tinction created by the statutory scheme is between goods purchased "for . . . use" in Nevada, NRS 372.185(1), and those purchased for use in interstate commerce, even if such use might occur in Nevada, *see* NRS 372.258(2). We are not concerned here with the soundness of this distinction—we merely apply it.[2]

Harrah's use of the aircraft in Nevada was use in interstate commerce—a flight departing from Nevada nearly always terminated in a flight arriving in another state or country. In addition, the statute contemplates that some interstate commerce can occur wholly within the state. *See* NRS 372.258(2)(a)(2). Therefore, we determine that the stipulated facts do not rebut the presumption in NRS 372.258.

We conclude that the district court erred in affirming the ALJ's interpretation of NRS 372.258. The Department must refund the use taxes remitted for aircraft N89HE and N89CE. We accordingly affirm in part, reverse in part, and remand for further proceedings with respect to the requested refund.

HARDESTY and PARRAGUIRRE, JJ., concur.

KEONIS DAVIS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 57208

March 27, 2014 321 P.3d 867

Appeal from a judgment of conviction, pursuant to a jury verdict, of battery with the use of a deadly weapon resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

The supreme court, GIBBONS, C.J., held that: (1) evidence supported defendant's requested jury instruction on self-defense, (2) question of whether defendant reasonably believed he was in fear of death or great bodily harm or whether he was defending against an attempt by victim to commit a felony was a question of fact for the jury, (3) defendant's proposed jury instructions did not misstate law, (4) the district court's jury instructions regarding attempted

[2]We are aware that, as a result of our interpretation, Harrah's will not have paid any sales or use tax on two of their aircraft. Nevertheless, this court must apply the statutes as written. "[D]espite the fundamental changes in federal Commerce Clause jurisprudence," *Word of Life Christian Ctr. v. West*, 936 So. 2d 1226, 1241 (La. 2006), NRS 372.185 only imposes a use tax on goods purchased for storage, use, or consumption in Nevada, not those purchased for use in interstate commerce. Any expansion of Nevada's use tax must come from the Legislature, not this court.

killing that included the conduct that formed the basis for the battery charge did not obviate the need for a separate self-defense instruction focusing on battery, and (5) the district court's refusal to administer defendant's requested jury instruction on self-defense was not harmless error.

Reversed and remanded.

Legal Resource Group, LLC, and *T. Augustus Claus*, Henderson, for Appellant.

Catherine Cortez Masto, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Agnes Lexis*, Deputy District Attorney, Clark County, for Respondent.

1. Criminal Law.
   The district court has broad discretion to settle jury instructions.
2. Criminal Law.
   A district court's denial of proposed jury instructions is reviewed for abuse of discretion or judicial error.
3. Criminal Law.
   An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason.
4. Criminal Law.
   The supreme court reviews whether an instruction was an accurate statement of law de novo.
5. Assault and Battery.
   Evidence supported battery defendant's requested jury instruction on self-defense; defendant testified that: he had previously witnessed victim violently punch and kick another person until police arrived, victim previously challenged defendant to a fistfight, defendant had heard from others that victim wanted to kill him, defendant knew that victim carried a gun, victim started the argument, victim implied he was carrying a gun the day of the shooting, victim instigated the fight with defendant even though defendant had informed him that he was armed and tried to walk away, and victim punched defendant in the head. NRS 200.275.
6. Assault and Battery.
   Victim's death does not have to be the result for self-defense to be applicable.
7. Criminal Law.
   A defendant has the right to have the jury instructed on his or her theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be.
8. Assault and Battery.
   Question of whether battery defendant reasonably believed he was in danger of death or great bodily harm, or whether he was defending against an attempt by victim to commit a felony, was a question of fact for the jury when determining whether defendant acted in self-defense. NRS 200.275.
9. Assault and Battery.
   Justifiable battery is the battery of a human being, which does not result in death and is necessary for self-defense against one who manifestly intends to commit a felony by using violence or surprise, or when there is reasonable ground to apprehend a design on the part of the person injured

to do some great personal injury to the person inflicting the injury. NRS 200.120, 200.275.

10. Assault and Battery.
That the district court's jury instructions regarding attempted killing included the conduct that formed the basis for the battery charge did not obviate need for a separate self-defense instruction focusing on battery, in prosecution for battery with use of a deadly weapon resulting in substantial bodily harm; if jury believed that defendant meant to shoot victim in self-defense, but not kill him, then the district court's instructions were insufficient because they did not address justifiable battery, only justifiable killing or attempted killing.

11. Criminal Law.
The district court may refuse a jury instruction on the defendant's theory of the case that is substantially covered by other instructions.

12. Criminal Law.
The district court's refusal to administer defendant's requested jury instruction on self-defense was not harmless error; proposed instruction would have informed the jury about justifiable battery because the approved self-defense instructions only referenced "killing" and "attempted killing," and it was not clear whether the jury reached its verdict because the jurors found that defendant acted in self-defense on the attempted murder charge because that was the only crime for which they were provided self-defense instructions, or whether the jurors rejected defendant's self-defense theory regarding battery, but found he lacked the specific intent to kill necessary for the attempted murder charge.

13. Criminal Law.
Trial errors are subject to harmless error review because these errors may be quantitatively assessed in the context of other evidence presented in order to determine whether they were harmless beyond a reasonable doubt.

14. Criminal Law.
An error is harmless if the supreme court determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction.

Before Gibbons, C.J., Douglas and Saitta, JJ.

OPINION

By the Court, Gibbons, C.J.:

In this opinion, we address justifiable battery and the exercise of self-defense that results in the infliction of bodily harm but not death. Appellant Keonis Davis shot Damien Rhodes in the chest during an altercation. Rhodes survived, and the State charged Davis with one count of attempted murder with use of a deadly weapon and one count of battery with use of a deadly weapon. At trial, the district court denied two of Davis' proposed instructions on justifiable battery, which were both based on a theory of self-defense. The jury found Davis guilty of battery with use of a deadly weapon resulting in substantial bodily harm. Davis now appeals, arguing that the district court erred in denying his proposed instructions regarding self-defense that were accurate statements of Nevada law. We

agree, and because the error was not harmless, we reverse Davis' conviction and remand this case to the district court for a new trial.

FACTS AND PROCEDURAL HISTORY

Davis and Rhodes had been close friends, but that friendship deteriorated after Rhodes "took" a gun charge for Davis, incurring a significant fine. Police found the gun during a traffic stop of a vehicle driven by Rhodes. Davis was riding in the backseat and had possession of the gun when the vehicle was stopped, but he passed the gun to another passenger who put it in the front dash. The police arrested Rhodes and the other passenger in connection with the gun; Davis was not arrested. Rhodes subsequently negotiated a plea deal that resulted in four days in jail and a $2,000 fine. After serving the jail time, Rhodes encountered Davis and asked him to reimburse him for the $2,000 fine. However, Davis responded that he did not have the money. As a result, Davis stated that Rhodes challenged him to a fistfight, but it was broken up before any physical altercation occurred. Davis heard from other individuals that Rhodes wanted to physically harm him. He knew that Rhodes had a short temper because he previously witnessed Rhodes violently beat another person. Davis also knew that Rhodes carried a gun and previously witnessed Rhodes shoot at another person.

About five months later, Davis was at the Rancho Mesa Apartments when he encountered Rhodes again. Davis and Rhodes have different versions of the encounter. According to Davis, he tried to shake Rhodes' hand, but Rhodes refused and asked Davis where the $2,000 was. When Davis responded that he did not have the money, Rhodes attempted to instigate a fight. Davis informed Rhodes that he was armed and did not want to fight. Rhodes implied that he had a gun as well. Davis tried to walk away, but Rhodes ran after him and swung his fist at Davis, clipping the side of his head. Davis pushed Rhodes away to get some space. Rhodes again attempted to attack Davis. Davis started backing up while pulling his gun out. Davis tried to pull the slide of the handgun to chamber the round, but the gun jammed. Rhodes did not retreat. Davis tried to unjam the gun, but it fired and the bullet struck Rhodes in the chest. Davis fled the scene.

Rhodes admitted that he instigated the verbal argument with Davis but claimed that Davis initiated the physical altercation when he shot Rhodes in the chest. While on the ground, Rhodes claimed he heard a loud and clear "click click" noise. Two other witnesses also testified regarding the shooting, one whose story corresponded with Davis' account and the other whose story mirrored Rhodes' version. The latter testified that he saw Davis stand over Rhodes after shooting him and attempt to pull the trigger two more times, but the gun jammed. Police recovered two unspent .22 cartridges

and one .22 cartridge case from the scene. However, based on the evidence available, the State's firearms expert could not discern whether the gun jammed before or after the single bullet was successfully fired. Rhodes survived the shooting.

During his six-day jury trial, Davis proposed two jury instructions regarding justifiable infliction of bodily harm. The district court recognized that Davis was entitled to self-defense instructions but rejected his proposed instructions as confusing. Although the district court acknowledged that the proposed instructions mirrored Nevada's self-defense statutory language nearly verbatim, it concluded that the statutes did not accurately reflect Nevada law. Therefore, the district court only provided the instructions this court set forth in *Runion*.[1] The jury found Davis guilty of battery with use of a deadly weapon resulting in substantial bodily harm. Davis now appeals.

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[1]The district court provided instructions that were almost verbatim from *Runion v. State*, 116 Nev. 1041, 1051-52, 13 P.3d 52, 59 (2000). These instructions expressly addressed murder and attempted murder.

Jury Instruction No. 14 read:

> The killing or attempted killing of another person in self-defense is justified and not unlawful when the person who kills or attempts to kill actually and reasonably believes:
>
> 1[.] That there is imminent danger that the assailant will either kill him or cause him great bodily injury; and
>
> 2[.] That it is absolutely necessary under the circumstances for him to use, in self-defense, force or means that might cause the death of the other person, for the purpose of avoiding death or great bodily injury to himself.
>
> A bare fear of death or great bodily injury is not sufficient to justify a killing or attempted killing. To justify the taking of a life of another in self-defense, the circumstances must be sufficient to excite the fears of a reasonable person placed in a similar situation. The person killing or attempting to kill must act under the influence of those fears alone and not in revenge.

Jury Instruction No. 15 read:

> Actual danger is not necessary to justify a killing or attempted killing in self[-]defense. A person has a right to defend from apparent danger to the same extent as he would from actual danger. The person killing or attempted killing is justified if:
>
> 1. He is confronted by the appearance of imminent danger which arouses in his mind an honest belief and fear that he is about to be killed or suffer great bodily injury; and
>
> 2. He acts solely upon these appearances and his fear and actual beliefs; and
>
> 3. A reasonable person in a similar situation would believe himself to be in like danger.
>
> The killing or attempted killing is justified even if it develops afterward that the person killing or attempted killing was mistaken about the danger.

Jury Instruction No. 16 read:

> If evidence of self-defense is present, the State must prove beyond a reasonable doubt that the defendant did not act in self-defense. If you find that the State has failed to prove beyond a reasonable doubt that the defendant did not act in self-defense, you must find the defendant not guilty.

DISCUSSION

The district court erred in refusing to give Davis' proposed justifiable battery instructions

Davis contends that the district court committed reversible error by rejecting his proposed instructions on justifiable infliction of bodily harm because they were accurate statements of law and supported his theory of defense. The State argues that the district court properly denied Davis' proposed instructions because (1) there was no evidence to support a self-defense instruction, (2) the instructions misstated the law because deadly force cannot be used in circumstances where no threat of a felony involving substantial bodily harm or death exists, and (3) Davis' theory of self-defense was substantially covered by the given instructions. We agree with Davis.

[Headnotes 1-4]

"The district court has broad discretion to settle jury instructions." *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). We review a district court's denial of proposed jury instructions for abuse of discretion or judicial error. *Id.* "An abuse of discretion occurs if the district court's decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Jackson v. State*, 117 Nev. 116, 120, 17 P.3d 998, 1000 (2001). However, we review whether an instruction was an accurate statement of law de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

Davis presented evidence of self-defense

[Headnote 5]

The State argues that Davis was not entitled to self-defense instructions because there was no competent evidence of self-defense. We disagree.

[Headnote 6]

Death does not have to be the result for self-defense to be applicable. *See Rosas v. State*, 122 Nev. 1258, 1262, 147 P.3d 1101, 1104 (2006) (concluding that the district court erred in rejecting a jury instruction on self-defense for defendant charged with battery upon a police officer); *Barone v. State*, 109 Nev. 778, 779-81, 858 P.2d 27, 28-29 (1993) (district court committed reversible error by not instructing on the burden of proof for self-defense when defendant was charged with battery with a deadly weapon). Specifically, NRS 200.275 contemplates self-defense applying in contexts outside of homicide, as it unambiguously provides that "[i]n addition to any other circumstances recognized as justification at common law, the infliction or threat of bodily injury is justifiable, and *does not constitute* mayhem, *battery* or assault, if done under circumstances which would justify homicide" (emphases added); *see also* NRS 193.230

("Lawful resistance to the commission of a public offense may be made . . . [b]y the party about to be injured."); NRS 193.240 ("Resistance sufficient to prevent the offense may be made by the party about to be injured . . . [t]o prevent an offense against his or her person . . . ."). These provisions ensure that persons who stop short of killing in self-defense are afforded the same defenses as those who actually kill their assailants.

