRS 116.3116(8) allowed a prevailing party to recover its costs and attorney fees in any action involving claims that relate to an NRS 116.3116 lien foreclosure. By its terms, NRS 116.3116(8) mandates the award of costs and attorney fees only in an "action brought under this section" by a homeowners' association to enforce its lien, not collateral litigation between third parties following an NRS 116.3116 foreclosure sale.

When issues concerning attorney fees implicate questions of law, such as statutory construction, the proper review is de novo. *In re Estate & Living Tr. of Miller*, 125 Nev. 550, 552-53, 216 P.3d 239, 241 (2009). "This court has established that when it is presented with an issue of statutory interpretation, it should give effect to the statute's plain meaning." *MGM Mirage v. Nev. Ins. Guar. Ass'n*, 125 Nev. 223, 228, 209 P.3d 766, 769 (2009). Therefore, "when the language of a statute is plain and unambiguous, such that it is capable of only one meaning, this court should not" look beyond the plain meaning of the statute. *Id.* at 228-29, 209 P.3d at 769.

Nevada's HOA lien statute, NRS 116.3116, is modeled after the Uniform Common Interest Ownership Act of 1982, § 3-116, 7 U.L.A., part II 121-24 (2009) (amended 1994, 2008) (UCIOA), which Nevada adopted in 1991, *see* NRS 116.001. NRS Chapter 116 confers to a homeowners' association a superpriority lien on a homeowner's unit for unpaid assessments and fines levied against the unit. *See* NRS 116.3116(1)-(2). The specific statute at issue, NRS 116.3116(8), stated that "[a] judgment or decree in any action brought under this section must include costs and reasonable attorney's fees for the prevailing party." Throughout NRS 116.3116 *et seq.*, the Legislature used the term "action" to refer to an action by a homeowners' association to enforce its lien, whether by judicial or nonjudicial foreclosure sale. *See* NRS 116.3116(2) ("The lien is also prior to all security interests . . . to the extent of the assessments for common expenses . . . which would have become due in the absence of acceleration during the 9 months immediately preceding institution of an action to enforce the lien . . . ."); NRS 116.3116(7) ("This section does not prohibit actions to recover sums for which subsection 1 creates a lien or prohibit an association from taking a deed in lieu of foreclosure."); NRS 116.3116(11) ("In an action by an association to collect assessments or to foreclose a lien created under this section . . . .").[2] Thus, we conclude that NRS 116.3116(8)

[2]Although NRS 116.3116 permitted both nonjudicial and judicial foreclosure sales, NRS 116.3116(8) appears limited to the latter, given its reference to a "judgment" or "decree."

plainly and unambiguously granted to a prevailing party costs and attorney fees in an action initiated by the homeowners' association to enforce its lien pursuant to NRS 116.3116's superpriority lien provision.

Here, the homeowners' association foreclosed on the property pursuant to NRS 116.3116's superpriority provision. However, NRS 116.3116 does not authorize appellant's quiet title action even though appellant may have relied on the statute in framing its quiet title complaint. Thus, appellant's action was not brought under NRS 116.3116, which is required to receive attorney fees pursuant to NRS 116.3116(8). Rather, appellant's action was brought under NRS 30.010 *et seq.*, which authorizes actions to quiet title.

Caselaw from other jurisdictions also supports our conclusion. The purpose of the UCIOA is "to make uniform the law with respect to the subject of this chapter among states enacting it." NRS 116.1109(2). Vermont's Common Interest Ownership Act, modeled after the UCIOA, contains an identical costs and attorney fees provision. *See* Vt. Stat. Ann. 27A Art. 3, § 3-116(h) (2012) (providing "[a] judgment or decree in any action brought under this section shall include an award of costs and reasonable attorney fees to the prevailing party"). In *Will v. Mill Condominium Owners' Ass'n*, the Vermont Supreme Court addressed whether a condominium owner could receive costs and attorney fees pursuant to Vt. Stat. Ann. 27A Art. 3, § 3-116(g) (2006).[3] 898 A.2d 1264, 1266, 1269 (Vt. 2006). The owner had successfully initiated a suit against the homeowners' association challenging the validity of the foreclosure sale and requested costs and attorney fees pursuant to § 3-116(g). *Id*. Like NRS 116.3116(1), Vermont's statute permits "homeowners' associations to assert a lien over property where the property owner is delinquent in paying assessments." *Id*. at 1269. The court explained, "[g]enerally, a party must proceed under the applicable statute to recover statutory attorneys' fees." *Id*. Thus, "[w]hile it is true that the Association foreclosed on [the owner's] condominium under this statute," the owner's suit challenging the validity "of the foreclosure did not take place in the context of a § 3-116 proceeding." *Id*. As a result, the court held that the owner was not entitled to attorney fees under § 3-116(g). *Id*. Accordingly, we conclude that respondent was not entitled to costs and attorney fees pursuant to NRS 116.3116(8). Thus, we reverse the district court's order awarding respondent costs and attorney fees.

Pickering and Hardesty, JJ., concur.

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[3]At the time of the Vermont Supreme Court decision, Vt. Stat. Ann. 27A Art. 3, § 3-116(h) (2012), was codified as Vt. Stat. Ann. 27A Art. 3, § 3-116(g) (2006).

WEST SUNSET 2050 TRUST, A NEVADA TRUST, APPELLANT, *v.* NATIONSTAR MORTGAGE, LLC, A FOREIGN LIMITED LIABILITY COMPANY, RESPONDENT.

No. 70754

June 28, 2018 420 P.3d 1032

Appeal from summary judgment in an action to quiet title. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Reversed and remanded.

Ayon Law, PLLC, and *Luis A. Ayon* and *Stephen G. Clough*, Las Vegas, for Appellant.

Akerman LLP and *Ariel E. Stern* and *Thera A. Cooper*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

This appeal again requires us to consider the competing interests of the purchaser of property at an HOA foreclosure sale and the beneficiary of a deed of trust on that property at the time of the sale. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A. (SFR I)*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that valid foreclosure of an HOA superpriority lien extinguishes a first deed of trust).

In this case, the district court determined that respondent Nationstar Mortgage, LLC's deed of trust survived the HOA foreclosure sale because the HOA failed to provide statutorily required preforeclosure notice. Appellant West Sunset 2050 Trust argues that the district court erred in that determination. Nationstar counters that, even if the HOA fully complied with the notice requirements, the HOA lost its right to foreclose on the property because it sold its right to collect past-due assessments on that property to a third party. *See Edelstein v. Bank of N.Y. Mellon*, 128 Nev. 505, 508-09, 286 P.3d 249, 252 (2012) (holding that a party cannot foreclose on a property if the foreclosing entity does not simultaneously possess a promissory note and a lien on the property securing that note).

We hold that the foreclosure sale was not invalid due to a lack of notice, and we reject Nationstar's *Edelstein* argument as inapplicable to this scenario. Accordingly, we reverse the district court's order and remand for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

This case concerns competing rights to 7255 W. Sunset Road, Unit 2015 (the Property). In 2005, a homeowner purchased the

Property with a home loan from New Freedom Mortgage Corporation in the amount of $176,760. New Freedom secured that loan with a senior deed of trust on the Property. That deed of trust was recorded and subsequently assigned to an organization that merged with Bank of America. It was then reassigned to respondent Nationstar Mortgage, LLC.

The Property is within the Tuscano Homeowners Association (the HOA) and is subject to the HOA's covenants, conditions, and restrictions (CC&Rs). Those CC&Rs obligated the owner of the Property to pay monthly assessments and authorized the HOA to impose a lien upon the Property in the event of nonpayment. In 2012, the HOA recorded a lien for delinquent assessments on the Property and subsequently recorded a Notice of Default (NOD). When the HOA recorded the NOD, Bank of America was on record as the beneficiary of the deed of trust. The HOA mailed the NOD to New Freedom but not to Bank of America.

The HOA then sold to nonparty First 100, LLC, its "interest in any and all [proceeds on past income] arising from or relating to the [Property's] Delinquent Assessment[ ]." In the written contract memorializing that sale, the HOA promised to continue its efforts to collect on the Property's past-due assessments and to remit all such payments directly to First 100.

On May 29, 2013, the HOA recorded a Notice of Foreclosure Sale. The HOA mailed that notice to New Freedom, Bank of America, Nationstar, and other parties not relevant here. The Property's delinquent assessment remained unpaid, so the HOA proceeded with a nonjudicial foreclosure sale. Appellant West Sunset purchased the Property at that sale for $7,800.

West Sunset sued to quiet title against Nationstar, Bank of America, and other parties not relevant here. Nationstar counterclaimed to quiet title, and both parties moved for summary judgment.

The district court granted summary judgment to Nationstar. In its written order, the court found that the HOA failed to provide "any foreclosure notices to the beneficiary of the senior deed of trust," so Nationstar's deed of trust survived the foreclosure sale. The practical effect of the court's decision is to vest ownership of the Property in West Sunset while subjecting it to Nationstar's senior deed of trust.

DISCUSSION

Standard of review

This court reviews de novo a district court's order granting summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is appropriate upon a showing that "there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." NRCP 56(c).

In a quiet title action, "a plaintiff's right to relief . . . depends on superiority of title." *Chapman v. Deutsche Bank Nat'l Tr.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013) (internal quotation marks omitted). "[T]he burden of proof rests with the plaintiff to prove good title in himself." *Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996), *abrogated on other grounds by Delgado v. Am. Family Ins. Grp.*, 125 Nev. 564, 570, 217 P.3d 563, 567 (2009), *as recognized by In re Frei Irrevocable Tr.*, 133 Nev. 50, 56 n.8, 390 P.3d 646, 652 n.8 (2017).

Notice and due process

Nationstar's primary argument, both below and on appeal, is that the HOA failed to provide statutorily required notice of the impending foreclosure sale on the property.[1] That is, Nationstar attempts to escape the holding of *SFR I* by arguing that a lack of notice rendered the foreclosure improper. 130 Nev. at 758, 334 P.3d at 419 (holding that "proper foreclosure" of an HOA superpriority lien "will extinguish a first deed of trust").

To be clear, Nationstar does not allege that Nationstar itself was deprived of notice. It is undisputed that the HOA served Nationstar with notice of the foreclosure sale, and Nationstar does not argue that it was entitled to be served the NOD. *Cf. SFR Invs. Pool 1, LLC v. First Horizon Home Loans (SFR II)*, 134 Nev. 19, 21-23, 409 P.3d 891, 893-94 (2018) (holding that an HOA need not re-serve notices each time a property changes ownership). Rather, Nationstar's argument is that the HOA sale must be invalidated because its predecessor in interest—Bank of America—was not mailed the NOD.

While Nationstar is correct that Bank of America was not served the NOD, Nationstar provides no explanation as to how Nationstar was affected—much less injured—by defective notice to Bank of America. The HOA properly recorded the NOD prior to the assignment, so that assignment put Nationstar on record notice of the NOD. *Id.* at 892 ("Because NRS 116.31162 requires a[n] [HOA] foreclosing on its interest to record its notice of foreclosure sale, we conclude that any subsequent buyer purchases the property subject to that notice that a foreclosure may be imminent."). Nationstar's failure to allege prejudice resulting from defective notice dooms its claim that the defective notice invalidates the HOA sale.[2] *See*

[1]As a preliminary matter, the parties disputed at length whether Nationstar's deed of trust was invalid because, years before Nationstar became its beneficiary, the homeowner appears to have unilaterally executed a deed in lieu of foreclosure to New Freedom. We decline to settle this dispute because its resolution will not affect the outcome of this case. *See First Nat. Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) ("In that our determination of the first issue is dispositive of this case, we do not reach the second issue . . . .").

[2]Nationstar additionally argues that defective notice violated Bank of America's due process rights. We reject this argument as procedurally improper and substantively meritless. *Greene v. State*, 113 Nev. 157, 176, 931 P.2d

State, Dep't of Motor Vehicles & Pub. Safety v. Pida, 106 Nev. 897, 899, 803 P.2d 227, 228-29 (1990) (upholding a revocation of driving privileges despite the State's failure to serve statutorily required notice to the driver because the driver was not prejudiced by the defective service); *Turner v. Dewco Servs., Inc.*, 87 Nev. 14, 17, 479 P.2d 462, 465 (1971) (holding that defective notice "was not sufficiently prejudicial to void" a foreclosure sale).

In sum, the evidence does not support the district court's finding that the HOA failed to provide "any foreclosure notices to the beneficiary of the senior deed of trust." Rather, the record conclusively reveals that the HOA served notice of the foreclosure sale to Nationstar. Nationstar has failed to show that it was prejudiced by the HOA's failure to serve the NOD to Bank of America. Therefore, the district court erred in holding that Nationstar's deed of trust survived the foreclosure sale due to a lack of notice.

The Edelstein issue

Nationstar's second argument is that the foreclosure sale was invalid because the HOA lost standing to foreclose on the property when it entered into a "factoring agreement." A factoring agreement is "the sale of accounts receivable of a firm to a factor at a discounted price." *In re Straightline Invs., Inc*., 525 F.3d 870, 876 n.1 (9th Cir. 2008) (internal quotation marks omitted). Such an agreement accords the seller "two immediate advantages: (1) immediate access to cash; and (2) the factor assumes the risk of loss." *Id*. (internal quotation marks omitted).