[Headnote 7]

A defendant "has the right to have the jury instructed on [his or her] theory of the case as disclosed by the evidence, no matter how weak or incredible that evidence may be." *Crawford*, 121 Nev. at 751, 121 P.3d at 586 (internal quotations omitted); *see Harris v. State*, 106 Nev. 667, 670, 799 P.2d 1104, 1105-06 (1990) (concluding that the district court erred by refusing to approve a self-defense instruction when the defendant testified that the victim attacked and attempted to rob him); *Mirin v. State*, 93 Nev. 57, 59, 560 P.2d 145, 146 (1977) (concluding that the district court did not err by refusing to approve a self-defense instruction when the defendant was the established pursuer and aggressor).

Davis' theory of the case was that he was afraid that Rhodes was going to shoot him or beat him to death and he shot Rhodes to protect himself. During trial, Davis testified that: (1) he had previously witnessed Rhodes violently punch and kick another person until police arrived, (2) Rhodes previously challenged Davis to a fistfight, (3) Davis heard from others that Rhodes wanted to kill him, (4) Davis knew that Rhodes carried a gun, (5) Rhodes started the argument, (6) Rhodes implied he was carrying a gun the day of the shooting, (7) Rhodes instigated the fight with Davis even though Davis informed him that he was armed and tried to walk away, and (8) Rhodes punched Davis in the head. Davis also opined that "[f]ist fights kill people too." Davis' testimony supported his self-defense theory that he reasonably believed that he was in imminent danger from Rhodes and that the use of force was necessary under the circumstances to avoid death or great bodily injury to himself. *See Runion*, 116 Nev. at 1051, 13 P.3d at 59. Based on this evidence, we conclude that Davis was entitled to self-defense instructions. *See Williams v. State*, 99 Nev. 530, 531, 665 P.2d 260, 261 (1983) ("[e]vidence from the defendant alone need not be supported by other independent evidence" to entitle him to jury instructions regarding his theory of the case).

[Headnote 8]

While the State asserts that Davis was not allowed to claim self-defense because Rhodes' conduct did not amount to a felony, we conclude that this argument lacks merit for two reasons. First, a person is allowed to use "[r]esistance sufficient . . . [t]o prevent an offense against his or her person," and, if the resistance is homicide,

it is justifiable if "the circumstances were sufficient to excite the fears of a reasonable person." NRS 193.240; NRS 200.130. Second, whether Davis reasonably believed he was in fear of death or great bodily harm, or whether he was defending against an attempt by Rhodes to commit a felony, was a question of fact for the jury.

Davis' proposed jury instructions did not misstate Nevada law

[Headnote 9]

The district court recognized Davis' entitlement to self-defense instructions, but provided the instructions from our opinion in *Runion*.[2] The *Runion* case put the issue of self-defense for attempted murder in front of the jury. But here, attempted murder and battery were both before the jury. The district court denied two proposed defense instructions that would have put the specific issue of justifiable battery in front of the jury. Davis' first proposed instruction read:

> The infliction of bodily injury or the threat of bodily injury is justifiable, and does not constitute a public offense, if done under circumstances which would justify homicide.

The second proposed instruction read:

> Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against an individual who manifestly inten[d]s, or endeavors, by violence or surprise, to commit a felony.
>
> Homicide is also justifiable when committed:
>
> — In the lawful defense of the slayer or of any other person in his presence or company, when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer or to any such person, and there is imminent danger of such design being accomplished[;]
>
> — In the actual resistance of an attempt to commit a felony upon the slayer[; or]
>
> — In all other instances which stan[d] upon the same footing of reason and justice as those enumerated above.

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[2]We specifically required in *Runion* that "[t]he district courts should tailor instructions to the facts and circumstances of a case, rather than simply relying on 'stock' instructions." 116 Nev. at 1051, 13 P.3d at 59. We did not intend the instructions set forth in *Runion* to become "stock" instructions, but provided them as samples only. *Id.* Thus, when bodily injury (and not death) is the resulting harm to the victim, or when battery (and not killing) is the intended action by the defendant, the sample instructions should be reworded to account for those factual changes.

The district court rejected these instructions following an extensive discussion regarding the language in the second instruction dealing with a defendant's "reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury." Engaging in a hypothetical discussion beyond the facts of Davis' case, the district court struggled with the broad "commit a felony" language and whether someone could shoot a person who is attempting to commit, for example, felony larceny. The district court ultimately concluded that while the proposed instructions were consistent with Nevada's justifiable homicide statutes, the statutes were overbroad and did not reflect the true state of the law because deadly force is not justifiable when exercised to prevent nonviolent felonies. As a result, the district court refused to give Davis' requested instructions.

The State argues that the district court properly rejected Davis' proposed instructions because deadly force cannot be used in response to all felonies, particularly in circumstances where no threat of a felony involving substantial bodily harm or death exists. We note that the two proposed instructions are near verbatim copies of NRS 200.120(1),[3] NRS 200.150,[4] NRS 200.160,[5] and NRS 200.275.[6] The plain language of these statutes does not differentiate between the types of felonies from which a person may defend himself.

However, regardless of the statutes' language, this case does not present the question of whether battery is justifiable when used to defend against a nonviolent felony, and the district court's reliance on the proposed hypothetical was outside the facts of this case. This

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[3]NRS 200.120(1) states, in pertinent part:

> 1. Justifiable homicide is the killing of a human being in necessary self-defense, or in defense of habitation, property or person, against one who manifestly intends or endeavors, by violence or surprise, to commit a felony . . . .

[4]NRS 200.150 reads:

> All other instances which stand upon the same footing of reason and justice as those enumerated shall be considered justifiable or excusable homicide.

[5]NRS 200.160 reads, in pertinent part:

> Homicide is also justifiable when committed:
>
> 1. In the lawful defense of the slayer . . . when there is reasonable ground to apprehend a design on the part of the person slain to commit a felony or to do some great personal injury to the slayer . . . and there is imminent danger of such design being accomplished; or
>
> 2. In the actual resistance of an attempt to commit a felony upon the slayer . . . .

[6]NRS 200.275 reads:

> In addition to any other circumstances recognized as justification at common law, the infliction or threat of bodily injury is justifiable, and does not constitute mayhem, battery or assault, if done under circumstances which would justify homicide.

case did not involve a nonviolent felony such as larceny; Davis anticipated that Rhodes was going to violently attack him, causing him bodily injury or death if he did not act. Thus, under Davis' theory of the case, the second proposed instruction allowed the jury to find that Davis defended himself against Rhodes, "who manifestly inten[ded], or endeavor[ed], by violence or surprise, to commit a felony" or against the imminent threat of "some great personal injury."

We note that, to assuage its concerns that the unqualified reference to "commit a felony" in the second proposed instruction might confuse the jury, the district court could have omitted the "commit a felony" language in the second part of the second instruction. *See Runion*, 116 Nev. at 1050-51, 13 P.3d at 58 (allowing district courts to depart from repeating the exact statutory language in a jury instruction and instead encouraging the alteration of words to tailor the instruction to the facts of the case). Such an instruction would have allowed the jury to consider justifiable battery by determining (1) whether Rhodes' actions constituted an intent, by surprise or violence, to commit a felony; and (2) whether "there [was] reasonable ground to apprehend a design on the part of [Rhodes] . . . to do some great personal injury to [Davis]." *See Crawford*, 121 Nev. at 754-55, 121 P.3d at 589 ("[T]he district court is ultimately responsible for not only assuring that the substance of the defendant's requested instruction is provided to the jury, but that the jury is otherwise fully and correctly instructed. In this, the district court may either assist the parties in crafting the required instructions or may complete the instructions sua sponte.").

Davis' interpretation was legally correct and in accord with current statutes; justifiable battery is the battery of a human being, which does not result in death and is necessary for self-defense against one who manifestly intends to commit a felony by using violence or surprise, or when there is reasonable ground to apprehend a design on the part of the person injured to do some great personal injury to the person inflicting the injury. NRS 200.120; NRS 200.275.

Davis' justifiable battery theory was not substantially covered by other instructions

[Headnotes 10, 11]

"[T]he district court may refuse a jury instruction on the defendant's theory of the case which is substantially covered by other instructions." *Runion*, 116 Nev. at 1050, 13 P.3d at 58.

The State argues that the language in the jury instructions regarding "attempted killing" included the conduct that formed the basis for the battery charge and thus Davis did not need a separate self-defense instruction focusing on battery. The State contends that the factual basis of the attempted murder charge was that Davis un-

lawfully attempted to shoot Rhodes more than once, which was also the basis for the battery charge.

But the State's argument ignores the language in the information. Davis' alleged attempt to shoot Rhodes more than once was indeed the basis of the attempted murder charge. However, the State pleaded the battery charge as arising when Davis fired the gun at Rhodes and struck him in the chest. If the jury believed that Davis meant to shoot Rhodes in self-defense, but not kill him, then the *Runion* instructions were insufficient because they do not address justifiable battery, only justifiable killing or attempted killing. The first proposed instruction would have notified the jury that infliction of bodily injury in self-defense does not constitute a battery. *See Williams*, 99 Nev. at 531, 665 P.2d at 261. The second proposed instruction would have clarified the circumstances that constitute justifiable homicide in connection with the first instruction, which states that battery is justified "if done under circumstances which would justify homicide." Therefore, Davis' proposed instructions were not duplicative of those given by the district court and included unique concepts that should have been considered by the jury.

The district court's rejection of Davis' proposed jury instructions was not harmless and constitutes reversible error

[Headnotes 12-14]

" '[T]rial error[s]' are subject to harmless-error review because these errors 'may . . . be quantitatively assessed in the context of other evidence presented in order to determine whether [they were] harmless beyond a reasonable doubt.' " *Patterson v. State*, 129 Nev. 168, 177, 298 P.3d 433, 439 (2013) (quoting *Arizona v. Fulminante*, 499 U.S. 279, 307-08 (1991)). An error is harmless if this court determines beyond a reasonable doubt that the error did not contribute to the defendant's conviction. *Hernandez v. State*, 124 Nev. 639, 653, 188 P.3d 1126, 1136 (2008).

As discussed above, the district court's rejection of Davis' proposed jury instructions was not harmless because we cannot conclude beyond a reasonable doubt that the district court's rejection of these instructions did not contribute, at least partially, to Davis' conviction. The proposed instructions would have informed the jury about justifiable battery because the approved self-defense instructions only referenced "killing" and "attempted killing." Additionally, it is not clear whether the jury reached its verdict because (1) the jurors found that Davis acted in self-defense on the attempted murder charge because that was the only crime for which they were provided self-defense instructions; or (2) the jurors rejected Davis' self-defense theory regarding battery, but found he lacked the specific intent to kill necessary for the attempted murder charge. Therefore, we conclude that the district court's error was not harmless

and thus reversible.[7] *Williams*, 99 Nev. at 531, 665 P.2d at 261 ("If a defense theory of the case is supported by some evidence which, if believed, would support a corresponding jury verdict, failure to instruct on that theory totally removes it from the jury's consideration and constitutes reversible error.").

CONCLUSION

NRS 200.275 unequivocally provides that battery is justifiable in self-defense under the same conditions that would justify homicide. By refusing to provide an instruction to that effect, we conclude that the district court committed reversible error. Accordingly, we reverse Davis' conviction for battery with a deadly weapon causing substantial bodily harm and remand this case to the district court for a new trial.[8]

DOUGLAS and SAITTA, JJ., concur.

JUN LIU, APPELLANT, *v.* CHRISTOPHER HOMES, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND CHRISTOPHER HOMES RIDGES, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 61435

March 27, 2014 321 P.3d 875

Appeal from a district court judgment in a real property action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Subcontractor brought action against general contractor, developer, and homeowners seeking to foreclose on its liens. Homeowner filed cross-claim against general contractor and developer asserting breach of contract and sought attorney fees and costs incurred in defending against subcontractor's action. The district court, following dismissal of subcontractor's claims after parties entered into stipulated agreement, denied homeowner's attorney fees claim. Homeowner appealed. The supreme court, SAITTA, J., held that homeowner could recover attorney fees as special damages that were purportedly sustained in defending herself against subcontractor's

[7]In future cases involving justifiable-battery defenses, we strongly encourage a separate instruction that notifies the jury of the concepts set forth in NRS 200.120(1), NRS 200.150, NRS 200.160, and NRS 200.275.

[8]We have considered the parties' remaining arguments, including the State's argument that Davis was not entitled to self-defense instructions at all and that the jury must have found by its verdict that Davis was acting with cold-blooded intent to kill, and conclude they are without merit.

suit that was allegedly caused by developer's breach of contract with homeowner.

Affirmed in part, reversed in part, and remanded.

GIBBONS, C.J., dissented.

Pengilly Robbins Slater and *James W. Pengilly* and *Craig D. Slater*, Las Vegas, for Appellant.

The Hayes Law Firm and *Dale A. Hayes, Jr.*, Las Vegas, for Respondents.

1. APPEAL AND ERROR.
   Arguments concerning the district court's application of caselaw to claims for attorney fees are legal issues that are reviewed de novo.
2. COSTS; DAMAGES.
   Attorney fees are generally not recoverable absent authority under a statute, rule, or contract; but, as an exception to the general rule, attorney fees may be awarded as special damages in limited circumstances.
3. QUIETING TITLE.
   An action to clarify or remove a cloud on title is generally either an action in equity or an action for declaratory relief.
4. DAMAGES.
   Homeowner could recover attorney fees as special damages that were purportedly sustained in defending herself against subcontractor's suit that was allegedly caused by developer's breach of contract to convey good and marketable title to homeowner.
5. DAMAGES.
   A party to a contract may recover from a breaching party the attorney fees that arise from the breach that caused the former party to accrue attorney fees in defending himself or herself against a third party's legal action.
6. APPEAL AND ERROR.
   The supreme court does not resolve matters of fact for the first time on appeal.

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

OPINION

By the Court, SAITTA, J.:

The court in *Sandy Valley Associates v. Sky Ranch Estates Owners Association* stated that when a defendant's breach of contract with a plaintiff causes the plaintiff to incur attorney fees in his or her defense in a legal dispute that is brought by another party, the plaintiff can recover from the defendant the attorney fees as damages that arose from the breach of the contract. 117 Nev. 948, 957, 35 P.3d 964, 970 (2001). The *Sandy Valley* court also stated, "Attorney fees may . . . be awarded as damages in those cases in which a party

incurred the fee . . . in clarifying or removing a cloud upon the title to property." *Id.* The court in *Horgan v. Felton* retreated from this latter statement about the recovery of attorney fees in cloud-on-title cases, stating that "in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists." 123 Nev. 577, 579, 170 P.3d 982, 983 (2007). It held that slander of title was a prerequisite for a plaintiff to "recover as damages the expense of legal proceedings necessary to remove a cloud on the plaintiff's title." *Id.* at 584-85, 170 P.3d at 987.

Here the district court relied on *Horgan* in denying appellant Jun Liu's specially pleaded request to recover attorney fees from respondents Christopher Homes Ridges, LLC (CHR), and Christopher Homes, LLC (CH), concluding that because the breach of contract related to title to real property, and because Liu failed to allege and prove slander of title, she could not recover the attorney fees that she sought as special damages. We conclude that the district court erred in rejecting as a matter of law Liu's claim for attorney fees as special damages, as *Horgan* does not apply to preclude such recovery here. Although *Horgan* held that slander of title must be pleaded as a prerequisite for a party to recover attorney fees as damages in an action to clarify or remove a cloud on title to real property, that opinion did not retreat from the portion of *Sandy Valley* which held that a party, such as Liu, may recover attorney fees incurred in defending against third-party litigation because of CHR's or CH's breach of contract. *Horgan*, 123 Nev. at 583-86, 170 P.3d at 986-88. Accordingly, we reverse the district court's judgment to the extent that it denied Liu's request for special damages and affirm all other aspects of the district court's judgment. We remand this matter to the district court for proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Liu's appeal only challenges the district court's legal determinations regarding the recovery of attorney fees as special damages. Thus, our discussion of the facts is based on the district court's findings of fact, which Liu does not contest or seek to undo on appeal.

CHR was the developer of a residential community that hired CH as a general contractor for the construction of homes within its community. CH subcontracted with K&D Construction, LLC, for various construction services. One of the homes upon which K&D performed its services was Liu's. Liu had purchased the home from CHR pursuant to a contract (the Agreement), wherein CHR agreed to convey good and marketable title to Liu at the close of escrow. As K&D performed its construction services at CHR's residential

community, K&D was neither timely nor fully paid. As a result, K&D recorded liens on various properties within CHR's residential community, including Liu's property.

In addition, K&D filed a civil action against CHR, CH, Liu, and other homeowners. In its complaint, K&D sought to foreclose on its liens on numerous properties, including Liu's property. Liu filed an answer to K&D's complaint and a cross-claim against CHR and CH. She asserted a breach of contract claim against CHR and CH, alleging that they breached their duty under the Agreement to deliver good and marketable title when they failed to pay the debts to K&D that resulted in a lien on her property. Under this claim, Liu tried to recover from CHR and CH the attorney fees and costs that she allegedly incurred in defending herself against K&D's action. She also sought attorney fees that she incurred in prosecuting her claim for attorney fees.

K&D, CHR, and CH entered into a stipulated agreement that resolved the payments of the outstanding balances owed to K&D, dismissed K&D's claims against Liu, and resulted in the discharge and removal of K&D's liens. After the dismissal of K&D's claims, Liu's claims against CHR and CH remained, including the claim to recover attorney fees as damages that allegedly arose from the breach of the Agreement.

Before the district court, Liu contended that, pursuant to *Sandy Valley*, she could recover attorney fees as special damages that were caused by the breach of the Agreement by CH and CHR. The district court determined otherwise, concluding that CHR, not CH, possessed and breached a contractual duty to deliver good and marketable title to Liu when a lien was imposed on Liu's property because of unpaid debts to K&D. Relying on *Horgan*, the district court resolved that, as a matter of law, Liu could not recover attorney fees as special damages. According to the district court's interpretation of *Horgan*, Liu was required to prove slander of title in order to recover attorney fees as special damages, which the district court found that she failed to do. As a result, Liu filed this appeal challenging the district court's determinations regarding the recovery of attorney fees as special damages.

DISCUSSION

Liu argues that the district court erred in relying on *Horgan* for its conclusion that her failure to assert and prevail on a slander of title claim prevented her from recovering attorney fees as special damages in an action that related to the title to real property. She contends that *Horgan* does not bar a party from recovering attorney fees as special damages when the civil action incidentally pertains to title to real property. Liu reads *Horgan* to disallow attorney fees

that stem from an action in which a claimant tries to remove a cloud on title but fails to prove slander of title. She emphasizes that she did not seek attorney fees as special damages from an action to remove a cloud on title but rather as special damages that resulted from CHR's breach of contract. Liu argues that *Sandy Valley* permits the recovery of attorney fees as special damages that arise from a breach of contract and thus her attorney fees claim below was not barred as a matter of law.

CHR and CH respond that the district court did not err in finding against Liu on her claim for recovery of attorney fees as special damages. They read *Horgan* to provide that a party, such as Liu, who fails to assert and prevail on a slander of title claim in an action relating to the title to real property cannot recover attorney fees as special damages.

[Headnote 1]

These arguments indicate that there is confusion over (a) *Sandy Valley*'s and *Horgan*'s effect on the law regarding the recovery of attorney fees as special damages and (b) the extent to which *Horgan* retreated from *Sandy Valley*'s discussion about the grounds for recovering attorney fees as special damages. We take this opportunity to clarify our precedent. In so doing, because the arguments concern the district court's application of caselaw to Liu's claims for attorney fees, we review these legal issues de novo.[1] *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 90, 127 P.3d 1057, 1063 (2006) (providing that a denial of attorney fees is generally reviewed for abuse of discretion but that de novo review applies when an attorney fees matter concerns questions of law).

Horgan's partial abrogation of Sandy Valley

[Headnote 2]

Generally, attorney fees are not recoverable "absent authority under a statute, rule, or contract." *Albios v. Horizon Communities, Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006). But, "[a]s an exception to the general rule," attorney fees may be awarded "as special damages in limited circumstances." *Horgan*, 123 Nev. at 583, 170 P.3d at 986.

The court in *Sandy Valley* made three significant statements about the grounds for recovering attorney fees as special damages. 117 Nev. at 956-57, 35 P.3d at 969-70. First, the court stated that at-

[1]In addition to the arguments above, CHR contends that the district court rejected Liu's claim for attorney fees for reasons other than its interpretation and application of caselaw, such as insufficient evidence to support Liu's claim that the breach of the Agreement caused her to incur attorney fees in defending herself against K&D's action. This contention lacks merit because the district court rejected Liu's attorney fees claim solely as a matter of law.

torney fees may be recovered as special damages when they are pleaded as such pursuant to NRCP 9(g) and are a "natural and proximate consequence of the injurious conduct." *Id.* at 956-57, 35 P.3d at 969. Second, the court explained that

> [a]ttorney fees may be an element of damage in cases when a plaintiff becomes involved in a third-party legal dispute as a result of a breach of contract . . . [and] [t]he fees incurred in defending . . . the third-party action could be damages in the proceeding between the plaintiff and the defendant [who breached the contract].

Id. at 957, 35 P.3d at 970. Third, the *Sandy Valley* court stated the following about the recovery of attorney fees as special damages in actions concerning a cloud on title to real property: "[a]ttorney fees may . . . be awarded as damages in those cases in which a party incurred the fees . . . in clarifying or removing a cloud upon the title to property." *Id.*

The *Horgan* court revisited *Sandy Valley* in addressing a matter involving the recovery of attorney fees that were accumulated in seeking declaratory relief to remove a cloud on title to real property. *Horgan*, 123 Nev. at 579-80, 583-86, 170 P.3d at 983-84, 986-88. In clarifying *Sandy Valley*, the *Horgan* court retreated from the third statement above concerning the award of attorney fees in cloud-on-title actions. *Horgan*, 123 Nev. at 579, 588, 170 P.3d at 983, 988. In doing so, it did not retreat from the *Sandy Valley* court's position regarding the recovery of attorney fees as damages that are caused by injurious conduct or a breach of contract. *Id.* Disapproving of *Sandy Valley*'s broad statement that " '[a]ttorney fees may . . . be awarded as damages in those cases in which a party incurred the fees . . . *in clarifying or removing a cloud upon the title to property*,' " the *Horgan* court stated that "in cases *concerning title to real property*, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists." *Id.* at 579, 583, 170 P.3d at 983, 986 (alterations in original) (second emphasis added) (quoting *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970). When read in isolation, this statement conveys that in any action that merely relates to title, clarification of title, or removal of a cloud on title to real property, a party can recover attorney fees as special damages only if he or she asserts and prevails on a slander of title claim. *See id.* Thus, when read by itself, this statement appears to support the district court's determination that Liu could not recover attorney fees.

However, the meaning and effect of *Horgan* cannot be ascertained by reading one statement to the exclusion of the rest of the opinion. *See Orr v. Allen*, 248 U.S. 35, 36 (1918) (indicating that language

in an opinion must not to be taken out of context or segregated from the remainder of the opinion); *Mashpee Tribe v. New Seabury Corp.*, 592 F.2d 575, 585 (1st Cir. 1979) ("Different sections of an opinion should be read as consistent with each other."). Rather, *Horgan* "must be read as a whole, without particular portions read in isolation, [so as] to discern the parameters of its holding." *Fisher v. Big Y Foods, Inc.*, 3 A.3d 919, 926-27 (Conn. 2010).

The remainder of the *Horgan* court's opinion indicates that it did not hold that a party in any matter that relates to title to real property must prevail on a slander of title claim in order to recover attorney fees as special damages. 123 Nev. at 583-86, 170 P.3d at 986-88. Rather, the *Horgan* court contemplated a party's ability to recover attorney fees as special damages that were incurred in a specific type of civil action that is brought by that party: an action to *clarify or remove a cloud on title*. *Id.*

The *Horgan* court stated that a "plaintiff may recover as damages the expense of legal proceedings necessary to *remove a cloud on the plaintiff's title*" when he or she prevails on a slander of title claim. *Id.* at 584-85, 170 P.3d at 987 (emphasis added). It stated that "attorney fees are only available as special damages in slander of title actions and not simply when a litigant seeks to *remove a cloud upon title*." *Id.* at 586, 170 P.3d at 988 (emphasis added). In asserting these conclusions, the *Horgan* court primarily relied on authorities that permit the award of attorney fees as special damages to parties who brought claims to clarify or remove a cloud on title, accrued attorney fees in bringing those claims, and prevailed on a slander of title claim. *See id.* at 584-86, 170 P.3d at 987-88 (citing: *Wright v. Rogers*, 342 P.2d 447, 449, 457 (Cal. Ct. App. 1959) (providing that in an action to remove a cloud on title, the plaintiff may recover attorney fees as special damages if he or she prevails on a slander of title claim); *Price v. Tyler*, 890 So. 2d 246, 248-49, 251, 253 (Fla. 2004) (explaining that parties cannot recover attorney fees as special damages that were accrued in declaratory relief and quiet title actions absent a slander of title); *Rayl v. Shull Enters., Inc.*, 700 P.2d 567, 573 (Idaho 1984) (concluding that a plaintiff who sought to remove a cloud on his title was entitled to attorney fees as special damages that arose from the slander of title); *Paulson v. Kustom Enters., Inc.*, 483 P.2d 708, 715-16 (Mont. 1971) (remanding a matter to allow parties to recover attorney fees accrued in removing a cloud on title resulting from slander); *Den-Gar Enters. v. Romero*, 611 P.2d 1119, 1121, 1124 (N.M. Ct. App. 1980) (providing that plaintiffs who sought to remove a cloud on title through a quiet title action could recover attorney fees under a slander of title claim); *Peckham v. Hirschfeld*, 570 A.2d 663, 667-70 (R.I. 1990) (providing the same); *Dowse v. Doris Trust Co.*, 208 P.2d 956, 958-59 (Utah

1949) (concluding that a plaintiff was entitled to special damages, including attorney fees, in an action to remove a cloud on his title because the defendant slandered it); and *Rorvig v. Douglas*, 873 P.2d 492, 494, 497-98 (Wash. 1994) (providing the same)).