In this case, the HOA entered into a factoring agreement when it sold to nonparty First 100 its "interest in any and all [proceeds on past income] arising from or relating to the [Property's] Delinquent Assessment[ ]." That agreement indicates that the HOA sold for $1,476 the right to receive $4,279.86 in past-due assessments on the Property.

Nationstar contends that this factoring agreement deprived the HOA of standing to foreclose.[3] A lack of standing, says Nationstar, would invalidate the foreclosure sale and allow Nationstar's deed of trust to escape the fate of subpriority interests on properties properly

54, 66 (1997) ("Constitutional rights are personal and may not be asserted vicariously."), *receded from on other grounds by Byford v. State*, 116 Nev. 215, 235, 994 P.2d 700, 713 (2000); *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortg.*, 133 Nev. 28, 34, 388 P.3d 970, 975 (2017) ("[T]he Due Process Clauses of the United States and Nevada Constitutions are not implicated in an HOA's nonjudicial foreclosure of a superpriority lien.").

[3]Nationstar additionally argues that the factoring agreement's existence violates NRS 116.3102(1)(p) and the HOA's CC&Rs. We decline to consider this argument because resolving it will not affect the outcome of this case. That is, a declaration that the factoring agreement was invalid would not alter our conclusion that the valid HOA foreclosure sale extinguished Nationstar's deed of trust.

foreclosed upon pursuant to NRS Chapter 116. *See SFR I*, 130 Nev. at 758, 334 P.3d at 419 (extinguishing all junior interests, including a first deed of trust).

Nationstar's argument relies upon *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 508, 286 P.3d 249, 252 (2012). In that case, David Edelstein financed a home purchase by executing a promissory note in favor of a lender. *Id*. at 509, 286 P.3d at 252. That promissory note was secured by a deed of trust, which authorized the lender to foreclose on the house should Edelstein default on the note. *Id.* The note and the deed of trust were subsequently transferred to separate entities, but both ultimately fell under the control of Bank of New York Mellon (BNYM), which sought to foreclose on the house. *Id.* at 509-10, 286 P.3d at 252-53. Edelstein argued that BNYM could not foreclose because it failed to demonstrate that it simultaneously held both the promissory note and the deed of trust. *Id.* at 511-12, 286 P.3d at 253-54. While this court ultimately ruled against Edelstein, we agreed with his legal analysis regarding the foreclosure requirement:

> To enforce the obligation by nonjudicial foreclosure and sale, [t]he deed and note must be held together because the holder of the note is only entitled to repayment, and does not have the right under the deed to use the property as a means of satisfying repayment. Conversely, the holder of the deed alone does not have a right to repayment and, thus, does not have an interest in foreclosing on the property to satisfy repayment.

Id. at 512, 286 P.3d at 254 (internal citation and quotation marks omitted) (alteration in original). In short: "to have standing to foreclose, the current beneficiary of the deed of trust and the current holder of the promissory note must be the same."[4] *Id*. at 514, 286 P.3d at 255.

Nationstar analogizes the present situation to *Edelstein* by comparing the HOA's superpriority lien to a deed of trust, and the HOA's right to receive payment on past assessments to a promissory note. Therefore, Nationstar argues, in selling the right to collect past assessments on the Property, the HOA severed its lien from the underlying debt and lost its ability to foreclose until the two become reunified.

Nationstar accurately analogizes the HOA's superpriority lien to a deed of trust, but the analogy collapses when Nationstar attempts

[4]Nothing in this discussion affects our holding in *In re Montierth*, 131 Nev. 543, 547, 354 P.3d 648, 651 (2015) ("[F]oreclosure is not impossible if there is either a principal-agent relationship between the note holder and the mortgage holder, or the mortgage holder 'otherwise has authority to foreclose in the [note holder]'s behalf.'" (alteration in original) (quoting Restatement (Third) of Property: Mortgages § 5.4 cmts. c, e (1997)). To the extent that *In re Montierth* is relevant here, it indicates that Nevada disfavors an expansion of the *Edelstein* no-splitting rule.

to equate the HOA's factoring agreement with *Edelstein*'s transfer of a promissory note. Unlike the transfer of a promissory note, the factoring agreement did not affect the relationship between debtor and lender. That is, the Property owner remained indebted to the HOA (as opposed to becoming indebted to First 100), and the HOA retained the exclusive right to collect that debt. Indeed, the factoring agreement obliges the HOA, through its agent, to continue its collection efforts on the past-due assessments. The agreement merely instructs that agent to remit all payments directly to First 100. In short, unlike the transfer of a promissory note in *Edelstein*, the factoring agreement at issue did not affect the HOA's right to foreclose on the property.

While the foregoing is sufficient to reject Nationstar's *Edelstein* argument, we offer one final observation on this matter. Nationstar has provided no argument as to why, as a practical or policy matter, we should discourage HOAs from executing factoring agreements. Such agreements serve the valid purpose of providing HOAs with immediate access to cash, thus helping them meet their perpetual upkeep obligations. *See In re Straightline Invs.*, 525 F.3d at 876 n.1. Extending *Edelstein* to this situation would complicate HOAs' decisions to execute such agreements and thereby frustrate their efforts to attain cash needed to maintain their communities. Absent a theory as to how these factoring agreements result in harm, we are disinclined to so interfere with HOAs' financing practices.

CONCLUSION

Given that Nationstar's rights were not prejudiced by the HOA's failure to serve the NOD upon Bank of America, the district court erred in holding that defective notice allowed Nationstar's deed of trust to survive the HOA foreclosure sale. We reject Nationstar's *Edelstein* argument as inapplicable to this HOA-factoring agreement scenario. Accordingly, and having carefully considered the parties' remaining arguments,[5] we reverse the entry of summary judgment and remand for further proceedings consistent with this opinion.

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

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[5]That is, we reject Nationstar's argument that "gross inadequacy of price" invalidated the HOA sale. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 741, 405 P.3d 641, 643 (2017) ("[I]nadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale." (internal quotation marks omitted)). Moreover, because we conclude that the HOA sale was valid, we need not resolve the parties' additional dispute as to whether West Sunset was a *bona fide* purchaser.

IN THE MATTER OF N.J., A MINOR CHILD.

N.J., APPELLANT, *v.* THE STATE OF NEVADA, RESPONDENT.

No. 70220

June 28, 2018 420 P.3d 1029

Appeal from a district court order adjudicating appellant as a delinquent child. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Affirmed.

Troy Curtis Jordan, Reno, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Arthur E. Mallory*, District Attorney, and *Joseph L. Sanford*, Deputy District Attorney, Churchill County, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, DOUGLAS, C.J.:

In this opinion, we are asked to determine whether the juvenile court abused its discretion in admitting uncharged acts as evidence. We conclude that it did not because the evidence was competent, material, and relevant to appellant's underlying charges, as required pursuant to juvenile justice statute NRS 62D.420.

FACTS AND PROCEDURAL HISTORY

On September 22, 2015, appellant N.J. and a group of mutual acquaintances were at a park in Fallon, Nevada, when N.J. attempted to fight the victim in this case. According to witness testimony, N.J. believed that her boyfriend, T.H., was sexually intimate with the victim. The victim eluded an altercation and left the park.

Later that evening, the victim received a text message from T.H. The victim and T.H. planned to visit Walmart to purchase pajamas. T.H. picked up the victim, but instead of visiting Walmart, they drove to an isolated area behind Walmart. After they parked the vehicle, N.J. pulled up in a vehicle behind them. N.J. left her vehicle and entered the vehicle carrying the victim. N.J. struck the temple of the victim's head, threatened to hurt the victim if she did not stay away from T.H., and spat on the victim.

The State filed a delinquency petition in juvenile court charging N.J. with one count of battery and one count of harassment. During an evidentiary hearing, N.J. objected to the admission of testimony regarding two uncharged acts, namely testimony that she had

(1) challenged the victim to a fight earlier in the day at the park, and (2) spat on the victim after the battery and harassment. With regard to the two uncharged acts, the district court overruled the objections based on the res gestae doctrine. The district court ultimately adjudicated N.J. delinquent on both counts. This appeal followed.

DISCUSSION

This court generally defers to the district court's discretion in admitting or excluding evidence of uncharged acts. *Braunstein v. State*, 118 Nev. 68, 72, 40 P.3d 413, 416 (2002). Thus, this court will not reverse such determinations absent manifest error. *Id.* However, questions of statutory interpretation are reviewed de novo. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011).

N.J. argues that the testimony regarding two uncharged acts constitutes bad act evidence and is inadmissible in juvenile proceedings because NRS Chapter 62D does not have a provision similar to NRS 48.045, which allows the admission of bad act evidence for certain limited purposes in adult criminal proceedings.[1] We disagree.

In criminal cases involving adult defendants, NRS 48.045 permits the admission of uncharged-act evidence for certain limited purposes. Although evidence of prior misconduct "is not admissible to prove the character of a person," it may be admitted "for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." NRS 48.045(2). Prior to the admission of evidence of other wrongs in the context of a criminal case, the prosecutor has the burden of establishing at a hearing outside the jury's presence that: "(1) . . . the evidence is relevant to the crime charged; (2) that the other act is proven by clear and convincing evidence; and (3) that the probative value of the other act is not substantially outweighed by the danger of unfair prejudice." *Taylor v. Thunder*, 116 Nev. 968, 973, 13 P.3d 43, 46 (2000) (internal quotation marks omitted).

NRS 48.045 makes no mention of its inadmissibility in juvenile proceedings. *See Union Plaza Hotel v. Jackson*, 101 Nev. 733, 736, 709 P.2d 1020, 1022 (1985) (providing that this court is "not empowered to go beyond the face of a statute to lend it a construction contrary to its clear meaning"); *see also* NRS 49.295(2)(d) (providing unequivocally that the marital privileges do not apply in juvenile proceedings). Although juvenile proceedings are civil in nature,

[1]We note that N.J. also argues there is insufficient evidence to support the delinquency adjudication due to inconsistent and contradictory witness testimony. After considering this claim, we conclude that it lacks merit. *See Barber v. State*, 131 Nev. 1065, 1071, 363 P.3d 459, 464 (2015) (explaining that the standard of review when analyzing "the sufficiency of the evidence is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt" (internal quotation marks omitted)).

formal evidentiary hearings are required to adjudicate a juvenile as delinquent. *See State v. Javier C.*, 128 Nev. 536, 540, 289 P.3d 1194, 1197 (2012) (recognizing that juvenile proceedings and confinement resulting therefrom are civil, not criminal); *N.L. v. State*, 989 N.E.2d 773, 779 (Ind. 2013) (holding that while juvenile delinquency hearings are civil in nature, a formal fact-finding hearing is analogous to a criminal trial and the rules of evidence apply to the same extent as in a criminal case). Thus, initially, NRS 48.045 appears to apply in juvenile proceedings.

We now turn to the application of NRS 62D.420, which provides, in pertinent part:

> 1. In each proceeding conducted pursuant to the provisions of this title, the juvenile court may:
>
> (a) Receive all competent, material and relevant evidence that may be helpful in determining the issues presented, including, but not limited to, oral and written reports; and
>
> (b) Rely on such evidence to the extent of its probative value.

NRS 62D.420 unequivocally provides that a juvenile court may receive any evidence that is competent, material, and relevant to the underlying charge and is more relaxed than the rules of evidence provided in NRS 48.045. NRS 48.045 excludes the admission of evidence of uncharged acts for the purpose of proving character, while NRS 62D.420 is void of such exclusion. This distinction makes sense given that NRS 48.045 acts as a procedural safeguard in a criminal case to ensure "that the jury will [not] be unduly influenced by the evidence, and thus convict the accused because it believes the accused is a bad person." *Tavares v. State*, 117 Nev. 725, 730, 30 P.3d 1128, 1131 (2001). In contrast, juvenile proceedings "[m]ust be heard without a jury." NRS 62D.010. Consequently, NRS 62D.420 and NRS 48.045, applied in the context of juvenile proceedings, conflict.