[Headnote 3]

Thus, the *Horgan* court's holding that one must prevail on a slander of title claim to recover attorney fees as special damages is one that applies to the recovery of attorney fees that are accrued from pursuing an action to *clarify or remove a cloud on title*. Generally, an action to clarify or remove a cloud on title is either an action in equity or an action for declaratory relief. *See MacDonald v. Krause*, 77 Nev. 312, 317-18, 362 P.2d 724, 727 (1961) (identifying actions to quiet title and to remove clouds on title as actions in equity); *Kress v. Corey*, 65 Nev. 1, 25-26, 189 P.2d 352, 363-64 (1948) (stating that a cloud on title may be removed by a declaratory judgment). Hence, when discussing the recovery of attorney fees as damages that arose from actions to clarify or remove a cloud on title, the *Horgan* court was not concluding that a slander of title claim is a prerequisite to recovering attorney fees as special damages in *all* civil actions that relate to title to real property. *See* 123 Nev. at 579, 583-86, 170 P.3d at 983, 986-88. Rather, as revealed by its language and the authorities it relied on, the *Horgan* court held that slander of title is a prerequisite to a party's recovery of attorney fees that were amassed in asserting claims to clarify or remove a cloud on title, such as declaratory or equitable relief claims. *Id.*

In explaining its analysis and conclusions, the *Horgan* court stated that when a plaintiff incurs attorney fees as a result of a defendant's intentional effort to cloud title, the plaintiff deserves the fees because he or she had no choice but to litigate. *Id.* at 585-86, 170 P.3d at 987-88. Otherwise, absent slander of title, the plaintiff shoulders the debt for the attorney fees that he or she risked accruing when deciding to clarify or remove a cloud on title by suing the defendant. *See id.*

[Headnote 4]

Here, Liu was not a plaintiff who incurred attorney fees by asserting equitable or declaratory relief claims to clarify or remove a cloud on title. Rather, she pleaded to recover attorney fees as special damages that she allegedly incurred defending against K&D's civil action as a result of CHR's breach of the Agreement. Thus, the attorney fees that Liu incurred in her defense against K&D's action and her claim for attorney fees were not within the purview of *Horgan*'s requirement that a party who brought an action to clarify or remove a cloud on title must prove slander of title in order to recover the

attorney fees that he or she incurred in the action. *See Horgan*, 123 Nev. at 583-86, 170 P.3d at 986-88.

The portion of Sandy Valley that Horgan did not overturn

[Headnote 5]

When revisiting and abrogating *Sandy Valley*, the *Horgan* court only overturned the analysis and conclusion in *Sandy Valley* that concerned the recovery of attorney fees that are accumulated in actions to clarify or remove a cloud on title to real property. *Horgan*, 123 Nev. at 579, 583-86, 170 P.3d at 983, 986-88. The court did not retreat from *Sandy Valley*'s conclusion that a party to a contract may recover, as special damages, the attorney fees that arise from another party's breach of the contract when the breach causes the former party to incur attorney fees in a legal dispute brought by a third party. *See Horgan*, 123 Nev. at 579, 583-86, 170 P.3d at 983, 986-88 (omitting from its discussion *Sandy Valley*'s language that concerns the recovery of attorney fees as special damages that arise from a breach of contract); *Sandy Valley*, 117 Nev. at 957, 35 P.3d at 970. Thus, this portion of *Sandy Valley* was not undercut by *Horgan*. In unity with the various jurisdictions that have held the same, we maintain that a party to a contract may recover from a breaching party the attorney fees that arise from the breach that caused the former party to accrue attorney fees in defending himself or herself against a third party's legal action. *See, e.g.*, *Masonic Temple Ass'n of Crawfordsville v. Ind. Farmers Mut. Ins. Co.*, 837 N.E.2d 1032, 1039 (Ind. Ct. App. 2005) (providing that when the defendant's breach of contract caused the plaintiff to engage in litigation with another party, the attorney fees from that litigation "may be recovered as an element of . . . damages from [the] defendant's breach of contract"); *Pac. Coast Title Ins. Co. v. Hartford Accident & Indem. Co.*, 325 P.2d 906, 907-08 (Utah 1958) (providing the same); *Fid. Nat'l Title Ins. Co. of N.Y. v. S. Heritage Title Ins. Agency, Inc.*, 512 S.E.2d 553, 558 (Va. 1999) (concluding that attorney fees incurred in litigation caused by a party's breach of contract can be recovered as special damages); *Kremers-Urban Co. v. Am. Emp'rs Ins. Co.*, 351 N.W.2d 156, 168 (Wis. 1984) (recognizing that attorney fees and expenses incurred in third-party litigation are recoverable "when they are the natural and proximate result of the breach of contract or other wrongful act" that caused the plaintiff to be involved in litigation with other parties).

In light of the above, *Sandy Valley* permits, and *Horgan* does not bar, Liu's claim to recover attorney fees as special damages that were purportedly sustained in defending herself against K&D's suit, which was allegedly caused by CHR's breach of the Agreement. Accordingly, we hold that the district court erred in relying on *Hor-*

gan to conclude that Liu cannot recover attorney fees as special damages.[2]

The district court must revisit Liu's claim for attorney fees

[Headnote 6]

Determining whether a party's breach of contract caused another party to incur attorney fees in defending himself or herself from a third party's complaint involves factual inquiries. *See Frantz v. Johnson*, 116 Nev. 455, 468, 999 P.2d 351, 359 (2000) (indicating that causation is an issue of fact). In our appellate capacity, we do not resolve matters of fact for the first time on appeal. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) (noting that "an appellate court is not an appropriate forum in which to resolve disputed questions of fact").

When the district court determined that *Horgan* barred Liu's claim to recover attorney fees as special damages, it also found that CHR breached its contract with Liu by leaving its debts to K&D unpaid. But, because it erroneously reasoned that *Horgan* disposed of Liu's attorney fees claim as a matter of law, the district court did not resolve whether the evidence before it proved that CHR's breach of the Agreement caused Liu to accumulate the attorney fees in defending her interests against K&D's suit. We do not resolve this factual issue that the district court did not reach, as doing so would require us to inappropriately weigh the evidence and resolve questions of fact for the first time on appeal. It is up to the district court on remand to resolve these questions.

CONCLUSION

In light of our analysis and determinations above, we reverse the district court's findings of fact, conclusions of law, and judgment on Liu's claim for the recovery of attorney fees as special damages that allegedly arose from CHR's breach of the Agreement.[3] All other

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[2]It appears that Liu also relies on *Sandy Valley* for the contention that she can recover attorney fees and costs that she incurred when prosecuting her claim against CHR to recover attorney fees as special damages—in addition to the attorney fees that she incurred when defending herself against K&D's action. *Sandy Valley* does not support this contention. *See* 117 Nev. at 957, 35 P.3d at 970. It only provides for the recovery of attorney fees as special damages that are incurred in defending against third-party litigation that is caused by a breach of contract. *Id.* Because Liu has not provided any other salient authority in support of her argument, we do not address the recovery of attorney fees and costs that are incurred when prosecuting a claim for attorney fees as special damages. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (providing that this court need not address an argument that is not cogently made).

[3]The dissent disagrees with our conclusions, relying on a concurrence in *Horgan* which noted that there are claims, other than slander of title, under which a party can recover attorney fees as special damages, such as "actions

aspects of the district court's judgment are affirmed. We remand this matter for further proceedings that are consistent with this opinion.

DOUGLAS, J., concurs.

GIBBONS, C.J., dissenting:

As the majority notes, we concluded in *Horgan v. Felton*, 123 Nev. 577, 579, 170 P.3d 982, 983 (2007), that "in cases concerning title to real property, attorney fees are only allowable as special damages in slander of title actions, not merely when a cloud on the title to real property exists." In *Horgan*, the concurrence noted that there are other types of cases that allow attorney fees as damages, such as "actions for malicious prosecution, abuse of process, wrongful attachment, trademark infringement, false imprisonment or arrest." *Id.* at 587, 170 P.3d at 989 (MAUPIN, J., concurring). Breach of contract is not one of the exceptions specified in *Horgan* and should fall into the same category as actions to quiet title. This would further address our concern in *Horgan* that the scope of real property cases where attorney fees are available as special damages was "inadvertently expanded." *Id.* at 586, 170 P.3d at 988. For this reason, I conclude that the district court correctly interpreted the holding of *Horgan*, and I would affirm the district court's denial of attorney fees.

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for malicious prosecution, abuse of process, wrongful attachment, trademark infringement, false imprisonment or arrest." 123 Nev. at 587, 170 P.3d at 988-89 (MAUPIN, J., concurring). The dissent appears to conclude that because the *Horgan* concurrence did not include a breach of contract claim within its list, it is persuasive authority that attorney fees that arise from a breach of contract cannot be recovered as special damages. We disagree. We do not read the *Horgan* concurrence as conveying a comprehensive and exclusive list of claims on which a party can recover attorney fees as special damages. Rather, the *Horgan* concurrence stressed that the *Horgan* opinion did not preclude the recovery of attorney fees as special damages in circumstances other than those presented in that appeal. *Id.* In so doing, it offered examples of claims under which one may recover attorney fees. *Id.* Thus, like the *Horgan* concurrence, we conclude that *Horgan* does not bar the recovery of attorney fees in circumstances that are not addressed in *Horgan*, such as the circumstances that are present in this appeal.

THE STATE OF NEVADA, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE STEFANY MILEY, DISTRICT JUDGE, RESPONDENTS, AND JIHAD ANTHONY ZOGHEIB, REAL PARTY IN INTEREST.

No. 62615

March 27, 2014 321 P.3d 882

Original petition for a writ of mandamus challenging a district court order that granted the defendant's motion to disqualify the Clark County District Attorney's Office.

Defendant who was charged with theft and other offenses moved to disqualify the county district attorney's office based on a conflict of interest. The district court granted the motion, concluding that there was a conflict of interest between district attorney and defense counsel, who was an attorney in district attorney's former law firm, and imputing the conflict to the office. The State filed an original petition for a writ of mandamus. The supreme court, HARDESTY, J., held that: (1) when determining whether an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office, so as to require disqualification of the office, the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the office is disqualified from prosecuting the case, overruling *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982), and (2) the district court acted arbitrarily or capriciously in granting defendant's motion to disqualify.

Petition granted.

[Rehearing denied May 30, 2014]

Catherine Cortez Masto, Attorney General, Carson City; *Ryan J. MacDonald*, Deputy District Attorney, Clark County, for Petitioner.

Lucherini Law and *Robert G. Lucherini*, Las Vegas, for Real Party in Interest.

1. MANDAMUS.
   Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within the supreme court's discretion.
2. CRIMINAL LAW.
   Disqualification of a prosecutor's office rests with the sound discretion of the district court.
3. MANDAMUS.
   Although mandamus lies to enforce ministerial acts or duties and to require the exercise of discretion, it will not serve to control the proper exercise of that discretion or to substitute the judgment of the supreme court for that of the lower tribunal.

4. MANDAMUS.
   When a district court has exercised its discretion, a writ of mandamus is available only to control an "arbitrary or capricious exercise of discretion," which is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law.
5. CRIMINAL LAW.
   An individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office in extreme cases, requiring the disqualification of the office. RPC 1.9, 1.11.
6. CRIMINAL LAW.
   When determining whether an individual prosecutor's conflict of interest may be imputed to the prosecutor's entire office, so as to require disqualification of the office, the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the office is disqualified from prosecuting the case, overruling *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982). RPC 1.9, 1.11.
7. CRIMINAL LAW; MANDAMUS.
   The district court acted arbitrarily or capriciously in granting defendant's motion to disqualify the county district attorney's office based on a conflict of interest between district attorney and defense counsel, who was an attorney in district attorney's former law firm, and an imputation of the conflict to the district attorney's office, such that a writ of mandamus was available; screening procedures in place at district attorney's office were sufficient to ensure that district attorney had no involvement in the prosecution, no appearance of impropriety existed to such an extent that it would undermine the public trust and confidence in the criminal justice system, and there was no showing that continued participation of district attorney's office in the prosecution would render it unlikely that defendant would receive a fair trial. RPC 1.9, 1.11.

Before HARDESTY, PARRAGUIRRE and CHERRY, JJ.

OPINION[1]

By the Court, HARDESTY, J.:

Clark County District Attorney Steven Wolfson was a criminal defense attorney before being appointed to the elective office he currently holds. The transition from defense counsel to head of a prosecutor's office results in a conflict of interest under Nevada Rule of Professional Conduct 1.9 that, depending on the circumstances, disqualifies Wolfson from prosecuting his former clients. The question presented in this original proceeding is whether that conflict of interest was properly imputed to all of the lawyers in his office, requiring the disqualification of the Clark County District Attorney's Office. In answering that question, we consider whether

[1]This opinion has been circulated among all justices of this court, any two of whom, under IOP 13(b), may request en banc review of a case. The two votes needed to require en banc review in the first instance of the question of overruling *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982), were not cast.

the appearance-of-impropriety standard used by this court in *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982), to determine when an individual prosecutor's conflict should be imputed to all of the lawyers in the prosecutor's office has been undermined by our subsequent adoption of the Model Rules of Professional Conduct. We conclude that the appearance-of-impropriety standard is not the correct standard because it was based on an ethical rule that this court never adopted. The more appropriate standard is whether the individual lawyer's conflict would render it unlikely that the defendant would receive a fair trial unless the conflict is imputed to the prosecutor's office. For the reasons discussed in this opinion, regardless of which standard is applied, the district court acted arbitrarily or capriciously in granting the motion to disqualify the Clark County District Attorney's Office. We therefore grant the petition.

FACTS AND PROCEDURAL HISTORY

The State charged real party in interest Jihad Anthony Zogheib with conspiracy to commit a crime, passing a bad check with intent to defraud, forgery, and two counts of theft. After Steven Wolfson was appointed District Attorney, Zogheib moved to disqualify the Clark County District Attorney's Office based on a conflict of interest: an attorney in Wolfson's former law firm, Patrick McDonald, represented Zogheib in the instant case.

The district court held several evidentiary hearings regarding the motion to disqualify.[2] According to the district court's order, the evidentiary hearing showed that while Wolfson was not Zogheib's attorney, he was involved in discussions regarding the case. McDonald testified that he spoke frequently with Wolfson regarding Zogheib's case because Wolfson had successfully litigated multiple check and marker fraud cases in his career. Wolfson testified that he remembered Zogheib's case and that he had probably talked with McDonald and Zogheib in the past. He also testified that after accepting the appointment as district attorney, he never made an appearance on this case, never obtained or reviewed discovery on this case, and never discussed this case with the deputy district attorney appointed to prosecute the case.

After hearing the testimony at the evidentiary hearing, the district court determined that the Clark County District Attorney's Office should be disqualified. The district court concluded that there was

[2]The hearings were sealed because they involved attorney-client privilege. Neither party has asked to file an appendix under seal containing the transcripts, to have the hearings unsealed, or to have the district court transmit a transcript of the hearings under seal for this court to consider. The statements in this opinion regarding the content of the testimony presented at those hearings are based on the findings set forth in the district court's written order.

a conflict of interest between Wolfson and Zogheib and that the conflict should be imputed to the office because there was an appearance of impropriety that was so great as to make this an extreme case that warranted vicarious disqualification even though Wolfson had been effectively screened from participating in the case. This original petition for a writ of mandamus followed.

DISCUSSION

[Headnotes 1-4]

Mandamus is an extraordinary remedy, and the decision to entertain a petition for a writ of mandamus rests within our discretion. *See Poulos v. Eighth Judicial Dist. Court*, 98 Nev. 453, 455, 652 P.2d 1177, 1178 (1982); *see also State ex rel. Dep't of Transp. v. Thompson*, 99 Nev. 358, 360, 662 P.2d 1338, 1339 (1983). We have indicated that mandamus is the appropriate vehicle for challenging attorney disqualification rulings. *See generally Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982). But "[t]he disqualification of a prosecutor's office rests with the sound discretion of the district court," *id.* at 309, 646 P.2d at 1220, and "while mandamus lies to enforce ministerial acts or duties and to require the exercise of discretion, it will not serve to control the proper exercise of that discretion or to substitute the judgment of this court for that of the lower tribunal," *id.* at 310, 646 P.2d at 1221. Accordingly, where the district court has exercised its discretion, a writ of mandamus is available only to control an arbitrary or capricious exercise of discretion. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 603-04, 637 P.2d 534, 536 (1981). "An arbitrary or capricious exercise of discretion is one founded on prejudice or preference rather than on reason, or contrary to the evidence or established rules of law." *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 780 (2011) (internal citation and quotation marks omitted).

The State conceded that Wolfson has a conflict of interest that disqualifies him from representing the State against Zogheib in the underlying criminal prosecution. RPC 1.9. Generally one attorney's conflict of interest under Nevada Rule of Professional Conduct 1.9 is imputed to all other attorneys in the disqualified attorney's law firm. RPC 1.10. But that general rule does not apply to lawyers working in government offices. The disqualification of lawyers who are government officers and employees based on a conflict of interest is governed by Nevada Rule of Professional Conduct 1.11, not Rule 1.10. Paragraph (d) of Rule 1.11 addresses lawyers who are current government officers and employees and "does not impute the conflicts of a lawyer currently serving as an officer or employee of the government to other associated government officers or em-

ployees, although ordinarily it will be prudent to screen such lawyers." Model Rules of Prof'l Conduct R. 1.11 cmt. 2 (2012).[3]

Our primary decision addressing the disqualification of government lawyers was issued several years before we adopted the Nevada Rules of Professional Conduct. In *Collier v. Legakes*, 98 Nev. 307, 646 P.2d 1219 (1982), we held that "[t]he disqualification of a prosecutor's office rests with the sound discretion of the district court" and that when exercising its discretion, the district court "should consider all the facts and circumstances and determine whether the prosecutorial function could be carried out impartially and without breach of any privileged communication." *Id.* at 309-10, 646 P.2d at 1220. The State conceded that a conflict exists between Wolfson and Zogheib because Wolfson received confidential information during his firm's representation of Zogheib. In *Collier*, this court cited authorities indicating that vicarious-disqualification rules at the time were not strictly applied to government offices and held that vicarious disqualification of a prosecutor's office may be required "in extreme cases where the appearance of unfairness or impropriety is so great that the public trust and confidence in our criminal justice system could not be maintained without such action." *Id.* at 310, 646 P.2d at 1221.

The overarching question is whether Wolfson's conflict should be imputed to all of the lawyers in the district attorney's office. However, before answering that question, we must address a threshold issue raised by the State: whether the appearance-of-impropriety standard espoused in *Collier* should be reconsidered in light of our adoption of the Model Rules of Professional Conduct and our more recent decisions in *Liapis v. Second Judicial District Court*, 128 Nev. 414, 418-19, 282 P.3d 733, 736-37 (2012), and *Brown v. Eighth Judicial District Court*, 116 Nev. 1200, 1204 n.4, 14 P.3d 1266, 1269 n.4 (2000).

This court, in applying the appearance-of-impropriety standard in *Collier*, relied on *State v. Tippecanoe County Court*, 432 N.E.2d 1377, 1379 (Ind. 1982), which cited Canon 9 of the ABA Model Code of Professional Responsibility. *Collier*, 98 Nev. at 310, 646 P.2d at 1220-21. Canon 9 required attorneys to avoid even the appearance of impropriety. *Liapis*, 128 Nev. at 418, 282 P.3d at 736. In 1983, the ABA Model Code of Professional Responsibility was replaced by the Model Rules of Professional Conduct, which did not include Canon 9. *Id.* In 1986, four years after *Collier*, this court adopted the Model Rules of Professional Conduct with only slight

[3]Rule 1.11 is based on the identically numbered ABA Model Rule. As provided in Nevada Rule of Professional Conduct 1.0A, the "comments to the ABA Model Rules of Professional Conduct . . . may be consulted for guidance in interpreting and applying the Nevada Rules of Professional Conduct, unless there is a conflict between the Nevada Rules and the . . . comments."

variations as SCR 150-203.5, which were later renumbered to track the ABA Model Rules numbering scheme. *Id.*; *In the Matter of Amendments to the Supreme Court Rules of Prof'l Conduct*, SCR 150-203.5, ADKT 370 (Order Repealing Rules 150-203.5 of the Supreme Court Rules and Adopting the Nevada Rules of Professional Conduct, February 6, 2006). Despite these changes and our refusal to adopt Canon 9, our recent decisions in *Liapis* and *Brown* identify the rule set forth in *Collier* as the only limited circumstance in which an appearance of impropriety may form a basis for attorney disqualification. *Liapis*, 128 Nev. at 419, 282 P.3d at 737; *Brown*, 116 Nev. at 1204 n.4, 14 P.3d at 1269 n.4. With *Collier* noted as the exception, *Liapis* states a general rule that an appearance of impropriety by itself does not support a lawyer's disqualification. 128 Nev. at 419, 282 P.3d at 737. The carve-out of *Collier* from that general rule understandably creates some confusion.

Some courts have continued to apply the appearance-of-impropriety standard while noting that the American Bar Association and the Model Rules no longer recognize it. *State v. Retzlaff*, 490 N.W.2d 750, 752 (Wis. Ct. App. 1992) (explaining that "[t]he obligation to avoid appearances of impropriety is nonetheless implicit in the new Wisconsin Rules of Professional Conduct" and "[w]hile the appearance of impropriety is not a basis for automatic disqualification, it is an element that the trial court may consider in making disqualification determinations" and may be the basis for disqualifying counsel "if the conduct is sufficiently aggravated"); *Gomez v. Superior Court*, 717 P.2d 902, 904 (Ariz. 1986) (explaining that even though recently adopted Arizona Rules of Professional Conduct omitted "appearance of impropriety," "[i]t would appear . . . that 'appearance of impropriety' " nonetheless "survives as a part of conflict of interest and an appearance of impropriety should be enough to cause an attorney to closely scrutinize his conduct" even if "[i]t does not necessarily follow that it must disqualify him in every case"). Other courts and some legislatures have rejected the appearance-of-impropriety standard. In some instances, recusal is required only if the conflict would render it unlikely that the defendant would receive a fair trial. Cal. Penal Code § 1424(a)(1) (West 2011); *State v. Cope*, 50 P.3d 513, 515-16 (Kan. Ct. App. 2002); *People v. C.V.*, 64 P.3d 272, 275 (Colo. 2003) (finding that while the appearance of impropriety may be used to disqualify a prosecutor's office, a trial court "should focus on whether disqualification appears reasonably necessary to ensure 'the integrity of the fact-finding process, the fairness or appearance of fairness of trial, the orderly or efficient administration of justice, or public trust or confidence in the criminal justice system' " (quoting *People v. Garcia*, 698 P.2d 801, 806 (Colo. 1985))). Other courts have gone further, finding that a mere appearance of impropriety is not enough and that a showing of ac-

tual prejudice to the defendant is required. *Schumer v. Holtzman*, 454 N.E.2d 522, 526 (N.Y. 1983); *Wilkey v. State*, 953 P.2d 347, 348-49 (Okla. Crim. App. 1998); *Haywood v. State*, 344 S.W.3d 454, 462-63 (Tex. Crim. App. 2011).

We are not convinced that appearance of impropriety is the appropriate standard for determining whether an individual prosecutor's conflict should be imputed to an entire office. First, that standard is not implicit in the current Nevada Rules of Professional Conduct. Second, there are several policy arguments in favor of a test that limits the disqualification of an entire district attorney's office: there is a large cost to the county in paying for a special prosecutor to prosecute the case; an attorney is presumed to perform his ethical duties, including keeping the confidences of a former client; *State v. Pennington*, 851 P.2d 494, 498 (N.M. Ct. App. 1993); *State v. Cline*, 405 A.2d 1192, 1206 (R.I. 1979); and the courts should not unnecessarily interfere with the performance of a prosecutor's duties, *State v. Camacho*, 406 S.E.2d 868, 872 (N.C. 1991). These are the same policy considerations that informed the decision to exempt government offices from imputed conflicts. Model Rules of Prof'l Conduct R. 1.11 cmt. 2 (2012) ("Rule 1.10 is not applicable to the conflicts of interest addressed by this Rule . . . [b]ecause of the special problems raised by imputation within a government agency."); Model Rules of Prof'l Conduct R. 1.11 cmt. 4 (2012) ("[T]he rules governing lawyers presently or formerly employed by a government agency should not be so restrictive as to inhibit transfer of employment to and from the government. The government has a legitimate need to attract qualified lawyers as well as to maintain high ethical standards."). Using a standard that is as ambiguous as the appearance-of-impropriety standard, *see MJK Family L.L.C. v. Corporate Eagle Mgmt. Servs., Inc.*, 676 F. Supp. 2d 584, 593 (E.D. Mich. 2009) (noting that while the "former Code of Professional Responsibility . . . expressly prohibited the 'appearance of impropriety[,]' . . . . [t]hat ambiguous standard has long been abandoned"), could result in many unnecessary disqualifications, limit mobility from private practice, and restrict the assignment of counsel when no breach of confidences has occurred. *Camacho*, 406 S.E.2d at 874; *United States v. Goot*, 894 F.2d 231, 236 (7th Cir. 1990) (concerned with the government's ability to attract good attorneys). For these reasons, we overrule *Collier* to the extent that it relies on appearance of impropriety to determine when vicarious disqualification of a prosecutor's office is warranted.

[Headnotes 5, 6]

There is, however, a broader concern in criminal cases that cannot be overlooked: the defendant's right to a fair trial. Based on that concern we agree with *Collier* that an individual prosecutor's

conflict of interest may be imputed to the prosecutor's entire office in extreme cases. But rather than making that determination based on an appearance of impropriety, we conclude that the appropriate inquiry is whether the conflict would render it unlikely that the defendant would receive a fair trial unless the entire prosecutor's office is disqualified from prosecuting the case. *See, e.g.*, *Cope*, 50 P.3d at 515-16. This approach strikes the correct balance between the competing concerns of the State and the right of the defendant to a fair trial.