"When two statutory provisions conflict, this court employs the rules of statutory construction and attempts to harmonize conflicting provisions so that the act as a whole is given effect." *State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 508, 306 P.3d 369, 380 (2013) (internal citations omitted). "Under the general/specific canon, the more specific statute will take precedence and is construed as an exception to the more general statute, so that, when read together, the two provisions are not in conflict, but can exist in harmony." *Williams v. State, Dep't of Corr.*, 133 Nev. 594, 601, 402 P.3d 1260, 1265 (internal citations and quotation marks omitted); *see also Piroozi v. Eighth Judicial Dist. Court*, 131 Nev. 1004, 1009, 363 P.3d 1168, 1172 (2015) (providing that "[w]here a general and a special statute, each relating to the same subject, are in conflict and they cannot be read together, the special statute con-

trols" (internal quotation marks omitted)). Because NRS 62D.420 is a statute focusing specifically on the admission of evidence in juvenile proceedings, it is the more specific statute, and it governs here. *See* NRS 47.020(1)(a) (providing NRS 48.045 governs proceedings except "[t]o the extent to which its provisions are relaxed by a statute or procedural rule applicable to the specific situation"). As the specific statute, in juvenile proceedings, NRS 62D.420 sets forth an exception to NRS 48.045.[2]

Based on the foregoing analysis, the district court was allowed to receive any evidence that was competent, material, and relevant to N.J.'s underlying charges of battery and harassment. The district court concluded that the two uncharged acts provide a full account of the circumstances surrounding the commission of the battery and harassment. We note that the district court acknowledged that N.J. could have been charged with a separate battery for spitting on the victim but was not. Nonetheless, the district court allowed such testimony as evidence in this case. We are satisfied that the testimony regarding the two uncharged acts is competent, material, and relevant, as required pursuant to NRS 62D.420(1)(a). Thus, the district court did not abuse its discretion in admitting the testimony regarding the two uncharged acts, and therefore, we affirm the district court's order.

Cherry, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

JAPONICA GLOVER-ARMONT, Appellant, *v.* JOHN CARGILE; and CITY OF NORTH LAS VEGAS, a Municipal Corporation Existing Under the Laws of the State of Nevada in the County of Clark, Respondents.

No. 70988-COA

July 19, 2018 426 P.3d 45

Japonica Glover-Armont appeals from a district court order granting summary judgment in a tort action. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed in part, reversed in part, and remanded.

Tao, J., dissented in part.

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[2]We note that NRS 48.045 was enacted 32 years prior to the enactment of NRS 62D.420. This court must assume that, when enacting NRS 62D.420, the Legislature was aware of related statutes, such as NRS 48.045. *See City of Sparks v. Reno Newspapers, Inc.*, 133 Nev. 398, 405, 399 P.3d 352, 356 (2017). Thus, the Legislature could have used identical language in NRS 62D.420 or structured the statute in a similar way.

Ganz & Hauf and *Adam Ganz, Jeffrey L. Galliher, Marjorie L. Hauf*, and *David T. Gluth II*, Las Vegas, for Appellant.

Micaela Rustia Moore, City Attorney, and *Christopher D. Craft*, Senior Deputy City Attorney, North Las Vegas, for Respondents.

Amanda Kellar and *Caitlin Cutchin*, Bethesda, Maryland; *Lewis Brisbois Bisgaard & Smith, LLP*, and *Robert W. Freeman* and *Cheryl A. Grames*, Las Vegas, for Amicus Curiae International Municipal Lawyers Association.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Silver, C.J.:

In this appeal, we consider whether the discretionary-act-immunity doctrine applies to an action arising from a vehicular accident involving a police officer responding to an emergency. NRS 41.032(2) provides immunity to government officials acting within their discretionary purview. However, that statute is in tension with NRS 484B.700, which allows a police officer to proceed past a red traffic signal in an emergency, but also requires that officer to utilize audio and visual or visual signals only, as required by law, and to drive with due regard for others' safety when doing so. Having considered the tension between these two statutes, we conclude that discretionary-act immunity is unavailable in the circumstance identified above because the language of NRS 484B.700(4) mandates that the police officer drive with due regard for the safety of others, and this duty is not discretionary.

While responding to an emergency call early one morning, North Las Vegas Police Department Sergeant John Cargile made a left turn against a red light, and collided with Japonica Glover-Armont's vehicle, injuring her. Glover-Armont thereafter sued Sergeant Cargile and the City of North Las Vegas, alleging various negligence claims and vicarious liability. The district court granted summary judgment in favor of Sergeant Cargile and the City of North Las Vegas, concluding the doctrine of discretionary-act immunity provided them with qualified immunity to Glover-Armont's claims.

We conclude that the district court erred by granting summary judgment based upon discretionary-act immunity as NRS 484B.700(4) does not confer discretion, and therefore, the discretionary-immunity doctrine does not apply. We further conclude that the facts regarding the incident are highly contested, and

a jury, taking the facts in the light most favorable to Glover-Armont, could conclude that Sergeant Cargile breached NRS 484B.700(4)'s duty of care. Accordingly, summary judgment on Glover-Armont's negligence, negligent entrustment, and vicarious liability claims was improper.

FACTS AND PROCEDURAL HISTORY

In the early morning hours of November 5, 2012, appellant Japonica Glover-Armont drove eastbound towards an intersection displaying a green traffic signal for eastbound traffic. Simultaneously, respondent North Las Vegas Police Department Sergeant John Cargile, responding to an emergency, drove northbound toward the same intersection. A large hill located off the southwest corner of the intersection obstructed both Sergeant Cargile's view of eastbound oncoming traffic and Glover-Armont's view of northbound oncoming traffic. Sergeant Cargile, in an effort to quickly reach the emergency, attempted to make a left turn against the red traffic signal for northbound traffic, but his vehicle collided with Glover-Armont's vehicle within the intersection. Glover-Armont suffered injuries in the collision. The parties do not dispute that Sergeant Cargile activated his emergency lights, but Glover-Armont contends that Sergeant Cargile failed to use his siren.

Glover-Armont sued Sergeant Cargile and respondent City of North Las Vegas for negligence, vicarious liability, and negligent entrustment, as well as negligent hiring, training, and supervision. Glover-Armont alleged that Sergeant Cargile failed to use due care and failed to engage his siren in the course of responding to an emergency. The City of North Las Vegas traffic investigator who investigated the accident reported that Glover-Armont was not speeding and that it was impossible for Sergeant Cargile to see oncoming eastbound traffic while traveling northbound until he entered the intersection.

Sergeant Cargile and the City of North Las Vegas (collectively, North Las Vegas) moved for summary judgment, arguing that discretionary-act immunity barred Glover-Armont's claims. North Las Vegas acknowledged that the hill on the corner obstructed Sergeant Cargile's visibility, making it nearly impossible for him to see eastbound oncoming traffic before entering the intersection. Nevertheless, North Las Vegas argued that Sergeant Cargile's decision to enter the intersection against a red traffic signal, even if made without due care, was a discretionary decision in furtherance of public policy because he did so in response to an emergency call, and, therefore, discretionary-act immunity barred all of Glover-Armont's claims against North Las Vegas.

Glover-Armont conceded that Sergeant Cargile's decision to proceed against a red traffic signal in an emergency was discretionary. However, she argued that his decision to do so without a siren and without due care as required by NRS 484B.700 was not discretionary. Additionally, Glover-Armont noted in her supplemental opposition to North Las Vegas' summary judgment motion that the parties still disputed whether Glover-Armont saw Sergeant Cargile's lights, whether Sergeant Cargile engaged his siren, whether Glover-Armont had her headlights on, whether Cargile proceeded through the intersection when Glover-Armont was already in the intersection, and who hit whom.

During argument on North Las Vegas' summary judgment motion, the district court noted that the parties still disputed whether Sergeant Cargile operated his siren when traveling through the red light, and that both Sergeant Cargile and Glover-Armont acknowledged during deposition testimony that each did not see the other until each entered the intersection due to the hill. The district court denied summary judgment based on this factual dispute and evidence in the record, concluding that an officer responding to an emergency still has a duty to notify the public that he is responding to an emergency, and that the fact that the hill obstructed Glover-Armont's view of northbound traffic and Sergeant Cargile's view of eastbound traffic created a genuine issue of material fact as to whether Sergeant Cargile entered the intersection in a safe manner for the public.

North Las Vegas moved for reconsideration, citing two additional cases and arguing that discretionary-act immunity applied even if Sergeant Cargile abused his discretion. Glover-Armont opposed the motion for reconsideration, arguing that North Las Vegas' motion was flawed because it incorrectly relied on an exception to the discretionary-act-immunity doctrine for intentional torts. After a hearing, the district court granted North Las Vegas' motion for reconsideration.

The district court thereafter granted summary judgment as to Glover-Armont's negligence claim against North Las Vegas, finding, without addressing NRS 484B.700, that Sergeant Cargile used his individual judgment in deciding whether and how to proceed against the red traffic signal and that his decisions were discretionary, such that North Las Vegas was entitled to discretionary-act immunity. And given that finding, the district court also concluded that summary judgment was warranted as to Glover-Armont's remaining claims against North Las Vegas for negligent entrustment, vicarious liability, and negligent hiring, training, and supervision. To support its overall decision, the district court cited public policy concerns, noting that Sergeant Cargile acted to protect the public, enforce the law, and apprehend criminals.

ANALYSIS

The primary issue raised in this appeal is whether discretionary-act immunity, a qualified immunity, provided North Las Vegas with an affirmative defense to Glover-Armont's claims.[1]

We review a district court's order granting summary judgment de novo and will uphold summary judgment only where "the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a

[1]Our dissenting colleague suggests that, before addressing discretionary-act immunity, we must decide whether a private analogue to the conduct at issue here exists, such that Nevada can be said to have waived its sovereign immunity under NRS 41.031. But the private-analogue doctrine is a creature of statutory interpretation, *see Feres v. United States*, 340 U.S. 135, 141-42 (1950) (construing the Federal Tort Claims Act to require a private analogue), and Nevada's appellate courts have not imposed a private-analogue requirement on NRS 41.031. Instead, Nevada's jurisprudence in this area proceeds from the principle that the State has waived sovereign immunity and looks directly to whether discretionary-act immunity applies. *See, e.g.*, *Ortega v. Reyna*, 114 Nev. 55, 62, 953 P.2d 18, 23 (1998), *abrogated in part on other grounds by Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). And our supreme court has ruled against the State as to liability without addressing the private-analogue doctrine even where a private analogue may arguably not exist. *See, e.g.*, *Butler v. Bayer*, 123 Nev. 450, 464-66, 168 P.3d 1055, 1065-67 (2007) (concluding that genuine issues of material fact remain with regard to whether the state negligently released an inmate); *Golconda Fire Prot. Dist. v. Cty. of Humboldt*, 112 Nev. 770, 774-75, 918 P.2d 710, 712-13 (1996) (remanding for an accounting to determine whether a county wrongfully retained interest on taxes that it collected); *cf. Tobin v. Fish*, 161 Wash. App. 1019 (Ct. App. 2011) (unpublished) (concluding that Washington did not require a private analogue because its supreme court had ruled against the government as to liability for conduct having no private analogue).

Moreover, even if we were to adopt a private-analogue requirement for NRS 41.031, despite the dissent's suggestion to the contrary, recent federal jurisprudence on this topic would support a determination that there is a private analogue to the conduct at issue in this case. Indeed, the United States Supreme Court has explained that courts should construe the conduct and claims at issue in a case broadly in searching for a private analogue. *See United States v. Olson*, 546 U.S. 43, 46-47 (2005) (holding that the private-analogue inquiry is not restricted to "the *same circumstances*," but extends "further afield" and providing, as an example, that a negligence claim against a private person who undertakes a duty to warn is a private analogue for the government's failure to maintain a lighthouse). And in that vein, federal courts have found private analogues in situations nearly identical to the present case. *See, e.g.*, *Lee v. United States*, 570 F. Supp. 2d 142, 150-52 (D.D.C. 2008) (determining that a private analogue existed for negligent police chases based on general traffic regulations).

Finally, we note that neither the parties nor the amicus curiae address the private-analogue doctrine, nor did the district court. While this is unsurprising given that, as detailed above, this doctrine does not impact our consideration of the discretionary-act-immunity issue presented here, because the dissent's sua sponte discussion of the doctrine raises jurisdictional questions, we have briefly addressed this matter here.

judgment as a matter of law." *Wood v. Safeway, Inc*., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (internal quotation marks omitted). We review the pleadings and other proof in a light most favorable to the nonmoving party. *Id.* at 732, 121 P.3d at 1031. Genuine issues of material fact remain if a reasonable jury could return a verdict in favor of the nonmoving party based on the evidence presented. *Butler v. Bayer*, 123 Nev. 450, 457-58, 168 P.3d 1055, 1061 (2007). However, Nevada's appellate courts are reluctant to affirm summary judgment on negligence claims because the question of whether a defendant exercised reasonable care is nearly always a question of fact for the jury. *Id.* at 461, 168 P.3d at 1063.

On appeal, Glover-Armont argues that the district court erred by granting summary judgment, asserting questions of fact remain as to whether Sergeant Cargile used due care, pursuant to NRS 484B.700, in proceeding through the intersection against a red traffic signal. North Las Vegas counters that the district court correctly granted summary judgment because, under NRS 41.032(2), discretionary-act immunity bars Glover-Armont's claims.[2]

In addressing these arguments, we first consider the applicability of Nevada's discretionary-act-immunity doctrine to a police officer acting pursuant to NRS 484B.700's exemptions, and thereafter determine the scope of NRS 484B.700(4)'s duty of care and whether summary judgment was appropriate under these facts.[3]

Discretionary-act immunity

Nevada generally waives sovereign immunity. NRS 41.031. However, a doctrine known as discretionary-act immunity, codified as NRS 41.032(2), provides an exception to this general waiver through a qualified immunity for state agencies and their employees who perform discretionary acts. *City of Boulder City v. Boulder Excavating, Inc.*, 124 Nev. 749, 754, 756, 191 P.3d 1175, 1178, 1179-80 (2008). In *Martinez v. Maruszczak*, Nevada adopted the

[2]The International Municipal Lawyers Association filed an amicus brief, but we do not specifically address the arguments presented therein, as they are substantially similar to those raised in North Las Vegas' answering brief.