[Headnote 7]

Regardless of the standard applied in this case, we conclude that the district court acted arbitrarily or capriciously in granting the motion to disqualify. The district court concluded that because the district attorney is the one who has the conflict and is the head of the office, the entire office must be disqualified.[4] The district court made this finding despite also finding that the screening procedures in place at the Clark County District Attorney's Office were sufficient to ensure that Wolfson had no involvement in the prosecution.[5]

The district court erred when it concluded that this case was different than the situation presented in *Collier*. The district court focused on the district attorney's role as the head of the office: his name is on every pleading, and he is in charge of policymaking for the office. *See* NRS 173.045; NRS 252.070(1). But the chief deputy involved in *Collier* had much more hands-on responsibility for the cases handled by the office than the district attorney in this

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[4]The district court relied on a California case, *City and County of San Francisco v. Cobra Solutions, Inc.*, 135 P.3d 20 (Cal. 2006), to find that when the conflict is with the head of the office, the entire office must be disqualified regardless of whether there were proper screening procedures in place. There are several reasons that the district court's reliance on this case was problematic. First, *Cobra Solutions* is a civil case, and California has a criminal penal code section in place that applies in criminal cases that is different than the standard set forth for civil cases. Cal. Pen. Code § 1424 (West 2011). California courts have specifically stated that the reasoning used in *Cobra Solutions* does not apply in criminal cases. *Spaccia v. Superior Court*, 146 Cal. Rptr. 3d 742, 753 (Ct. App. 2012). Second, California has not adopted the ABA Model Rules of Professional Conduct, which specifically allows the screening of conflicted attorneys who serve as public officers or employees. *Cobra Solutions*, 135 P.3d at 29; Model Rules of Prof'l Conduct R. 1.11 (2012). While California does allow for the screening of employees of a government agency, it does not allow for the screening of the head public officer of the agency. *Cobra Solutions*, 135 P.3d at 29. This is in contrast to the rules of professional conduct adopted in Nevada, which do allow for the screening of a public officer. RPC 1.11. Therefore, the district court's reliance on this case was misplaced.

[5]We note that the district court concluded that Wolfson had not acted unethically in this matter. Within this conclusion, the district court indicated that it considered the screening procedures, thereby demonstrating that the district court believed the screening procedures were adequate to ensure that Wolfson would have no involvement in the prosecution.

case does. While it is true that the district attorney is responsible for deciding the overall policy of the office, consistent with NRS 252.070(1), the deputies appointed by the district attorney handle the day-to-day operations of the divisions of the office and make decisions regarding specific cases. And even though the district attorney's name appears on every document filed with the court, it is clear that the district attorney is not personally handling all of the cases filed by his office, and that the individual cases are instead handled by the deputy who is also listed on every document. In these circumstances and considering the screening procedures in place at the district attorney's office, the district court acted arbitrarily or capriciously because, applying the *Collier* standard, no appearance of impropriety existed to such an extent that it would undermine the public trust and confidence in the criminal justice system and, applying the standard adopted in this opinion, there has been no demonstration that the Clark County District Attorney's Office's continued participation in the prosecution of Zogheib would render it unlikely that Zogheib would receive a fair trial.

We grant the petition. The clerk of this court shall issue a writ of mandamus directing the district court to vacate its order disqualifying the Clark County District Attorney's Office.[6]

PARRAGUIRRE and CHERRY, JJ., concur.

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[6]We previously stayed the proceedings in district court pending our resolution of this original proceeding. Given our resolution of the original proceeding in this opinion, we deny the State's motion to dissolve the stay as moot. To the extent that Zogheib's opposition to the State's motion raises factual allegations that were not presented to the district court regarding the merits of the motion to disqualify the district attorney's office, we have not considered them.

PROGRESSIVE GULF INSURANCE COMPANY, AN OHIO CORPORATION, APPELLANT, *v.* RANDALL K. FAEHNRICH, INDIVIDUALLY AND AS NATURAL PARENT AND/OR LEGAL GUARDIAN OF RANDY FAEHNRICH AND CHRISTIAN FAEHNRICH, MINORS; AND TONI A. FAEHNRICH, INDIVIDUALLY AND AS NATURAL PARENT AND/OR LEGAL GUARDIAN OF RANDY FAEHNRICH AND CHRISTIAN FAEHNRICH, MINORS, RESPONDENTS.

No. 57324

March 27, 2014 327 P.3d 1061

Certified question under NRAP 5 concerning the enforceability of a household exclusion clause in an automobile liability insurance policy issued out of state but applied to Nevada residents injured in Nevada. United States Court of Appeals for the Ninth Circuit; Robert R. Beezer, Andrew Jay Kleinfeld, and Susan Graber, Circuit Judges.

The supreme court, PICKERING, J., held that Nevada public policy does not bar household exclusions in automobile liability insurance policies.

Question answered.

Prince & Keating and *Dennis M. Prince* and *Douglas J. Duesman*, Las Vegas, for Appellant.

Benson Bertoldo Baker & Carter, Chtd., and *Brett A. Carter*, Las Vegas, for Respondents.

1. FEDERAL COURTS.
   As the answering court on a certified question, the supreme court's role is limited to answering the questions of law posed to it; the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts. NRAP 5.
2. FEDERAL COURTS.
   As the answering court on a certified question, the supreme court accepts the facts as stated in the certification order and its attachments. NRAP 5.
3. INSURANCE.
   Nevada public policy does not preclude giving effect to a household exclusion clause in an automobile liability insurance policy delivered in Mississippi to Mississippi residents and choosing Mississippi law as controlling, where Mississippi law permits household exclusions but the effect of the exclusion is to deny Nevada residents who were injured in Nevada recovery of the minimum liability coverage specified by Nevada law. NRS 485.3091, 687B.147.
4. CONTRACTS; INSURANCE.
   Nevada tends to follow the Restatement (Second) of Conflict of Laws in determining choice-of-law questions involving contracts, generally, and

insurance contracts, in particular. Restatement (Second) of Conflict of Laws § 187 *et seq.*

5. CONTRACTS.
   So long as the parties acted in good faith and not to evade the law of the real situs of the contract, Nevada's choice-of-law principles permit parties within broad limits to choose the law that will determine the validity and effect of their contract, but the situs fixed by the agreement must have a substantial relation with the transaction, and the agreement must not be contrary to the public policy of the forum or other interested state.
6. FEDERAL COURTS.
   The supreme court could not address insureds' argument that their automobile liability policy's "Out-of-State Coverage" clause overrode the policy's choice-of-law clause and made Nevada law applicable to insureds' children's claims personal injury against insured for a single-car accident, in answering a certified question from the Court of Appeals for the Ninth Circuit as to whether public policy precludes giving effect to a choice-of-law provision in an insurance contract that would deny recovery of the minimum liability coverage specified by Nevada law, where the "Out-of-State Coverage" clause was not included in the excerpts of record and other materials forwarded to the supreme court by the Ninth Circuit with its certification order, and no argument concerning that clause was made in the briefs filed in the Ninth Circuit. NRS 485.3091.
7. INSURANCE.
   Nevada law permits motor vehicle insurance policies to exclude liability coverage for bodily injury to a member of the household of a named insured. NRS 687B.147.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

The United States Court of Appeals for the Ninth Circuit has certified the following question to this court: "Does Nevada's public policy preclude giving effect to a choice-of-law provision in an insurance contract that was negotiated, executed, and delivered while the parties resided outside of Nevada, when that effect would deny any recovery under NRS 485.3091 to Nevada residents who were injured in Nevada?"

I.

The certified question grows out of a dispute over the validity of a household exclusion in an automobile liability insurance policy. The policy was negotiated, delivered, and renewed several times in Mississippi, where Randall and Toni Faehnrich lived with their two children. The policy was entitled "Mississippi Motor Vehicle Policy." The Faehnriches' insurance application listed Mississippi

as their state of residence. This made Mississippi the state whose statutory law the policy incorporated:

> **TERMS OF POLICY CONFORMED TO STATUTES**
>
> If any provision of this policy fails to conform with the legal requirements of the state listed on your application as your residence [Mississippi], the provision shall be deemed amended to conform with such legal requirements. All other provisions shall be given full force and effect. *Any disputes as to the coverages provided or the provisions of this policy shall be governed by the law of the state listed on your application as your residence.*

(Emphasis added.) The parties and the Ninth Circuit refer to the italicized language as the policy's choice-of-law provision.

Eventually, the couple divorced and Toni moved to Nevada. She drove here in a Jeep that she and Randall co-owned.[1] The couple's minor children, both boys, then flew out to join their mother in Las Vegas. The next day, while driving the Jeep with the children as passengers, Toni was involved in a single-car accident; the car rolled, and the boys suffered serious injuries. At the time, the Jeep still carried Mississippi registration and license plates, and Toni had a Mississippi driver's license.

The insurance policy, issued by Progressive Gulf Insurance Co., generally provides bodily injury liability coverage up to $100,000 per person and $300,000 per accident. But it includes a household exclusion that, on its face, eliminates coverage for the boys' claims against Toni. The exclusion states that the policy's liability coverage "does not apply to . . . bodily injury to you or a relative." "Relative" is defined as

> a person residing in the same household as you, and related to you by blood, marriage, or adoption . . . . Your unmarried dependent children temporarily away from home will be considered residents if they intend to continue to reside in your household.

When the policy was issued, Progressive offered, but the Faehnriches declined, "All Uninsured/Underinsured Bodily Injury . . . Coverage."

Randall presented a claim to Progressive for his sons' injuries. Citing the household exclusion, the insurer denied coverage. Progressive then brought a declaratory judgment action in Nevada

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[1]The Ninth Circuit describes the Jeep as an "insured vehicle." We accept that designation. *See In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 955-56, 267 P.3d 786, 794-95 (2011).

federal district court, followed by a motion for summary judgment, seeking, among other things, an order declaring the household exclusion valid and applicable. Stressing that "[t]he family member [or household] exclusion does not [afford] the minimum [$15,000/$30,000 bodily injury] coverage required by the Nevada Insurance Code," *see* NRS 485.185; NRS 485.3091, the district court denied summary judgment. It held that the "exclusion violates Nevada public policy [and] is unenforceable; and, in accordance with Nevada choice of law rules, Mississippi law [validating such exclusions] cannot apply."

Progressive appealed. Because the order denying summary judgment did not resolve the case, the Ninth Circuit dismissed the first appeal for lack of a final, appealable judgment. There followed a stipulation designed to convert the summary judgment denial into a final judgment. In the stipulation, the parties "agreed that if Mississippi law is applicable, there is no coverage under the terms and conditions of the Progressive policy." They further agreed that, "[i]n the event that Nevada law is applicable, Progressive would owe a duty to . . . indemnify [Toni] Faehnrich consistent with the terms and conditions of its policy up to the applicable limits of $15,000.00 per person and $30,000.00 per occurrence," and that this would entitle the two children to $15,000 apiece for their bodily injuries. In the stipulation "Progressive waives any other coverage defenses," and both sides agree that "there are no other issues to adjudicate."

A second Ninth Circuit appeal followed. After briefing and argument, a divided panel concluded that this case turns on an unsettled question of Nevada public policy and certified that question to this court.

II.

A.

[Headnotes 1, 2]

Rule 5 of the Nevada Rules of Appellate Procedure gives this court discretionary authority to accept and answer certified questions of Nevada law that "may be determinative of the cause then pending in the certifying court." *See Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 749-51, 137 P.3d 1161, 1163-64 (2006). As the answering court, our role "is limited to answering the questions of law posed to [us;] the certifying court retains the duty to determine the facts and to apply the law provided by the answering court to those facts." *In re Fontainebleau Las Vegas Holdings, L.L.C.*, 127 Nev. 941, 955, 267 P.3d 786, 794-95 (2011). We accept "the facts as stated in the certification order and its attachment[s]." *Id.* at 956, 267 P.3d at 795.

[Headnote 3]

These rules, combined with the parties' stipulation, prompt us to narrow the question posed by the Ninth Circuit. *See Chapman v. Deutsche Bank Nat'l Trust Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1105-06 (2013) (this court may, in its discretion, rephrase a certified question). Rephrased, the question we consider is: Does Nevada public policy preclude giving effect to a household exclusion clause in an automobile liability insurance policy delivered in Mississippi to Mississippi residents and choosing Mississippi law as controlling, where Mississippi law permits household exclusions but the effect of the exclusion is to deny Nevada residents who were injured in Nevada recovery of the minimum coverages specified in NRS 485.3091?

B.