[3]We have also reviewed Glover-Armont's argument that the district court improperly considered her traffic citation as evidence when granting summary judgment. The record shows the district court did not consider her traffic citation, but instead considered her nolo contendere plea. We conclude that the district court improperly considered Glover-Armont's nolo contendere plea to her traffic citation. *See* NRS 48.125(2) ("Evidence of a plea of nolo contendere or of an offer to plead nolo contendere to the crime charged or any other crime is not admissible in a civil or criminal proceeding involving the person who made the plea or offer."). We caution the district court against considering inadmissible evidence when deciding summary judgment motions. *See Henry Prods. Inc. v. Tarmu*, 114 Nev. 1017, 1019, 967 P.2d 444, 445 (1998) ("Evidence introduced in support of or opposition to a motion for summary judgment must be admissible evidence.").

federal two-part *Berkovitz-Gaubert*[4] test for determining whether a state actor is protected by discretionary-act immunity. 123 Nev. 433, 445-47, 168 P.3d 720, 728-29 (2007). Under the *Berkovitz-Gaubert* test, the discretionary-act-immunity doctrine applies if the decision "(1) involve[s] an element of individual judgment or choice and (2) [is] based on considerations of social, economic, or political policy." *Id.* at 446-47, 168 P.3d at 729. Since adopting the federal *Berkovitz-Gaubert* test, Nevada's appellate courts have yet to apply this test to actions permitted by NRS 484B.700.

A critical preliminary step in the discretionary-act-immunity analysis is identifying the specific government action challenged before turning to the *Berkovitz-Gaubert* test. *See Young v. United States*, 769 F.3d 1047, 1053-54 (9th Cir. 2014) (providing that a district court must first identify the specific agency action challenged before turning to the *Berkovitz-Gaubert* test); *cf. N. Nev. Ass'n of Injured Workers v. Nev. State Indus. Ins. Sys.*, 107 Nev. 108, 113, 807 P.2d 728, 731 (1991).

As a threshold matter, we conclude that the district court incorrectly applied the *Berkovitz-Gaubert* test because it failed to pinpoint Glover-Armont's specific allegations within her complaint. *See Young*, 769 F.3d at 1053 ("To identify the particular agency conduct with which [p]laintiffs take issue, we look to the allegations of [p]laintiffs' complaint."); *see also N. Nev. Ass'n of Injured Workers*, 107 Nev. at 113, 807 P.2d at 731 ("In analyzing respondents' entitlement to immunity under [NRS 41.032], it is necessary to determine whether the acts alleged in appellants' amended complaint are properly categorized as discretionary."). Below, North Las Vegas framed Glover-Armont's allegation as a blanket challenge to Sergeant Cargile's decision to enter the intersection against a red traffic signal in an emergency, when in fact Glover-Armont alleged that the conditions and manner in which Sergeant Cargile proceeded through the red traffic signal did not adhere to NRS 484B.700's standard of care. The district court did not address NRS 484B.700 and did not determine whether the statute requires police officers to use their own judgment when acting under the statute's exemptions. Accordingly, we turn to the first prong of the *Berkovitz-Gaubert* test with Glover-Armont's precise allegations in mind and determine whether NRS 484B.700 confers discretion.

NRS 484B.700 does not confer discretion

Glover-Armont contends that the duty to comply with NRS 484B.700's requirements is not discretionary. We agree.

We review questions of law de novo. *Clark Cty. Sch. Dist. v. Payo*, 133 Nev. 626, 631, 403 P.3d 1270, 1275 (2017). In Nevada, an act

[4]*United States v. Gaubert*, 499 U.S. 315, 322-25 (1991); *Berkovitz v. United States*, 486 U.S. 531, 536-39 (1988).

is discretionary if law or policy allows the public official to use his or her own judgment and deliberation in acting. *Ransdell v. Clark Cty.*, 124 Nev. 847, 856-57, 858, 192 P.3d 756, 763, 764 (2008) (holding that Clark County's actions were discretionary under the *Berkovitz-Gaubert* test because the Clark County Code provided its officials with the discretion to take action). NRS 484B.700 allows an officer to proceed through a red traffic signal when responding to an emergency, but requires the officer to "slow[ ] down as may be necessary for safe operation" and to use either "(a) [a]udible and visual signals; or (b) [v]isual signals only, as required by law." Moreover, NRS 484B.700(4) expressly provides that it does not relieve the officer from "the duty to drive with due regard for the safety of all persons" or "protect the [officer] from the consequences of [the officer's] reckless disregard for the safety of others."

Nevada's appellate courts have not addressed whether this statute confers discretion or requires the state actor to abide by a nondiscretionary standard of care. Other jurisdictions have addressed similar issues with mixed outcomes. For example, North Las Vegas asserts that this court should follow the Minnesota Supreme Court's reasoning in *Vassallo v. Majeski*, 842 N.W.2d 456 (Minn. 2014).

In *Vassallo*, the Minnesota Supreme Court determined that, as relevant here, Minnesota's emergency vehicle statute conferred discretion, and thus, discretionary-act immunity barred the plaintiff's claims. *Id.* at 463-66. The plaintiff sued for injuries sustained after a police officer responding to an emergency sped through an intersection against a red traffic signal and collided with the plaintiff's vehicle. *Id.* at 460. Minnesota's emergency vehicle statute provided that when an emergency vehicle approaches a red traffic signal it must "slow down as necessary for safety, but may proceed cautiously past such red or stop sign or signal after sounding siren and displaying red lights." *Id.* at 461 n.2. The *Vassallo* court concluded that the requirement to "slow down as necessary for safety" was conditioned upon the driver's determination of a safe speed. *Id.* at 463. In addition, the court likened the term "proceed cautiously" to a duty to use due care to avoid a collision and concluded that a due care requirement calls for the use of independent judgment. *Id.* Thus, the court concluded that these requirements conferred a discretionary duty to which immunity applied.[5] *Id.* at 463-64.

However, other courts addressing similar situations have determined that an emergency vehicle statute does not confer discretion in circumstances similar to the case at hand. *See Legue v. City of Racine*, 849 N.W.2d 837, 859 (Wis. 2014). For example, in *Legue*,

[5]The *Vassallo* court also examined a Minnesota county sheriff's office policy that required officers to drive with due regard and summarily concluded that the term "due regard" invited independent judgment, like the term "due care." 842 N.W.2d at 461 n.3, 464.

the plaintiff sued a police officer and the City of Racine for injuries sustained in an accident where the police officer entered an intersection with a red traffic signal en route to an emergency call. *Id.* at 842-43. The police officer had lights and sirens engaged, but a building blocked her view of oncoming traffic. *Id*. After the jury returned a verdict in favor of the plaintiff, the lower court granted defendant's motion for judgment notwithstanding the verdict based upon discretionary-act immunity. *Id.* at 844.

On appeal, the Wisconsin Supreme Court considered whether the police officer was entitled to immunity based upon subsection 5 of Wisconsin's emergency vehicle statute, Wis. Stat. Ann. § 346.03 (West 2015),[6] and a city policy, which both required emergency responders to drive with "due regard under the circumstances" for the public's safety. *Id.* at 858. The court concluded that Wis. Stat. Ann. § 346.03(5) (West 2015) and the city policy imposed a nondiscretionary duty to drive with "due regard under the circumstances" when responding to an emergency. *Id*. at 859-60, 862. In reaching this conclusion, the court reasoned that § 346.03(5)'s language qualified the privileges contained in the earlier part of the statute allowing the emergency responder to disregard speed limits and proceed through red traffic signals, and that the only reasonable interpretation of § 346.03(5)'s conditions was to impose liability on the governmental actor. *Id.* at 851 (discussing § 346.03(5)'s declaration that "the exemptions granted the operator of an authorized emergency vehicle by this section do not relieve such operator from the duty to drive or ride with due regard under the circumstances for the safety of all persons" and explaining that "[t]his language leads us to conclude that an exemption or privilege begets immunity and a duty begets liability"); *see* Wis. Stat. Ann. § 346.03(1)-(2) (West 2015). Further, the court reasoned that "§ 346.03(5)['s] declar[ation] that the exemptions or privileges '*do not relieve* such operator from the duty to drive with due regard'" was mandatory language. *Legue*, 849 N.W.2d at 858. The court ultimately concluded that the duty to maintain a particular standard of care is not discretionary, and reinstated the jury verdict. *Id.* at 858-59, 862.

Wisconsin's statute, like Nevada's statute, states that "[t]he exemptions granted the operator of an authorized emergency vehicle by this section *do not relieve* such operator from the duty to drive or ride with due regard under the circumstances for the safety of all persons, nor do they protect such operator from the consequences of his or her reckless disregard for the safety of others." Wis. Stat. Ann. § 346.03(5) (West 2015) (emphasis added); *see also* NRS 484B.700(4) ("The provisions of this section do not relieve the driv-

[6]The Wisconsin statute has been amended since the Wisconsin Supreme Court entered *Legue*, *see* 2015 Wis. Laws, Act 102, at 807-08, but the amendments were to other portions of the statute.

er from the duty to drive with due regard for the safety of all persons and do not protect the driver from the consequences of the driver's reckless disregard for the safety of others."). And while Minnesota's statute shares some similarities with both Nevada's and Wisconsin's statutes, it is distinctly distinguishable insofar as it does not require an emergency vehicle operator to drive with due regard for the public's safety, but rather states the emergency vehicle operator "may proceed cautiously." Minn. Stat. Ann. § 169.03(2) (West 2016); NRS 484B.700(4); Wis. Stat. Ann. § 346.03(5) (West 2015). Of course, in *Vassallo*, the court likened the term "proceed cautiously" to a duty to use due care, 842 N.W.2d at 463, and arguably, a duty to use due care is similar to Nevada's duty to drive with due regard.

But critically, Minnesota's statute uses the phrase "proceed cautiously" in an open-ended manner, which, as the Minnesota Supreme Court noted, indicates that officers are allowed to use their personal judgment in order to determine what constitutes caution under the circumstances. *Vassallo*, 842 N.W.2d at 463. Conversely, Nevada's statute, like Wisconsin's statute, uses mandatory language in providing that the privileges set forth therein "do not relieve" the driver from the "duty to drive with due regard," NRS 484B.700(4); *see* Wis. Stat. Ann. § 346.03(5), which is indicative of a nondiscretionary duty to act in a certain manner and liability for failing to do so. Indeed, as the Wisconsin Supreme Court reasoned in *Legue*, where there is a duty, there is also liability. *See* 849 N.W.2d at 851 (asking rhetorically, "[w]hy would the legislature exempt an operator of an authorized emergency vehicle from complying with certain rules of the road and impose a duty of due regard unless a violation of the duty can result in liability?").

The reasoning in *Legue* and the similarity between Nevada's and Wisconsin's emergency vehicle statutes are persuasive here, and we therefore conclude that NRS 484B.700(4) imposes a mandatory duty, which gives rise to liability if breached.[7] *See id.* Accordingly, we hold that a police officer's duty to drive with due care when responding to an emergency is mandatory, not discretionary, under the first prong of the *Berkovitz-Gaubert* test.[8] *Cf. N. Nev. Ass'n of In-*

[7]For the same reason, this court is unpersuaded by the Minnesota court's conclusion that officers were afforded discretion under the department policy discussed above.

[8]To the extent that Glover-Armont asserts that North Las Vegas policy also imposes a nondiscretionary duty upon a police officer to utilize both lights and sirens when responding to an emergency, we conclude that Glover-Armont fails to support this argument. In particular, while testimony in the record supports Glover-Armont's assertion, it is impossible for this court to fully review this matter, as she failed to include North Las Vegas' policy in the record. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (noting appellant has the burden of providing this court with an

jured Workers v. Nev. State Indus. Ins. Sys., 107 Nev. 108, 114, 807 P.2d 728, 731 (1991) (explaining that mandatory duties entail little or no discretion, and that the discretionary-act-immunity doctrine does not apply to such obligatory acts). This conclusion is consistent with the approach taken by several other jurisdictions.[9] *See Biscoe v. Arlington Cty.*, 738 F.2d 1352, 1363 (D.C. Cir. 1984); *Legue*, 849 N.W.2d at 859; *Mason v. Bitton*, 534 P.2d 1360, 1365 (Wash. 1975) (en banc).[10]

In reaching this conclusion, we reject a broad-based view of discretionary-act immunity that would render any accident involving a public vehicle responding to an emergency nonactionable. We are mindful that the Legislature intended to give emergency vehicles privileges to allow swift response to those in need; however, the Legislature and our courts have long held that such privileges are to be exercised while keeping the safety of all members of the public in mind. *See* NRS 484B.700(4); *Johnson v. Brown*, 75 Nev. 437, 445, 345 P.2d 754, 758 (1959). Moreover, this holding is in line with the purpose behind Nevada's waiver of sovereign immunity, which is to equally compensate victims of negligence regardless of whether the negligent actor is a state official or private citizen. *See Martinez*, 123 Nev. at 444, 168 P.3d at 727 (discussing the purpose of Nevada's waiver of sovereign immunity).