[Headnotes 4, 5]

Nevada tends to follow the Restatement (Second) of Conflict of Laws (1971) in determining choice-of-law questions involving contracts, generally, *see Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortgage Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979) (citing and applying Restatement (Second) of Conflict of Laws § 187 to a contractual choice-of-law clause), and insurance contracts, in particular. *See Sotirakis v. USAA*, 106 Nev. 123, 125-26, 787 P.2d 788, 790-91 (1990) (citing and applying Restatement (Second) of Conflict of Laws §§ 188 and 193 to an insurance choice-of-law question where the policy did not include a choice-of-law clause); *see also Williams v. USAA*, 109 Nev. 333, 335, 849 P.2d 265, 266-67 (1993) (to like effect); *Daniels v. Nat'l Home Life Assurance Co.*, 103 Nev. 674, 677-78, 747 P.2d 897, 899-900 (1987) (effectively adopting, although not citing, Restatement (Second) of Conflict of Laws § 192 & *id.* cmt. e, denying effect "to a choice of law provision in a life insurance contract designating a state whose local law gives the insured less protection than he would receive under the otherwise applicable law," that being the insured's domicile when he or she applied for the policy). So long as "the parties acted in good faith and not to evade the law of the real situs of the contract," Nevada's choice-of-law principles permit parties "within broad limits to choose the law that will determine the validity and effect of their contract." *Ferdie Sievers*, 95 Nev. at 815, 603 P.2d at 273. "The situs fixed by the agreement, however, must have a substantial relation with the transaction, and the agreement must not be contrary to the public policy of the forum," *id.*, or other interested state.

As the Ninth Circuit declared, the parties to this appeal chose Mississippi law in good faith and not in an attempt to evade the law

of the real situs of the contract. This makes *Daniels*, 103 Nev. at 677-78, 747 P.2d at 899-900, inapplicable.[2] The question, then, is whether the policy's choice of Mississippi law, which validates the household exclusion,[3] offends a fundamental Nevada policy in the circumstances of this case. This depends not just on Nevada public policy but also on Mississippi public policy and whether Nevada or Mississippi has a materially greater interest in the matter. "Application of the chosen law will be refused only (1) to protect a fundamental policy of the state which, under the rule of § 188 [choice-of-law in contract cases without choice-of-law clauses], would be the state of the otherwise applicable law, provided (2) that this state has a materially greater interest than the state of the chosen law in the determination of the particular issue." Restatement (Second) of Conflict of Laws § 187 cmt. g. "An important consideration is [where and to what extent] the significant contacts are grouped. For the forum will be more inclined to defer to the policy of a state which is closely related to the contract and the parties than to the policy of a state where few contacts are grouped." *Id.*

In *Sotirakis*, we weighed analogous contacts and concerns. Sotirakis, a California resident covered by a California insurance policy, was injured in an accident in Nevada. 106 Nev. at 124, 787 P.2d at 789. As here, the insurer denied coverage based on a household exclusion clause. Had the policy been delivered in Nevada, to a Nevada resident owning a car principally garaged in Nevada, then-existing case law would have invalidated the household exclusion to the extent it "eliminate[d] the statutorily mandated [$15,000/$30,000] minimum liability coverage" specified in NRS 485.3091. *Farmers Ins. Exch. v. Warney*, 103 Nev. 216, 217, 737 P.2d 501, 501 (1987); *see Estate of Neal v. Farmers Ins. Exch.*, 93 Nev. 348, 351, 566 P.2d 81, 83 (1977) (invalidating a household exclusion clause under the since-repealed NRS 698.320, requiring bodily injury insurance in specified minimum amounts). Based on this case law, Sotirakis asked us to invalidate her policy's household exclusion, even though, "[u]nder California statutes and case law, [household] exclusion clauses are permissible." *Sotirakis*, 106 Nev. at 124, 787 P.2d at 789.

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[2]In *Daniels*, the insurer sold "group life insurance" to military veterans pursuant to a master policy that recited it was "delivered" in Missouri, whose law the policy chose. 103 Nev. at 677-78, 747 P.2d at 899-900. We determined the policy was not true group insurance but "'franchise insurance,' which is to be treated as an individual policy." *Id.* at 678, 747 P.2d at 899. Since the policy was applied for and delivered to a Nevada domiciliary in Nevada, Nevada law applied notwithstanding the master policy's recitation that it was issued and delivered in Missouri. *Id.* at 678, 747 P.2d at 900.

[3]We accept the parties' stipulated representation that Mississippi law validates household exclusions even as to minimum statutory coverages. *See Thompson v. Miss. Farm Bureau Mut. Ins. Co.*, 602 So. 2d 855, 856 (Miss. 1992).

We rejected Sotirakis's invitation to look to Nevada law, applied California law, and upheld the household exclusion. In doing so, we emphasized that "the policy was issued in California to a California resident who paid premiums in California. Moreover, the driver was also a resident of California." *Id.* at 126, 787 P.2d at 790. As "the principal location of the risk" was California and "the cost of the policy . . . was determined in California[,] . . . the insureds presumably assumed that their premium was based on California, rather than another state's, rates." *Id.* at 126, 787 P.2d at 791. *See* Restatement (Second) of Conflict of Laws § 193 ("The validity of a contract of . . . casualty insurance and the rights created thereby are determined by the local law of the state which the parties understood was to be the principal location of the insured risk during the term of the policy, unless with respect to the particular issue, some other state has a more significant relationship . . . to the transaction and the parties . . . ."). The "only contact" Nevada had with Sotirakis "was the mere fact that it was the state in which [she] happened to have an accident. If this were enough to apply a state's law, then laws would be applied according to the fortuity of where the accident occurred rather than by the provisions of the insured's policy." *Sotirakis*, 106 Nev. at 126, 787 P.2d at 791 (citing *Boardman v. USAA*, 470 So. 2d 1024, 1032 (Miss. 1985)).

Sotirakis represents the majority rule. 1 Irvin E. Schermer & William J. Schermer, *Automobile Liability Insurance* § 6.9 (4th ed. 2013) ("Where the insured vehicle covered by a policy containing a household exclusion is involved in an accident in a foreign state, a majority of the courts have applied the rule of the state in which the policy was issued to enforce the exclusion, provided the exclusion was valid in the issuing state."). But the Faehnriches argue *Sotirakis* should not apply because upholding the household exclusion in this case will leave the children with "no recovery from any other source." As support, they cite NRS 485.3091 and *Williams*, 109 Nev. at 336, 849 P.2d at 267.

Decided three years after *Sotirakis*, *Williams* applied California law to deny an insured injured in a Nevada accident underinsured motorist (UIM) coverage mandated by application of Nevada but not California law. *Id.* The facts were similar to *Sotirakis* except that, in *Williams*, the insured was a member of the United States Air Force on four-week assignment to Nevada when the accident occurred, and he had already recovered $300,000 under the negligent parties' and his own policies. *Id.* at 333-34, 849 P.2d at 265-66. Even though Williams had been in Nevada longer than Sotirakis, we concluded that "Williams' most significant contact with Nevada is that he was in a car accident in this state," a contact we dismissed as a "'fortuity,'" quoting *Sotirakis*, 106 Nev. at 126, 787 P.2d at

791. *Williams*, 109 Nev. at 335, 849 P.2d at 267. And so, we rejected Williams' argument that "the application of California law violates the Nevada public policy that affords insureds an expansive recovery under UIM coverage" as improperly "equat[ing] a routine dissimilarity between two states' laws with a violation of a fundamental public policy." *Id.* at 336, 849 P.2d at 267. We continued, though, as follows: "*Indeed, in scenarios similar to Williams', we applied Nevada public policy only where other states' laws would preclude* ***all*** *recovery for the injured insured*." *Id.* (emphasis added to that in original) (citing *Daniels*, 103 Nev. 674, 747 P.2d 897).

The Faehnriches argue that the converse to the language just quoted is true as well: If other states' laws preclude all recovery, they necessarily violate Nevada public policy. And because the family-member exclusion included in their Mississippi-based insurance policy would preclude the Faehnrich children from recovering anything, including the statutory minimums enumerated in NRS 485.3091, they reason that the policy is unenforceable for public policy reasons. But this reading of *Williams* cannot be squared with the holding in *Sotirakis*. The cases that invalidated household exclusion clauses in Nevada-based policies did so only as to the minimum coverages specified in NRS 485.185 and NRS 485.3091. *Warney*, 103 Nev. at 217, 737 P.2d at 501; *see Estate of Neal*, 93 Nev. at 351, 566 P.2d at 82 (decided under prior statute). While *Sotirakis* mentions in passing that the accident was caused by the combined negligence of Sotirakis's husband and the driver of the other car, 106 Nev. at 124, 787 P.2d at 789, the opinion says nothing about other insurance being available. If the availability of other insurance obviated the need to apply Nevada's household exclusion case law, surely the opinion would have said so. And as for *Daniels*, on which *Williams* relies, Nevada's statutory requirements for life insurance policy cancellations applied because the policy was "'delivered in this state' within the meaning of NRS 687B.010(2)." *Daniels*, 103 Nev. at 678, 747 P.2d at 900 (quoting NRS 687B.010(2)), *discussed supra* note 2. We thus reject as *obiter dictum* the suggestion in *Williams* that Nevada public policy requires coverage whenever applying foreign law would deny all recovery to an insured.

The more relevant distinction between *Sotirakis* and this case is the residence of Toni and the two children, which the Ninth Circuit's certification order declared to be Nevada, a finding binding on us. *Fontainebleau*, 127 Nev. at 955, 267 P.3d at 794. Although the parties make some general arguments about public policy and residency, they do not tie it to the statutes of either Mississippi or Nevada beyond a general citation to NRS 485.3091. But the Legislature expresses the relevant public policy in the motor vehicle and insurance statutes it passes. *See Nat'l Cnty. Mut. Fire Ins. Co. v. Johnson*, 879 S.W.2d 1, 5 (Tex. 1993) (Cornyn, J., concurring and dissenting); *cf. Daniels*, 103 Nev. at 678, 747 P.2d at 900 ("If the statute under consideration is clear on its face, we cannot go beyond

it in determining legislative intent."). We therefore look to Nevada statutes to determine Nevada public policy.

NRS 485.3091(1) is codified under the heading "proof of financial responsibility." It states that an "owner's policy of liability insurance" must provide bodily injury coverage of at least $15,000 per person and $30,000 per accident. This statute complements Nevada's compulsory insurance law, NRS 485.185, which provides that "[e]very owner of a motor vehicle which is registered or required to be registered in this State shall continuously provide, while the motor vehicle is present or registered in this State," insurance providing bodily injury coverage of at least $15,000/$30,000. NRS 482.385(3) specifies when a motor vehicle is "required to be registered in this State" and, so, becomes subject to Nevada's compulsory insurance law. As written at the time relevant to this dispute, NRS 482.385(3) provided:

> When a person, formerly a nonresident, becomes a resident of this State, he shall:
>
> (a) Within 30 days after becoming a resident; or
>
> (b) At the time he obtains his driver's license,
>
> whichever occurs earlier, apply for the registration of any vehicle which he owns and which is operated in this State.

[Headnote 6]

Here, we know from the Ninth Circuit certification order that Toni and the boys were Nevada residents on June 8, when the accident occurred. But we do not know when Toni, who still carried a Mississippi driver's license, became a Nevada resident and so, whether the Jeep, still carrying Mississippi plates and registration, was "required to be registered in this State" under NRS 485.185 and NRS 482.385(3). The Ninth Circuit order does not say and the documents appended to it address the date Toni and the boys became Nevada residents only in pleadings. In this regard, the Faehnriches admit in part and deny in part Progressive's allegation that Toni "is and was, at all times relevant to these proceedings, a resident and/or domicile [sic] of Mississippi;" they also affirmatively allege that, "on June 7," the day before the accident, "Defendant Toni Faehnrich moved from Mississippi to Nevada with her two minor children."[4] We thus cannot conclusively say that Nevada statutory

[4]The Faehnriches submitted a "Respondents' Appendix" to this court when they filed their answering brief. They argue that the policy's "Out-of-State Coverage" clause overrides the policy's choice-of-law clause and makes Nevada law applicable. But the page of the policy where this clause appears, included in the appendix filed with this court, is not included in the excerpts of record and other materials forwarded to this court by the Ninth Circuit with its certification order. Also, no argument concerning this clause was made in the briefs filed in the Ninth Circuit. Under *Fontainebleau*, 127 Nev. at 955, 267 P.3d at 794-95, we cannot, and therefore do not, address the "Out-of-State Coverage" clause.

law applies to this policy. *See also Progressive Max Ins. Co. v. Toca*, No. 2:05-CV-0845-KJD-PAL, 2007 WL 2891980, at *3-4 (D. Nev. Sept. 28, 2007) (declining to apply Nevada substantive law to a Mississippi policy issued to a Mississippi resident who moved to Nevada shortly before the accident).

[Headnote 7]

More fundamentally, it appears from our research that Nevada law respecting household exclusions changed in 1990, when NRS 687B.147 took effect. This statute specifically authorizes household exclusions in Nevada motor vehicle insurance policies, as follows:

> A policy of motor vehicle insurance covering a private passenger car may be delivered or issued for delivery in this state if it contains an exclusion, reduction or other limitation of coverage for the liability of any named insured for bodily injury to:
>
> 1. Another named insured; or
> 2. Any member of the household of a named insured,
>
> unless the named insured rejects the exclusion, reduction or other limitation of coverage after full disclosure of the limitation by the insurer on a form approved by the Commissioner. The form must be written in a manner which is easily understood, printed in at least 12-point type and contain the statement "I understand that this policy excludes, reduces and limits coverage for bodily injury to members of my family and other named insureds . . . ."