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adequate appellate record, and when the appellant "fails to include necessary documentation in the record, [this court] necessarily presume[s] that the missing portion supports the district court's decision"). Moreover, an officer does not breach the duty to drive with due regard for the safety of all persons merely by failing to operate his siren. *See* NRS 484D.400(5)-(6) (providing, among other things, that when an officer uses warning lamps without sounding the siren, the officer "shall be deemed to have adequately warned pedestrians and other drivers of [the officer's] approach for purposes of determining whether the [officer] met the duty to drive with due regard for the safety of all persons pursuant to NRS 484B.700").

[9]Importantly, cases in other jurisdictions which conclude that immunity applies to protect police officers from claims arising from a traffic accident involving an emergency responder are distinguishable. For example, while discretionary-act immunity is available to first responders in Virginia, it does not immunize them from suit, but instead, elevates the standard for liability from negligence to gross negligence. *Colby v. Boyden*, 400 S.E.2d 184, 186-87 (Va. 1991). And Texas' immunity doctrine likewise imposes liability for reckless conduct, but does so based on its express exclusion of emergency vehicle operators from the waiver of immunity for negligence. *City of Amarillo v. Martin*, 971 S.W.2d 426, 430 (Tex. 1998).

[10]Likewise, other jurisdictions also hold immunity does not apply to bar a cause of action when a police officer's negligence causes harm to an innocent member of the public, albeit on slightly different grounds. *Patrick v. Miresso*, 848 N.E.2d 1083, 1086-87 (Ind. 2006); *Horta v. Sullivan*, 638 N.E.2d 33, 36-37 (Mass. 1994); *Jones v. Chieffo*, 700 A.2d 417, 420 (Pa. 1997); *Haynes v. Hamilton Cty.*, 883 S.W.2d 606, 611 (Tenn. 1994); *Willden v. Duchesne Cty.*, 217 P.3d 1143, 1145-46 (Utah Ct. App. 2009).

Given the foregoing, because we hold that NRS 484B.700 does not afford discretion, North Las Vegas was not entitled to discretionary-act immunity as to Glover-Armont's negligence, negligent entrustment, and vicarious liability claims, and we need not reach the second prong of the *Berkovitz-Gaubert* test.[11] Accordingly, we conclude that the district court erred by granting North Las Vegas summary judgment as to Glover-Armont's negligence, negligent entrustment, and vicarious liability claims based on that conclusion.[12]

With this in mind, we now turn to the parties' arguments regarding whether genuine issues of fact remain to preclude summary judgment.

Summary judgment was improper

Glover-Armont asserts that there are several issues of material fact that preclude summary judgment because the facts, when viewed in a light most favorable to Glover-Armont, demonstrate that Sergeant Cargile failed to proceed with due care as required by NRS 484B.700(4).

NRS 484B.700(4) states that a police officer traveling through a red traffic signal in an emergency is not relieved "from the duty to drive with due regard" for the public's safety nor protected from the consequences of the officer's reckless disregard for the public's safety. The Nevada Supreme Court has previously interpreted similar language within a Reno Municipal Ordinance[13] to impose an

[11]In light of our conclusion that North Las Vegas is not entitled to discretionary-act immunity, we need not address North Las Vegas' arguments that discretionary-act immunity applies even when a public official abuses his or her discretion, and that the bad-faith and intentional-torts exceptions do not bar immunity in this case. *Franchise Tax Bd. of State of Cal. v. Hyatt*, 133 Nev. 826, 841-42, 407 P.3d 717, 733 (2017) (holding that NRS 41.032 does not protect against intentional torts or bad-faith misconduct), *cert. granted*, 138 S. Ct. 2710 (2018).

[12]With regard to Glover-Armont's negligent hiring, training, and supervision claim, respondents cite *Bryan v. Las Vegas Metro. Police Dep't*, 349 F. App'x 132, 134 (9th Cir. 2009), for the argument that North Las Vegas' training decisions involve policy judgments of the type the discretionary-function exception is designed to shield, and Glover-Armont failed to address that case in her reply brief or otherwise offer specific argument as to why North Las Vegas' failure to adequately train Sergeant Cargile did not involve a shielded policy judgment. Thus, Glover-Armont waived any argument that North Las Vegas was not immune from Glover-Armont's negligent hiring, training, and supervision claims. *See State ex rel. State Bd. of Equalization v. Bakst*, 122 Nev. 1403, 1417 n.41, 148 P.3d 717, 726 n.41 (2006) (concluding appellant waived its argument when it did not refute respondent's argument in its reply brief). Therefore, we affirm summary judgment as to Glover-Armont's negligent hiring, training, and supervision claim.

[13]Reno Municipal Code (RMC) § 10-60 (1954) (allowing emergency responders certain exemptions from the rules of the road and providing that the ordinance's exemptions "shall not relieve the driver of an authorized emergency

ordinary negligence standard of liability, holding that an emergency responder has a "duty to be on the lookout at all times for the safety of the public whose peril is increased by their exemptions from the rules of the road." *Johnson*, 75 Nev. at 445, 345 P.2d at 758.

In *Johnson*, a firefighter responding to an emergency sped through an intersection with obstructed visibility without stopping at a stop sign and collided with another driver whose passenger then brought suit. *Id.* at 439, 345 P.2d at 755. The jury found in favor of the plaintiff, and the firefighter appealed arguing that the Reno Municipal Ordinance requiring him to "drive with due regard for the safety of others" was met because he was utilizing lights and sirens. *Id.* at 439-40, 345 P.2d at 755 (internal quotation marks omitted). The supreme court disagreed concluding that the Reno Municipal Ordinance imposed an ordinary negligence standard of liability and opining that the government is better able to bear the burden of tort liability than an individual to bear loss from an accident. *Id.* at 442-45, 345 P.2d at 756-58.

While *Johnson* was decided before NRS 41.032, the discretionary-act-immunity statute, was enacted, 75 Nev. at 437, 345 P.2d at 754; 1965 Nev. Stat., ch. 505, §§ 1-7, at 1413-15, we look to *Johnson* to determine the standard for liability applicable here given our conclusion that immunity does not apply. Because the language of the Reno ordinance is nearly identical to NRS 484B.700(4), we conclude that NRS 484B.700(4) imposes an ordinary negligence standard of liability. This conclusion is consistent with other jurisdictions that have interpreted similar language to impose an ordinary negligence standard of liability. *See Rutherford v. State*, 605 P.2d 16, 18-19, 18 n.5 (Alaska 1979); *City of Little Rock v. Weber*, 767 S.W.2d 529, 533 (Ark. 1989); *Barnes v. Toppin*, 482 A.2d 749, 755 (Del. 1984); *City of Baltimore v. Fire Ins. Salvage Corps*, 148 A.2d 444, 447 (Md. 1959); *City of Kalamazoo v. Priest*, 49 N.W.2d 52, 54 (Mich. 1951); *Cairl v. City of St. Paul*, 268 N.W.2d 908, 912-13 (Minn. 1978); *Wright v. City of Knoxville*, 898 S.W.2d 177, 179-80 (Tenn. 1995); *Estate of Cavanaugh v. Andrade*, 550 N.W.2d 103, 114-15 (Wis. 1996).

Below, the parties conceded that a hill blocked their respective views, but they disputed everything else about the cause and circumstances of the accident in light of their obstructed views, including whether Glover-Armont saw Sergeant Cargile's lights, whether Sergeant Cargile engaged his siren, whether Glover-Armont had her headlights on, whether Cargile proceeded through the intersection when Glover-Armont was already in the intersection, and who hit whom. And conflicting evidence supported the parties' respective positions with regard to whether Sergeant Cargile gave adequate

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vehicle from the duty to drive with due regard for the safety of all persons using the street, nor shall it protect the driver of any such vehicle from the consequence of a reckless disregard for the safety of others").

warning of his approach and what precautions he took before entering the intersection. Given this conflicting evidence, as the district court originally found, genuine issues of fact remain as to whether Sergeant Cargile violated his duty to drive with due regard, such that summary judgment was unwarranted. *See Butler v. Bayer*, 123 Nev. 456, 461, 168 P.3d 1055, 1063 (2007) (noting Nevada's appellate courts are reluctant to affirm summary judgment on negligence claims because the question of whether a defendant exercised reasonable care is nearly always a question of fact for the jury); *Cf. Legue*, 849 N.W.2d at 842-43, 862 (reinstating a jury verdict that found a police officer negligent where she, utilizing lights and sirens, entered an intersection against a red traffic signal en route to an emergency call when a building obstructed her view of oncoming traffic).

CONCLUSION

We conclude that the district court erred by granting summary judgment based upon discretionary-act immunity. NRS 484B.700 allows an officer to proceed through a red traffic signal in an emergency but imposes mandatory conditions on that privilege, including the duty to drive with due regard of the public's safety. Here, the parties contest whether Sergeant Cargile drove with due regard for the public's safety. Because a jury could conclude Sergeant Cargile did not proceed with due regard, summary judgment was improper. Accordingly, we reverse summary judgment and remand this matter to the district court for further proceedings on Glover-Armont's negligence, negligent entrustment, and vicarious liability claims.[14]

Gibbons, J., concurs.

Tao, J., concurring in part and dissenting in part:

I agree that the majority properly resolves the issue of sovereign immunity as the parties have framed it. But I believe that the parties have framed this case all wrong.

In the words of a fictional television police detective, "all the pieces matter." (Detective Lester Freamon, *The Wire*, HBO 2001). This is especially true when dealing with the "Byzantine complexity

[14]In light of our disposition of this appeal, we do not reach Glover-Armont's argument that the district court improperly granted reconsideration of its original oral denial of North Las Vegas' motion for summary judgment. But we vacate the district court's order awarding costs to North Las Vegas as the prevailing party. *Doud v. Las Vegas Hilton Corp.*, 109 Nev. 1096, 1106, 864 P.2d 796, 802 (1993) (vacating the district court's costs award made to the prevailing party in light of reversal), *superseded by statute on other grounds*, NRS 651.015, *as recognized in Estate of Smith v. Mahoney's Silver Nugget, Inc*., 127 Nev. 855, 858-59, 265 P.3d 688, 691 (2011).

of sovereign-immunity law," *Hall v. McRaven*, 508 S.W.3d 232, 245 (Tex. 2017) (Willett, J., concurring), a field which includes a general rule of immunity, subject to a partial statutory waiver, subject to exceptions to the waiver, within which lie yet more exceptions to those exceptions. When working through these layers of statutory text, we must take care that "no part of [the] statute should be rendered nugatory, nor any language turned to mere surplusage, if such consequences can properly be avoided." *Indep. Am. Party v. Lau*, 110 Nev. 1151, 1154, 880 P.2d 1391, 1392 (1994) (quotation marks omitted); *see* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 176 (2012).

The parties focus their briefing on whether the "discretionary function" exception applies. But in doing so, they overlook critical pieces of the analysis that should apply to this appeal that, when properly applied, lead to a very different result than they propose. Normally, we limit ourselves to the arguments that the parties make and the relief they request, because the parties are generally allowed to frame and present their own case the way they want. But when that approach causes us to gloss over important parts of a statute that would otherwise apply—thereby suggesting to other parties or courts tackling this issue that the right thing to do is to skip over those statutory provisions as well—then "[t]he ability of this court to consider relevant issues *sua sponte* in order to prevent plain error is well established. Such is the case where [clearly controlling law] was not applied by the trial court." *Bradley v. Romeo*, 102 Nev. 103, 105, 716 P.2d 227, 228 (1986) (internal citation omitted); *see Mardian v. Greenberg Family Tr.*, 131 Nev. 730, 733-34, 359 P.3d 109, 111 (2015) (on de novo review of denial of summary judgment, the court is not limited to only what the parties expressly argue: "While the arguments made by the parties focus on Nevada law, the issue of whether the Arizona law should have been applied must also be addressed."); *Nev. Power Co. v. Haggerty*, 115 Nev. 353, 365 n.9, 989 P.2d 870, 877-78 n.9 (1999) (explaining that the court would resolve an issue of statutory interpretation not litigated below "in the interests of judicial economy").

I therefore write separately to address the way I think this case should have come out had the parties properly understood the statute in all of its component parts. "[T]he bottom line is understanding the process. If you don't understand the process, you'll never reap the rewards." Donald J. Trump, *How to Get Rich* 74 (2004).

Nevada's statutory waiver of sovereign immunity is set forth in NRS 41.031, which specifies that the State consents to waive immunity "in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1). The parties ignore this statutory language—the language that initially defines the scope and reach of any waiver of immunity—and

focus instead on a later subsection that contains a specific exception to the waiver, namely, the discretionary function exception described in NRS 41.032(2). But focusing on whether an exception to the waiver applies only makes sense if it's clear that immunity has been waived in the first place. In this case, that's not clear at all. When the statute is properly analyzed in its entirety, I would affirm the district court's grant of summary judgment in its entirety and I therefore respectfully concur in part and dissent in part.