This statute is not cited by the parties to this case; nor was it addressed in *Sotirakis*, *Warney*, or *Neal*, whose operative facts predate its enactment. But it changes Nevada from a state that invalidates household exclusions to a state that, by statute, expressly permits them. *See generally* Schermer & Schermer, *supra*, § 6:8 n.14 (cataloguing the states that permit household exclusions by statute, including Nevada).

The Faehnriches' policy was neither issued for delivery nor delivered in Nevada, so NRS 687B.147 does not technically control. *See* NRS 687B.010(2) (NRS Chapter 687B excludes "[p]olicies or contracts not issued for delivery . . . nor delivered in this state"). But if by statute Nevada now permits household exclusions in "polic[ies] of motor vehicle insurance covering . . . private passenger car[s]," NRS 687B.147, assuming the required disclosures and rejections are made, Nevada should honor the parties' choice of Mississippi law with respect to policies issued for delivery and delivered in Mississippi like the Faehnriches' was. Mississippi is the state with the strongest ties to the transaction, and Nevada's public policy does not appear so strong as to justify application of its law to an

insurance policy applied for, delivered and renewed in Mississippi by Mississippi residents.

For these reasons, we answer the certified question in the negative and conclude that giving effect to the choice-of-law provision in the parties' automobile insurance policy does not violate Nevada's public policy.

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

DAHLIA WINGCO, INDIVIDUALLY; AND MARGARET WERNING, INDIVIDUALLY, AND ON BEHALF OF OTHERS SIMILARLY SITUATED, APPELLANTS, *v.* GOVERNMENT EMPLOYEES INSURANCE COMPANY; GEICO GENERAL INSURANCE COMPANY; GEICO INDEMNITY COMPANY; AND GEICO CASUALTY COMPANY, RESPONDENTS.

No. 59290

March 27, 2014 321 P.3d 855

Appeal from a district court order dismissing an insurance action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Insureds brought class action against motor vehicle insurer for compensatory and punitive damages for nonpayment of medical payment coverage, which insureds had not rejected in writing. The district court granted insurer's motion to dismiss. Insureds appealed. The supreme court, PICKERING, J., held that statute requiring motor vehicle insurers to offer medical payment coverage does not require rejection of such coverage to be in writing.

Affirmed.

Cottle Law Firm and *Robert Cottle*, Las Vegas; *Jesse Sbaih & Associates, Ltd.*, and *Jesse M. Sbaih* and *Ines Olevic-Saleh*, Henderson, for Appellants.

Snell & Wilmer, LLP, and *Richard C. Gordon, Brian R. Reeve*, and *Kelly H. Dove*, Las Vegas, for Respondents.

1. APPEAL AND ERROR.
   Statutory interpretation is a pure question of law reviewed novo.
2. STATUTES.
   Unless ambiguous, the statutory text controls statutory interpretation.

3. INSURANCE.
   The statute requiring motor vehicle insurers to offer at least $1,000 of medical payment (medpay) coverage does not require a written rejection of such coverage. NRS 687B.145(3).
4. STATUTES.
   Normally, the supreme court does not consult legislative history except to disambiguate unclear text.
5. COURTS.
   The supreme court may adopt unpublished federal district court dispositions that it finds persuasive.

Before the Court EN BANC.

OPINION

By the Court, PICKERING, J.:

In this appeal, we consider NRS 687B.145(3), which provides that a motor vehicle insurer must offer its insured the option of purchasing medical payment coverage. Appellants argue that the offer is not valid unless the insurer obtains from its insured a written rejection of medical payment coverage; otherwise, the insurer must pay its insured $1,000, which is the minimum amount that the insurer must offer. We disagree and affirm the district court's order of dismissal.

I.

Appellants Dahlia Wingco and Margaret Werning (together, Wingco) were injured in automobile accidents. Both were insured by respondent Geico,[1] and when Geico denied coverage of their medical expenses, both requested that Geico either present them with signed written rejections of medical payment coverage or tender $1,000 in medical benefits; Geico refused their requests. They thereafter instituted this class action on behalf of themselves and others similarly situated, seeking compensatory and punitive damages.

The core allegation in Wingco's complaint is that Geico violated NRS 687B.145(3) because, while the insurer may have offered medical payment coverage to its insureds, it did not obtain written rejections from them of the offered coverage. Based on this allegation, the complaint asserts claims for breach of contract, tortious breach of contract, breach of the implied covenant of good faith and fair dealing, unfair claims practices, violation of Nevada's Deceptive Trade Practices Act, reformation, unjust enrichment, and declaratory relief.

[1]We refer to respondents Government Employees Insurance Company, Geico General Insurance Company, Geico Indemnity Company, and Geico Casualty Company collectively as Geico.

Geico moved to dismiss, and Wingco filed a cross-motion for summary judgment. The parties joined issue on whether NRS 687B.145(3) requires a written rejection of medical payment coverage. The district court granted Geico's motion to dismiss and denied Wingco's motion for summary judgment.[2] Wingco appeals.

II.

A.

[Headnotes 1, 2]

This case presents an issue of statutory interpretation, a pure question of law, and thus this court's review is de novo. *Las Vegas Metro. Police Dep't v. Yeghiazarian*, 129 Nev. 760, 767, 312 P.3d 503, 508-09 (2013). Unless ambiguous, the statutory text controls. *In re Nilsson*, 129 Nev. 946, 949, 315 P.3d 966, 968 (2013).

B.

NRS 687B.145(3) is a "must offer" statute. It reads in full as follows:

> *An insurance company transacting motor vehicle insurance in this State* must offer *an insured under a policy covering the use of a passenger car, the option of purchasing coverage in an amount of at least $1,000 for the payment of reasonable and necessary medical expenses resulting from an accident.* The offer must be made on a form approved by the [Insurance] Commissioner. The insurer is not required to reoffer the coverage to the insured in any replacement, reinstatement, substitute or amended policy, but the insured may purchase the coverage by requesting it in writing from the insurer. Each renewal must include a copy of the form offering such coverage.

(Emphasis added.)

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[2]The district court dismissed based on Geico's alternative argument that, under *Allstate Insurance Co. v. Thorpe*, 123 Nev. 565, 170 P.3d 989 (2007), Wingco did not have a private right of action and/or that primary jurisdiction over the dispute lay with the Nevada Department of Insurance. This conclusion does not necessarily follow from *Thorpe*, *cf. Jonathan Neil & Associates, Inc. v. Jones*, 94 P.3d 1055, 1063-65 (Cal. 2004) (outlining three different strands of the agency exhaustion doctrine and the implications of each, as well as the separate primary jurisdiction doctrine), and the briefing on appeal does not adequately analyze the complex agency exhaustion and primary jurisdiction issues involved. We therefore resolve this appeal on the statutory interpretation issue presented, as we have in other similar appeals. *See Cont'l Ins. Co. v. Murphy*, 120 Nev. 506, 509-11, 96 P.3d 747, 750-51 (2004) (upholding declaratory judgment on issue of coverages mandated by NRS 687B.145(2) and NRS 690B.020); *see also Washoe Cnty. v. Otto*, 128 Nev. 424, 435, 282 P.3d 719, 727 (2012) (this court may affirm the district court if it reached the proper result, albeit on alternative grounds).

[Headnote 3]

By its terms, NRS 687B.145(3) requires Nevada motor vehicle insurers to offer insureds the option of purchasing medical payment or "medpay" coverage in the amount of at least $1,000. But the statute does not state that the insurer must obtain a written rejection of this coverage. For Wingco to prevail, this court would have to read a written rejection requirement into NRS 687B.145(3) that it does not expressly include. *But see Williams v. United Parcel Servs.*, 129 Nev. 386, 392, 302 P.3d 1144, 1148 (2013) (this court "cannot expand or modify . . . statutory language" to impose requirements the Legislature did not).

Wingco directs us to NRS 687B.145(2) which, using language similar to that in NRS 687B.145(3), provides that a Nevada motor vehicle insurer "must offer . . . uninsured and underinsured vehicle coverage in an amount equal to the limits of coverage for bodily injury sold to an insured under a policy of insurance covering the use of a passenger car." Citing *Continental Insurance Co. v. Murphy*, 120 Nev. 506, 507, 96 P.3d 747, 748 (2004), Wingco argues that, in *Continental*, this court read an implied written rejection requirement into NRS 687B.145(2) and that we should read NRS 687B.145(3) the same way. But the written rejection requirement referenced in *Continental* originates in NRS 690B.020, not NRS 687B.145, and is express, not implied. In this regard, NRS 690B.020 requires that UM/UIM coverage "must be" provided in an amount "not less than the minimum limits for liability insurance for bodily injury provided for under chapter 485 of NRS" in Nevada motor vehicle insurance policies, NRS 690B.020(2), *except* "*where rejected in writing*, on a form furnished by the insurer describing the coverage being rejected, *by an insured* named therein," NRS 690B.020(1) (emphasis added). The "minimum limits . . . provided for under chapter 485," are $15,000 for bodily injury or death of "one person in any one accident." NRS 485.185(1). The third-party liability and UM/UIM coverage provided by the *Continental* policy carried limits of $300,000, yet the court invalidated the non-occupancy exclusion only to the extent of the $15,000 statutory minimum. *Continental*, 120 Nev. at 512, 96 P.3d at 751. In invalidating the exclusion at issue only to the extent of the statutory minimum coverage of $15,000—for which NRS 690B.020(1) and (2) require a written rejection, signed by the insured—the court relied on NRS 690B.020, not the broader "must offer" provision in NRS 687B.145(2). *Id.* Thus, *Continental* supports the proposition that this court should not imply a written rejection requirement into NRS 687B.145(3), since it did not do so as to NRS 687B.145(2), relying instead on the more limited coverage for which NRS 690B.020 expressly imposes a written rejection requirement.

[Headnote 4]

Wingco next directs us to legislative history, specifically, committee minutes suggesting that an early draft of the bill that became NRS 687B.145(3) required motor vehicle insurers to offer medical payment coverage "or obtain a rejection in writing." Hearing on A.B. 405 Before the Assembly Commerce Comm., 65th Leg. (Nev., March 29, 1989); *see also* A.B. 405, 65th Leg. (Nev. 1989) (providing that every motor vehicle insurance policy "shall be deemed to provide [medpay coverage] unless the policyholder waives, in writing, inclusion of such coverage"). Normally, this court doesn't consult legislative history except to disambiguate unclear text. *Williams*, 129 Nev. at 391, 302 P.3d at 1147. But the fact that an early bill draft included a written rejection requirement that the enacted law deleted is unhelpful to Wingco in any event. *See* 2A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutory Construction* § 48:18 (7th ed. 2007) ("Generally the rejection of an amendment indicates that the legislature does not intend the bill to include the provisions embodied in the rejected amendment."); *Natchez v. State*, 102 Nev. 247, 250-51, 721 P.2d 361, 363 (1986) (noting that when the Legislature was presented with a bill allowing ophthalmologists to employ optometrists and then deleted that provision from the bill before passing it, it demonstrated that the Legislature intended to prohibit this employment relationship).

[Headnote 5]

In *Banks v. Progressive Northern Insurance Co.*, No. 2:12-CV-00861-KJD-VCF, 2012 WL 6697542 (D. Nev. Dec. 21, 2012), the federal district court considered and rejected the argument that NRS 687B.145(3) carries an implied written rejection requirement. Deeming NRS 687B.145(3) "unambiguous," the district court observed that, if the Legislature meant to impose a written rejection requirement on medpay coverage offers, it would have expressly so stated, as it did in NRS 690B.020 for minimum UM/UIM coverage: "UM/UIM coverage must be waived in writing because the legislature has expressly stated that it must be waived in writing, not because it is 'must offer' coverage." *Banks*, 2012 WL 6697542, at *2. This court may adopt unpublished federal district court dispositions that it finds persuasive, *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 440 n.2, 245 P.3d 542, 546 n.2 (2010), and it does so here.[3]

[3]*Banks* also disposes of Wingco's argument that the must-offer form Geico uses, compared to those other insurers use, suggests a practice of soliciting written rejections of medpay coverage. But we do not address here preferred or best practices. Rather, the question is whether NRS 687B.145(3) statutorily requires a written rejection of medpay coverage, such that the coverage becomes a part of the policy by operation of law if not rejected in writing by the insured.

All of Wingco's claims proceed from the mistaken premise that NRS 687B.145(3) requires a written rejection of medpay coverage. Because NRS 687B.145(3) does not require a written rejection of medpay coverage, Wingco's claims fail.

We therefore affirm the district court's order of dismissal.

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

Cf. Ippolito v. Liberty Mut. Ins. Co., 101 Nev. 376, 378-79, 705 P.2d 134, 136 (1985) (court will read coverage mandated by statute into Nevada motor vehicle insurance policies). As *Banks* correctly concludes, courts are "not bound by the legal conclusions of insurance companies" in interpreting Nevada's insurance code. 2012 WL 6697542, at *2.