I.

The United States is sovereignly immune and no citizen can sue it for any alleged negligence unless it consents to such suit. Prior to 1946, the only avenue through which a private citizen could seek redress for an injury inflicted by governmental negligence was to petition Congress for compensation through a "private bill."[1] *See Feres v. United States*, 340 U.S. 135, 139-40 (1950). Then, following the crash of a B-25 into the Empire State Building during foggy weather, Congress statutorily enacted the Federal Tort Claims Act (FTCA), which "constitutes a limited waiver by the United States of its sovereign immunity and allows for a tort suit against the United States under specified circumstances." *Hamm v. United States*, 483 F.3d 135, 137 (2d Cir. 2007) (quotation marks omitted); see 28 U.S.C. § 2674. This waiver is not complete; "the United States can be sued only to the extent that it has waived its immunity." *United States v. Orleans*, 425 U.S. 807, 814 (1976).

States, too, possess sovereign immunity, unless they waive it statutorily. Nevada's statutory waiver of sovereign immunity under NRS 41.032 "mirrors" the scope of the federal waiver under the FTCA, and the Nevada Supreme Court has expressly adopted federal judicial precedent applying the FTCA. *See Martinez v. Maruszczak*, 123 Nev. 433, 444, 168 P.3d 720, 727 (2007). Under both, immunity is waived only to the extent expressly outlined by statute and "must be 'construed strictly in favor of the sovereign' and not 'enlarge[d] . . . beyond what the language requires.'" *U.S. Dep't of Energy v. Ohio*, 503 U.S. 607, 615 (1992) (internal citation omitted).

In analyzing the scope of a waiver, two competing considerations are at stake. On the one hand is the foundational idea that citizens have inherent liberty to pursue their vision of happiness free from government interference or coercion, and whenever arbitrary or irrational—here, allegedly negligent—governmental conduct inflicts

[1]As a recent example, Congressional action was required for "downwinders" to receive compensation for exposure to radiation from atomic bomb testing at the Nevada Test Site during the 1950s, because the United States has not waived sovereign immunity for any injuries arising from the effects of military weapons testing.

injury on the innocent and unsuspecting, courts ought to rein in the conduct and provide fair redress to the victims. And what could be more arbitrary than a case like this which alleges that a government vehicle exercising official government power negligently plowed through a major intersection, quite possibly in violation of law and policy regarding police sirens, inflicting serious physical injury on an unsuspecting motorist? On the other hand, though, is the idea that overly abundant lawsuits instill "legal fear" even in those who are not sued, chilling initiative and inhibiting "people [from] doing what they know is right because they do not feel free to do so." Philip K. Howard, *Is Civil Litigation a Threat to Freedom?*, 28 Harv. J. Law & Pub. Pol'y 97, 102 (2004). I would think that if there's anyone in our society whom we don't want to feel inhibited in vigorously doing what they know is right, it ought to be a police officer racing to stop a felony in progress.

Here is the line that must be straddled in a case like this: we want police officers to courageously take risks and perhaps even engage in some level of derring-do to shield us from danger; but we also want any passersby that they irresponsibly injure along the way to have access to fair redress. The question becomes how to achieve one without chilling the other. If we go too far in immunizing government, then government officials get to act with impunity: "[t]he doctrine of sovereign immunity, by insulating imprudence, is innately unfair to those wronged." *Hall*, 508 S.W.3d at 245 (Willett, J., concurring). But if we go too far in the other direction and allow too many suits to create too much liability, then every injury warrants a payout and we drive up costs for everyone, since "[e]ven frivolous claims require the . . . Government to expend administrative and litigation costs, which ultimately fall upon society at-large." *United States v. Kwai Fun Wong*, 135 S. Ct. 1625, 1639 (2015) (Alito, J., dissenting). Worse, the police might not respond so quickly the next time someone dials 9-1-1, and we all end up paying more taxes for less effective service.

II.

To resolve this dilemma and balance these competing interests, the Nevada Legislature enacted NRS 41.031, embodying a general "Waiver of Sovereign Immunity." That general waiver is followed by certain "Conditions and Limitations on Actions" set forth in NRS 41.032 *et seq.*, including the "discretionary function" exception of NRS 41.032(2). Under this exception, when immunity has generally been waived, tort suits alleging negligence by government actors are permitted to proceed unless the governmental action: (1) involves an element of individual judgment or choice and (2) is based on considerations of social, economic, or political policy. *Martinez*, 123 Nev. at 446-47, 168 P.3d at 729 (citing *Berkovitz v. United States*, 486 U.S. 531 (1988); *United States v. Gaubert*, 499 U.S. 315 (1991)).

In analyzing the effect of these statutes on the case at hand, the parties jump straight to the "discretionary function" exception of NRS 41.032(2) and argue whether it applies throughout their briefing. But I would take a different approach and start in an entirely different place: at the very beginning.

To me, the proper starting point for actions alleging negligence by police officers is here: by statute, Nevada consents to waive immunity "in accordance with the same rules of law as are applied to civil actions against natural persons and corporations." NRS 41.031(1). The purpose of this waiver is to "compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated." *Martinez*, 123 Nev. at 444, 168 P.3d at 727. This isn't just a broad statement of intent. It's a specific legal doctrine that limits the scope of the waiver. It means that Nevada's waiver only extends to governmental actions "like those" that private citizens could also be sued for, and the government is liable in the same way that a private actor would be. Under the identical language of the FTCA, federal courts have held that there is no waiver of immunity "for claims against the government based on governmental action of the type that private persons could not engage in and hence could not be liable for under local law." *Liranzo v. United States*, 690 F.3d 78, 86 (2d Cir. 2012) (quotation marks omitted).

This matters here because private citizens can do a lot of things that governments also do, but they don't engage in police work. Quite to the contrary, much police work involves things that are not anything at all "like" things that private citizens can legally do. *See* Stanton R. Gallego, Note, *An Examination of the Federal Tort Claims Act's "Private Person" Standard as It Applies to Federal Law Enforcement Activities*, 76 Brook. L. Rev. 775, 784 (2011) ("no private citizen is truly comparable to a law enforcement officer"). Many police activities represent "quintessential examples of government discretion in enforcing the criminal law." *Pooler v. United States*, 787 F.2d 868, 871 (3d Cir. 1986), *abrogated on other grounds by Millbrook v. United States*, 569 U.S. 50 (2013); *see Kelly v. United States*, 924 F.2d 355, 362 (1st Cir. 1991). Thus, when the conduct targeted by suit involves law enforcement activity, courts must apply a different doctrine altogether, commonly referred to as the "private analogue" doctrine, and unfortunately expressed in rather tortured phrasing: immunity is waived only with respect to police actions that would result in liability if those actions were performed by a private actor "under like circumstances." *Indian Towing Co. v. United States*, 350 U.S. 61, 64 (1955); *see Liranzo*, 690 F.3d at 84-89. Or, described in a somewhat different but no less tortured manner: if an "analogous form of liability exists" had the same

negligence been committed by a private actor, then sovereignty has been waived and the state may be sued for the negligent conduct in the exact same way that the private actor could have been. *United States v. Muniz*, 374 U.S. 150, 159-60 (1963); *see United States v. Olson*, 546 U.S. 43, 45-46 (2005). But if the targeted conduct was something of "the type that private persons could not engage in," then immunity has not been waived and the state may not be sued. *Liranzo*, 690 F.3d at 86. What matters is not the status of the actor as either a law enforcement officer or something else, but rather "the nature of the conduct" and whether a private analogue exists or not. *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 813 (1984).

The structure of the statute is thus: the private analogue test of NRS 41.031(1) determines if and when sovereign immunity may have been initially waived. If the government action has no private analogue under NRS 41.031(1), then there is no waiver and the inquiry ends. Only if the government action has a private analogue can immunity be waived, and even then only potentially so. Even where such an analogue exists, the inquiry doesn't stop there but rather continues next to the listed exceptions to immunity, including the discretionary function exception, which restores immunity if the action sprang from the exercise of government discretion as defined in NRS 41.031(2).

The point is to start with whether a waiver of sovereign immunity is even possible under NRS 41.031(1) before proceeding to whether a specific exception to that waiver exists under NRS 41.031(2). And this is where I think the parties get the analysis wrong.

III.

Structurally, the first question at hand is whether Nevada's waiver of immunity applies at all to allegations of police negligence like those in this case. If it does not, then we don't need to even bother with asking whether the discretionary function exception applies. If the larger rule itself doesn't apply, there's no need to search for an exception within the rule designed to make the rule apply even less.

Rather than discuss how this case fits into the overarching framework of the statute, the parties instead bore in on *Martinez v. Maruszczak*, 123 Nev. 433, 168 P.3d 720 (2007). It's no wonder that they did so when Nevada cases addressing sovereign immunity are few and far between, and *Martinez* is about the best we have. But *Martinez* involved an action in medical malpractice against a government physician. To resolve the question of sovereign immunity, the Nevada Supreme Court adopted the federal discretionary function test that would have applied under the FTCA had the medical

malpractice action been brought against the federal government. *Id*. at 435, 168 P.3d at 722.

The parties here assume that this is the test that must be applied to this lawsuit. But it's not. Under the FTCA, the discretionary function test is an exception to the general waiver of sovereign immunity, not the entire rule, and the general rule doesn't apply to most law enforcement actions. *Martinez* doesn't explain this well because it doesn't expressly address whether the federal private analogue exception is also incorporated into Nevada's statutes. But then again, as a case arising in medical malpractice, *Martinez* didn't involve any kind of law enforcement activity, so there wasn't any reason for the court to gratuitously discuss or adopt a test that had nothing to do with the case at hand. For the kind of malpractice suit at stake in *Martinez*, the discretionary function exception was all that was needed.

But for the kind of lawsuit we have here, it's the wrong place to start. It seems to me that the questions raised by this appeal are these: whether this is an action in general negligence, or rather, an action involving a "law enforcement" activity; and, if the latter, whether Nevada did, or ought to, adopt the federal private analogue test to analyze whether the state is immune from suit for injuries arising from those actions. *Martinez* doesn't answer these questions one way or the other. But, notably, Nevada's waiver of sovereign immunity includes statutory language virtually identical to the language in the FTCA that the private analogue test derives from: like the FTCA, Nevada's waiver is designed "to compensate victims of government negligence in circumstances like those in which victims of private negligence would be compensated." *Martinez*, 123 Nev. at 444, 168 P.3d at 727 (quotation marks omitted); *see* 28 U.S.C. § 1364(b)(1). It seems self-evident to me that if the language of one statute tracks that of the other this closely then the two statutes ought to mean exactly the same thing, and consequently the private analogue test applies to claims against Nevada as much as it applies to claims against the federal government.

IV.

Some police actions involve conduct that can easily be committed by private citizens; for those actions, immunity has been waived and the police can be held liable in exactly the same way that the private actor would under state law. For example, a police department that refuses to clean up coffee spills on its floor in a reasonable manner and thereby causes a passerby to slip and fall has committed negligent conduct that any private person or entity could just as easily commit. So it can be sued and, if found negligent, must pay damages just as if the same thing happened in a private office building or

restaurant. Under Nevada tort law, the fact that the negligence involved the police is entirely irrelevant to the legal analysis; the legal analysis under state tort law is exactly the same whether the conduct was committed by a police officer in a police station or by a private innkeeper in the lobby of a hotel.

But a good number of law enforcement activities involve things that no private person is permitted to engage in and for which there is no private analogue. For example, police officers can trespass on private property to chase fleeing felons without fear of trespass suits; violently kick down doors and enter homes to execute no-knock search warrants without being charged with the felony crime of home invasion; and violate any number of traffic laws while responding to emergencies. Private citizens can do none of these things, at least not without serious legal repercussions ensuing. There's an easy comparison to be made between a coffee spill on a police precinct floor and a coffee spill on a private office building floor. But there's no such comparison to be made when dealing with officers chasing after fleeing felons, interrogating witnesses or suspects, collecting forensic evidence from crime scenes, or negotiating for the release of hostages. Thus, no private analogue exists for decisions that lie "at the core" of law enforcement activity, like how a police officer decides to investigate a crime. *Kelly*, 924 F.2d at 361-62; *see Doherty v. United States*, 905 F. Supp. 54, 56 (D. Mass. 1995) (holding that government is immune from suit for decisions on how and when to seek a search warrant). Those actions involves things that police officers can do and private actors cannot and for which the government has not waived immunity and cannot be found liable under state negligence law.

Applying these principles to the case at hand, the question becomes this: is there a private analogue for the law enforcement conduct targeted by this lawsuit? If the answer is no, then sovereign immunity has not been waived, we lack subject-matter jurisdiction over the allegations, and this case cannot proceed. Jurisdiction exists only if the answer is yes.[2]

V.

The crux of this lawsuit alleges that, while responding to an emergency call of "shots fired," Sergeant Cargile sped through a red light

[2]Adding to the complexity is that the federal circuit courts of appeal have split in various different ways in how the "private analogue" test should be applied to various types of conduct. *See* Stanton R. Gallego, Note, *An Examination of the Federal Tort Claims Act's "Private Person" Standard as It Applies to Federal Law Enforcement Activities*, 76 Brooklyn L. Rev. 775, 788-801 (2011) (discussing circuit split). Fortunately, however, the facts of this case fall so clearly within the area of uniquely governmental law enforcement activity having no private analogue that the federal circuit split doesn't matter much.

and entered an intersection without using his sirens to warn other drivers in violation of police policy. Glover-Armont happened to be entering the intersection perpendicularly on a green light and the two cars crashed. From these factual allegations, Glover-Armont specifically identifies four claims for relief: (1) negligence arising from Cargile's failure to use lights and sirens when entering a busy intersection against a red traffic light; (2) failure to exercise due care while driving; (3) negligent supervision and hiring by the police department; and (4) negligent entrustment of a police vehicle to Cargile.

I would analyze these claims for relief as follows. I agree with my colleagues in their conclusions about the third and fourth claims, although I would analyze them somewhat differently. They both seem to me to have simple and straightforward private analogues, involving the exercise of ordinary care in situations not unique to law enforcement. Police departments must exercise as much reasonable diligence when hiring, training, and supervising employees and entrusting them to drive employer-owned vehicles as does any private employer. Accordingly, sovereign immunity has been generally waived for these claims, and the next question is whether the targeted conduct involves the exercise of discretion under the "discretionary function" exception to the general waiver. I agree with my colleagues here. From what I see in the record, though, I harbor serious doubts whether Glover-Armont can ultimately prevail on the merits of these claims. For starters, the doctrine of "negligent entrustment of a motor vehicle" operates to impose liability upon one who "knowingly entrusts a vehicle to an inexperienced or incompetent person, such as a minor child unlicensed to drive a motor vehicle." *Zugel v. Miller*, 100 Nev. 525, 527, 688 P.2d 310, 312 (1984). I have trouble seeing how that could possibly apply to letting a police officer drive his assigned police cruiser on duty. But the merits of those claims are not presently before us. In the end, whether Glover-Armont can ultimately prevail on those claims or not, I agree that the State is not sovereignly immune from her efforts to try.

I diverge from my colleagues, however, with respect to the first and second claims. I would conclude that there is no private analogue for these claims, and therefore no need exists to even address whether the discretionary function exception applies. The State is simply immune whether it engaged in a discretionary function or not.

On appeal, Glover-Armont characterizes her claims as arising from a simple car crash that could have involved anyone, police or not. But her own factual allegations undermine her argument. Some car crashes involving police vehicles have straightforward private analogues: suppose a police car, not responding to an emergency, carelessly veers through a crosswalk and injures a pedestrian. In that event, the police car should be subject to the same principles of lia-

bility that apply to any private citizen because the scenario involves the kind of simple negligence that anyone can commit regardless of whether the vehicle in question was a police cruiser or a family station wagon.

But as detailed by Glover-Armont's complaint, summary judgment evidence, and briefing both below and on appeal, this case isn't so simple. The act that Glover-Armont specifically identifies as having been negligent is not simply that Sergeant Cargile drove carelessly in some way that any private actor could have. It's considerably more specific than that: it's that Cargile raced at high speed through an intersection against a red light without activating police warning sirens to clear civilians out of the way as police department policy specifically required. This is wholly unlike anything that a private citizen can do. Private actors can't legally speed on public roads (except to avoid some kind of imminent danger to them, not present here). They can't legally enter intersections against red lights (again, except to avoid some kind of imminent danger not present here). They don't have, and can't legally ever use, police lights and sirens in any shape or form. They aren't governed by police department policies, or any civilian analogue thereto, regarding the use of police lights and sirens in traffic. They don't have to make split-second decisions on the best way to quickly get to the scene of an active shooting before the victim dies or the criminal escapes. There is no private analogue of any sort for the negligence alleged here. Consequently, I would conclude that no private analogue exists for the negligence that Glover-Armont alleges in her first and second claims for relief, and sovereign immunity has not been waived for these claims to proceed.

VI.

Glover-Armont nonetheless argues that because a specific Nevada statute (NRS 484B.700) requires police officers to act with due care, then the Legislature must have intended to allow them to be sued when they do not, effectively creating an implied waiver to the larger rule of sovereign immunity. But that's too broad. There's no reason to read the two doctrines as necessarily being in tension with each other; indeed, when examining statutes, we're supposed to do the opposite and read them in harmony whenever possible. *See* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 180 (2012) (Statutes should be "interpreted in a way that renders them compatible, not contradictory."). Here, the two statutes work together and complement each other quite nicely. A police officer can violate NRS 484B.700 in a way that lends itself to a private analogue under NRS 41.031(1). But a police officer can also violate NRS 484B.700 in a way that has no private analogue under NRS 41.031(1). When the former happens, NRS 484B.700 permits a lawsuit against the government. When the latter happens,

NRS 41.031(1) prohibits a lawsuit against the government. It's that simple, and there's no need to labor for anything more elaborate.

VII.

For these reasons, I join my colleagues in remanding the third and fourth claims for relief, but would affirm the district court's grant of summary judgment with respect to Glover-Armont's first and second claims for relief.

THE STATE OF NEVADA, Petitioner, *v.* THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF WASHOE; and THE HONORABLE WILLIAM A. MADDOX, Respondents, and JOHN THOMAS KEPHART, Real Party in Interest.

No. 73389

July 19, 2018 421 P.3d 803

Original petition for a writ of mandamus in a criminal matter.

Petition granted.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Joseph R. Plater*, Deputy District Attorney, Washoe County, for Petitioner.

Jeremy T. Bosler, Public Defender, and *John Reese Petty*, Chief Deputy Public Defender, Washoe County, for Real Party in Interest.

Before the Supreme Court, Pickering, Gibbons and Hardesty, JJ.

OPINION

By the Court, Pickering, J.:

Nevada law imposes increasingly serious penalties on repeat domestic battery offenders. A first offense is a misdemeanor, while a third domestic battery offense within seven years of the first constitutes a felony. A jury convicted John Kephart of domestic battery, his third such offense in seven years. Kephart's second domestic battery conviction resulted from a plea bargain by which Kephart pleaded guilty to and was sentenced for a "first offense" domestic battery. The district court has ruled that it will not consider Kephart's second conviction at sentencing because it would be unfair, given the earlier plea deal, to use the second "first offense" conviction to enhance Kephart's most recent offense to a felony.

Kephart received the benefit of his earlier plea deal when he was given the shorter sentence and lower fine only available to a first-time offender. Before entering his plea, Kephart signed a written acknowledgment that, while he would be sentenced for a "first offense," the State could use that offense and any other prior offenses for enhancement purposes should he commit another domestic battery within seven years. Under these circumstances, using Kephart's two prior "first offense" convictions to enhance his third domestic battery conviction to a felony does not violate the plea bargain by which the second conviction was obtained. We therefore grant the State's petition for a writ of mandamus and direct the district court to take both of Kephart's prior convictions into account in imposing sentence and entering the judgment of conviction in this case.

I.

Kephart has three domestic battery convictions. The first conviction dates back to May 2010, when Kephart pleaded no contest to "Domestic Battery—1st Offense." Kephart was represented by counsel and signed an admonishment of rights form in which he acknowledged that "the State will use this conviction . . . to enhance the penalty for any subsequent offense." The form also set out the range of penalties for a "Second Offense within 7 years (Misdemeanor)" and a "Third Offense or any subsequent offense within 7 years (Category C felony)."

Kephart's second conviction came two months later, in July 2010. Citing the May 2010 conviction, the criminal complaint in the second case charged Kephart with "domestic battery with one prior conviction within the last seven years." A second domestic battery offense in seven years remains a misdemeanor but it carries a longer mandatory minimum term of imprisonment (ten days instead of two days), a higher minimum fine ($500 instead of $200), and more hours of community service (100-200 hours instead of 48-120 hours) than a "first offense" domestic battery conviction. *See* NRS 200.485(1)(a), (b) (2015).[1]

Kephart represented himself in the second case. He did so after being advised of his constitutional rights and signing a written waiver of the right to court-appointed counsel.[2] Initially, Kephart plead-

[1]The Legislature amended NRS 200.485 in 2017, *see* 2017 Nev. Stat., ch. 496, § 9, at 3183, but this opinion refers to the pre-amendment version of NRS 200.485, since the underlying offense predates the amendment.

[2]*See Koenig v. State*, 99 Nev. 780, 788, 672 P.2d 37, 42 (1983) (holding that a prior uncounseled misdemeanor conviction can be used for enhancement purposes if preceded by a valid waiver of counsel and the record establishes the proceedings were constitutionally adequate) (citing *Baldasar v. Illinois*, 446 U.S. 222 (1980) (plurality opinion)). Although the Supreme Court later overruled *Baldasar* in *Nichols v. United States*, 511 U.S. 738, 748-49 (1994), it did so on grounds not argued to undermine *Koenig*'s application here.

ed not guilty. Later, after the prosecutor amended the complaint by crossing out the references to the May 2010 conviction and writing in "1st" offense everywhere "2nd" offense appeared, Kephart changed his plea from not guilty to guilty. No transcript exists of the change-of-plea hearing, but the district court minutes note the district attorney "couldn't prove the prior domestic battery." The district court accepted Kephart's guilty plea and sentenced him to the statutory minimums applicable to a first offense domestic battery—two days in jail with the remaining 28-day sentence suspended, a $200 fine, and 48 hours of community service.

The plea was not memorialized in a formal plea agreement. Instead, Kephart signed and initialed an "admonishment of rights" form like the one he signed in connection with his May 2010 conviction. This form advised Kephart of the rights he waived by pleading guilty and reminded him of the increasingly severe sentences Nevada law imposes on repeat domestic battery offenders. In signing, Kephart acknowledged that:

> *I understand that the State will use this conviction, and any other prior conviction* from this or any other state which prohibits the same or similar conduct, *to enhance the penalty for any subsequent offense*.

(emphasis added).

Kephart's third, and current, conviction came in January 2017, when the jury found him guilty of one count of domestic battery. In charging the offense, the State relied on Kephart's May and July 2010 domestic battery convictions to enhance the offense to a Category C felony. *See* NRS 200.485(1)(c). Kephart objected to the State using the July 2010 conviction for felony enhancement since the conviction resulted from plea negotiations which, he alleged, obligated the State to treat the conviction as a first offense for all purposes.

The district judge deferred decision on Kephart's objection until trial concluded. *See* NRS 200.485(4) (in prosecuting a repeat domestic battery offense the "facts concerning a prior offense must . . . not be read to the jury or proved at trial but must be proved at the time of sentencing"). After the jury returned its verdict, the district court conducted a hearing on Kephart's objection. At the hearing, Kephart testified that he thought pleading guilty to the second conviction as a "first offense" meant that if he reoffended the next conviction would be a second offense. On cross-examination, Kephart admitted signing the admonishment of rights form and that he "kind of" understood the acknowledgment about the State using the conviction and any other prior conviction for future enhancement purposes. The district court did not find that the State affirmatively agreed not to use the July 2010 conviction for enhancement purposes, but nonetheless ruled in Kephart's favor. It deemed the notice to Kephart

that the July 2010 conviction could be used to enhance a subsequent offense to a felony inadequate and entered an order stating that it would not consider Kephart's July 2010 conviction in sentencing him.

The district court vacated the sentencing date so the State could appeal. After this court dismissed the State's direct appeal for want of jurisdiction, *see State v. Kephart*, Docket No. 72481 (Order Dismissing Appeal, June 6, 2017), the State filed the petition for a writ of mandamus now presented. We exercise our discretion in favor of granting extraordinary writ relief, *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991), because the State has no other adequate remedy at law, *see* NRS 34.170; NRS 177.015(3), and the district court's refusal, on this record, to take Kephart's July 2010 conviction into account at sentencing violates the statutory mandate in NRS 200.485(1)(c). *See State v. Eighth Judicial Dist. Court (Armstrong*), 127 Nev. 927, 932, 267 P.3d 777, 780 (2011).

II.

A.

Each of Kephart's convictions has been for the crime of "domestic battery, a violation of NRS 33.018, NRS 200.481, and NRS 200.485." Though three statutes are cited, they cross-reference each other and together establish the elements of battery constituting domestic violence and its associated penalties. The cross-referenced statutory scheme dates back to 1997 when the Legislature enacted NRS 200.485 and reorganized NRS 200.481 to discourage recidivism by enhancing the penalties for repeat domestic violence offenses. *See English v. State*, 116 Nev. 828, 832-35, 9 P.3d 60, 62-64 (2000) (chronicling the history of NRS 200.485 and its relationship to NRS 33.018 and NRS 200.481).

NRS 200.485 states the penalties for convictions for the crime of battery constituting domestic violence:

> 1. Unless a greater penalty is provided pursuant to subsection 2 or NRS 200.481, a person convicted of a battery which constitutes domestic violence pursuant to NRS 33.018:
>
> (a) For the first offense within 7 years, is guilty of a misdemeanor and shall be sentenced to:
>
> (1) Imprisonment in the city or county jail or detention facility for not less than 2 days, but not more than 6 months; and
>
> (2) Perform not less than 48 hours, but not more than 120 hours, of community service.
>
> The person shall be further punished by a fine of not less than $200, but not more than $1,000. . . .

> (b) For the second offense within 7 years, is guilty of a misdemeanor and shall be sentenced to:
>
> (1) Imprisonment in the city or county jail or detention facility for not less than 10 days, but not more than 6 months; and
>
> (2) Perform not less than 100 hours, but not more than 200 hours, of community service.
>
> The person shall be further punished by a fine of not less than $500, but not more than $1,000.
>
> (c) For the third and any subsequent offense within 7 years, is guilty of a category C felony and shall be punished as provided in NRS 193.130.

The statute further provides: "An offense that occurred within 7 years immediately preceding the date of the principal offense or after the principal offense constitutes a prior offense for the purposes of this section when evidenced by a conviction, without regard to the sequence of the offenses and convictions." NRS 200.485(4) (2015), now codified in revised form as NRS 200.485(5) (2017); *see* note 1, *supra*.

The 1997 Legislature modeled NRS 200.485 on Nevada's DUI enhancement statutes, now principally codified at NRS 484C.400 (2017). *See English*, 116 Nev. at 834, 9 P.3d at 63; *compare* NRS 200.485(1) & (4) (2015), *with* NRS 484C.400(1) & (2). In interpreting NRS 200.485 and its related statutes, this court thus looks to cases that have construed Nevada's DUI enhancement laws. *English*, 116 Nev. at 834, 9 P.3d at 63.

B.

A plain-text reading of NRS 200.485 undercuts the district court's decision not to count Kephart's July 2010 conviction against him because it purported to be for a "first offense." What determines felony enhancement under the statute is the defendant having committed three domestic battery offenses within seven years, two of which are evidenced by judgments of conviction—not the designation of the prior offenses as "first" and "second" offenses. *Cf. Speer v. State*, 116 Nev. 677, 679-80, 5 P.3d 1063, 1064-65 (2000) (holding that the DUI enhancement statute that NRS 200.485(4) copies "does not limit offenses that may be used for enhancement to those designated as a 'first offense' or a 'second offense'"). Even treating Kephart's July 2010 conviction as a "first offense" for all purposes leaves his May 2010 conviction for his first "first offense." And NRS 200.485(4) says that the sequence of the prior offenses and convictions does not matter, only how many of them there are. So, calling the July 2010 conviction a first offense still leaves Kephart with two prior offenses evidenced by convictions within seven years

of his current offense, making his current offense a felony under NRS 200.485(1)(c).

Our cases construing the DUI enhancement statutes complicate this plain-text approach. Citing *Santobello v. New York*, 404 U.S. 257, 262 (1971) ("when a plea rests in any significant degree on a promise or agreement of the prosecutor, so that it can be said to be part of the inducement or consideration, such promise must be fulfilled"), and *Van Buskirk v. State*, 102 Nev. 241, 243, 720 P.2d 1215, 1216 (1986) (in enforcing a plea bargain we hold the State to "the most meticulous standards of both promise and performance"), we held in *State v. Smith*, 105 Nev. 293, 299, 774 P.2d 1037, 1041 (1989), *abrogated on other grounds as recognized by Byars v. State*, 130 Nev. 848, 854, 336 P.3d 939, 943 (2014), that unless a defendant is told otherwise, it is reasonable to expect that, in being allowed to plead guilty to a "first offense" DUI for a known second offense, the State is agreeing to treat the conviction as a first offense for all purposes, including future enhancement. Part of the incentive to resolve a second DUI charge by pleading guilty to a first offense is "the knowledge that a first-time offense, for purposes of minimizing criminal penalties for future drunk-driving convictions, [is] preferable to a second offense." *Id.* at 298, 774 P.2d at 1041. Thus, when a defendant pleads a second DUI charge down to a first offense, "[t]he spirit of constitutional principles" require "appropriate clarification and warning" that the conviction will count as a second offense for future enhancement purposes for it to be later so used. *Id.* Because the record did not show that Smith received such clarification or warning, the court interpreted the plea bargain as an agreement to treat the offense as a first offense for both sentencing and future enhancement purposes. *Id.* at 299, 774 P.2d at 1041. *Accord Perry v. State*, 106 Nev. 436, 438, 794 P.2d 723, 724 (1990) (reaffirming *Smith*); *see State v. Crist*, 108 Nev. 1058, 1059, 843 P.2d 368, 369 (1992) (declining to reconsider *Smith* and extending it to out-of-state pleas). *But see Johnson v. Arkansas*, 932 S.W.2d 347, 349 (Ark. Ct. App. 1996) (declining to follow *Crist* as inconsistent with statutory enhancement penalty scheme, which bases felony enhancement on the number of prior offenses not their designation as first, second, or third).

We returned to the issue of using a second DUI pleaded to as a first offense to enhance a third offense to a felony in *Speer v. State*, 116 Nev. 677, 5 P.3d 1063 (2000). The defendant in *Speer* pleaded guilty to his third DUI offense in seven years. *Id.* at 678, 5 P.3d at 1064. The first conviction was for a felony DUI as the result of three DUI convictions during the preceding seven-year period. *Id.* The second conviction was for a misdemeanor pleaded to and sentenced as a "first offense." *Id.* But unlike *Smith*, where the record was silent as to future enhancement, in entering the guilty plea in *Speer*, "the

parties agreed that the conviction would not be treated as a 'first offense' for all purposes and that Speer's next offense could be treated as a felony." *Id.*

Speer mainly argued that the State could not use his prior felony conviction as one of three convictions within seven years, because the applicable statute only allowed use of first-offense and second-offense misdemeanor convictions, and not a prior felony conviction, for enhancement. *Speer*, 116 Nev. at 679, 5 P.3d at 1064. Rejecting Speer's argument, the court deemed the statute plain and unambiguous in providing that "any two prior offenses may be used to enhance a subsequent DUI so long as they occurred within 7 years of the principal offense and are evidenced by a conviction." *Id.* at 679-80, 5 P.3d at 1064. Thus, the DUI sentencing statute did "not limit offenses that may be used for enhancement to those designated as a 'first offense' or a 'second offense,'" and a felony DUI conviction could be used as one of the three offenses within seven years. *Id.* at 680, 5 P.3d at 1064. *Speer* distinguished *Smith*, *Perry*, and *Crist* as cases in which

> this court has held a second DUI conviction may not be used to enhance a conviction for a third DUI arrest to a felony where the second conviction was obtained pursuant to a guilty plea agreement specifically permitting the defendant to enter a plea of guilty to first offense DUI and limiting the use of the conviction for enhancement purposes. . . . The rule recognized [*Smith*, *Perry*, and *Crist*] is not applicable where, as here, there is no plea agreement limiting the use of the prior conviction for enhancement purposes. Because [*Smith*, *Perry*, and *Crist*] depend on the existence of a plea agreement limiting the use of the prior conviction for enhancement purposes, they do not stand for the general proposition that only offenses designated as a "first" or "second" offense may be used for enhancement purposes.

Speer, 116 Nev. at 680, 5 P.3d at 1065.

The State quotes this language from *Speer* and urges that, because the plea agreement did not specifically limit the State's use of the conviction for felony enhancement, it may use the conviction. But *Speer* misdescribes or at least oversimplifies *Smith* and its progeny. The plea agreement in *Smith* did not "specifically . . . limit[ ] the use of the conviction for enhancement purposes," *Speer*, 116 Nev. at 680, 5 P.3d at 1065; the record evidencing the plea agreement in *Smith* was *silent* on the subject of felony enhancement. *Smith*, 105 Nev. at 298, 774 P.2d at 1041 ("Nothing in the record indicates that, in 1986, the State advised Smith that after receiving treatment as a first-offender, the 1986 conviction would thereafter revert to a second offense in the event of further drunk-driving convictions."); *accord Perry*, 106 Nev. at 437, 794 P.2d at 724 (quoting this language

from *Smith* and saying "the facts [in *Smith*] were similar to those in the instant case"). *Smith* holds that a defendant who pleads guilty to a first offense DUI originally charged as a second may reasonably expect the State to treat the conviction as a first offense for all purposes, if the State allows the plea to be entered "without appropriate clarification and warning." 105 Nev. at 298, 774 P.2d at 1041.

It was in *Speer*, not *Smith*, that the plea deal specifically addressed enhancement: In *Speer*, "the parties agreed that the conviction would *not* be treated as a 'first offense' for all purposes and that Speer's next offense could be treated as a felony," 116 Nev. at 678, 5 P.3d at 1064 (emphasis added). Because the plea agreement allowed the State to use the second conviction, pleaded to as a first offense, for felony enhancement, the defendant could not reasonably expect the State to forgo that option. Having provided Speer the "appropriate clarification and warning" *Smith* requires, 105 Nev. at 298, 774 P.2d at 1041, the State could use Speer's second "first offense" to enhance his third offense in seven years to a felony. *Speer*, 116 Nev. at 681, 5 P.3d at 1065-66.

C.

Consistent with *Smith* and *Speer*, we hold that, when a plea agreement allows a defendant to plead guilty to a first offense for a second domestic battery conviction, it is reasonable for the defendant to expect first-offense treatment of the conviction for all purposes, *see Smith*, 105 Nev. at 298, 774 P.2d at 1041; *Perry*, 106 Nev. at 438, 794 P.2d at 724; *Crist*, 108 Nev. at 1059, 843 P.2d at 368-69, unless the defendant receives "appropriate clarification and warning" (*Smith*, 105 Nev. at 298, 774 P.2d at 1041)—or explicitly agrees (*Speer*, 116 Nev. at 678, 5 P.3d at 1064)—that the State may count the conviction as a second offense for future enhancement purposes.

Applying these principles to this case, we must decide whether Kephart's July 2010 plea to "first offense" domestic battery is more like *Smith*, where it was reasonable for the defendant to expect first-offense treatment for all purposes, or *Speer*, where the agreement provided for the defendant to be sentenced for a first offense but for the conviction to count as a second offense for enhancement purposes. In interpreting a plea agreement, the object is to enforce the reasonable expectations of the parties. *See State v. Crockett*, 110 Nev. 838, 842, 877 P.2d 1077, 1079 (1994); *Van Buskirk*, 102 Nev. at 244, 720 P.2d at 1217. Contract principles apply but, because plea agreements "implicate the deprivation of human freedom, the rules governing their interpretation, although having their roots in the principles of contract law, also acknowledge that 'concern for due process outweigh[s] concern for freedom of contract.'" *United States v. Mankiewicz*, 122 F.3d 399, 403 n.1 (7th Cir. 1997) (quoting *United States v. Sandles*, 80 F.3d 1145, 1148 (7th Cir. 1996)).

Kephart did not sign a formal plea agreement establishing the terms of his July 2010 plea. The record includes, though, Kephart's May 2010 judgment of conviction for his first "first offense" domestic battery, the written admonishment of rights Kephart signed in pleading guilty to his second "first offense" domestic battery in July of 2010, and the July 2010 judgment of conviction. In signing the July 2010 admonishment of rights form, Kephart specifically acknowledged that "I understand that the State will use this conviction, and any other prior conviction from this or any other state which prohibits the same or similar conduct, to enhance the penalty for any subsequent offense." He was also told what the penalties were for first-offense, second-offense, and third-offense domestic battery over a seven-year period. This information, combined with the reference to the use of "any other prior conviction" for "same or similar conduct," provided Kephart "appropriate clarification and warning" that the July 2010 conviction, in conjunction with his prior conviction from May 2010, would be used to enhance a subsequent third offense to a felony under NRS 200.485.

Kephart testified that he "understood" the July 2010 conviction would be a first offense for all purposes, but this understanding appears entirely subjective and not based on anything the State or the district court said or did to contradict the acknowledgment Kephart signed. *Compare Rouse v. State*, 91 Nev. 677, 679, 541 P.2d 643, 644 (1975) ("mere subjective belief of a defendant as to potential sentence, or hope of leniency, unsupported by any promise from the State or indication by the court, is insufficient to invalidate a guilty plea"), *with United States v. Malone*, 815 F.3d 367, 370 (7th Cir. 2016) ("we give unambiguous terms in the plea agreement their plain meaning"). Kephart received the benefit of his July 2010 plea deal when he was given the shorter sentence, lower fine, and lighter community service obligation only first offenders are eligible for. The record does not establish that, in entering into this plea deal, the State also agreed to treat Kephart's July 2010 conviction as a first offense for future enhancement purposes. Kephart's belief otherwise, in the face of the admonishment he acknowledged, was unreasonable. Under NRS 200.485(1)(c), Kephart has sustained three domestic battery convictions over a seven-year period for which the district court must now sentence him.

We therefore, grant the State's request for extraordinary relief and direct the clerk of this court to issue a writ of mandamus directing the district court to admit Kephart's July 2010 conviction for domestic battery to enhance his third conviction to a felony.

Gibbons and Hardesty, JJ., concur.