JIMMY D. PITMON, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 65000

March 26, 2015 352 P.3d 655

Appeal from a judgment of conviction of attempted lewdness with a child under the age of 14. Eighth Judicial District Court, Clark County; Douglas W. Herndon, Judge.

The court of appeals, TAO, J., held that: (1) statute that allows the courts to impose consecutive or concurrent sentences for two or more crimes does not violate the Due Process Clause, and (2) consecutive maximum sentences for each conviction did not violate the prohibition against cruel and unusual punishment.

Affirmed.

Turco & Draskovich, LLP, and *Robert M. Draskovich*, Las Vegas; *Law Office of Gary A. Modafferi* and *Gary A. Modafferi*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Steven S. Owens*, Chief Deputy District Attorney, Clark County, for Respondent.

1. CONSTITUTIONAL LAW; SENTENCING AND PUNISHMENT.
   Statute that allows courts to impose consecutive or concurrent sentences for two or more crimes does not violate Due Process Clause; statute is intended to give the district courts discretion to impose sentences concurrently or consecutively. U.S. CONST. amend. 14; NRS 176.035(1).
2. SENTENCING AND PUNISHMENT.
   In general, district judges in Nevada possess wide discretion in imposing sentences in criminal cases.
3. CRIMINAL LAW.
   On appeal, a sentence imposed in the district court will not be overruled absent a showing of abuse of discretion; thus, the appellate courts will refrain from interfering with sentences imposed in district court, so long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence.
4. SENTENCING AND PUNISHMENT.
   Regardless of its severity, a sentence that is within the statutory limits is not considered to violate the Eighth Amendment's proscription against cruel and unusual punishment, unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience. U.S. CONST. amend. 8.
5. CRIMINAL LAW.
   The constitutionality of a statute is a question of law that the court of appeals reviews de novo.
6. STATUTES.
   Statutes are presumed valid, and the burden therefore falls upon the challenger to make a clear showing of invalidity.

7. Constitutional Law.
   A statute may be challenged as unconstitutional either because it is vague on its face, or because it is vague as applied only to the particular challenger.
8. Constitutional Law.
   A statute is unconstitutionally vague in violation of the Due Process Clause if it: (1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited; and (2) lacks specific standards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement. U.S. Const. amend. 14.
9. Constitutional Law.
   To be considered unconstitutional on its face, a statute must be vague in violation of the Due Process Clause in all of its applications. U.S. Const. amend. 14.
10. Constitutional Law.
    When a challenge is made to a statute that implicates criminal penalties or constitutionally protected rights, the statute is unconstitutional if the vagueness so permeates the text that the statute cannot meet due process requirements in most applications; and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances. U.S. Const. amend. 14.
11. Statutes.
    In analyzing the meaning of a statute, the court must interpret it in a reasonable manner; that is, the words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results.
12. Statutes.
    A statute should be given its plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory.
13. Statutes.
    When the language of a statute is plain and unambiguous, the court is not permitted to look for meaning beyond the statute; the court will only go to legislative history when the statute is ambiguous.
14. Constitutional Law.
    Nothing in the Due Process Clause demands that defendants who commit multiple crimes must receive the same sentence as defendants who commit only one. U.S. Const. amend. 14; NRS 176.035(1).
15. Constitutional Law.
    The Due Process Clause does not require that every sentencing statute include specifically enumerated and rigorously defined checklists that must be mechanically applied by rote in every case; rather, the nature of criminal sentencing in Nevada is such that judges must be able to exercise discretion in order to match the sentence imposed in each case to the nature of a particular crime, the background of a particular defendant, the potential effect of the crime on any victim, and any other relevant factor. U.S. Const. amend. 14; NRS 176.035(1).
16. Criminal Law.
    A sentence may be reversed on appeal either if the record demonstrates prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence, or if the sentence was so unreasonably disproportionate to the offense as to shock the conscience.

17. Sentencing and Punishment.

Consecutive maximum sentences of 8 to 20 years for each of two convictions of attempted lewdness with a child under the age of 14 did not violate the prohibition against cruel and unusual punishment, where defendant was originally charged with committing similar offenses against three different children over a period of several months, admitted to committing additional offenses against a fourth child on prior occasions, and his psychosexual evaluation classified him as a high risk to reoffend. U.S. Const. amend. 8; NRS 176.035(1).

Before Gibbons, C.J., Tao and Silver, JJ.

OPINION

By the Court, Tao, J.:

When a criminal defendant stands convicted of two or more felony criminal offenses and has already been sentenced to a term of imprisonment for one of those offenses, NRS 176.035(1) expressly permits a district court to order that the sentence for the second offense be imposed either concurrently or consecutively to the first sentence. In this appeal, appellant Jimmy D. Pitmon asserts that NRS 176.035(1) violates the Due Process Clause of the United States and Nevada Constitutions[1] because it fails to articulate any "pre-existing and reviewable criteria" to guide the district court in deciding whether the second sentence should be imposed concurrently or consecutively. We conclude that NRS 176.035(1) is not constitutionally deficient and therefore affirm.

FACTS

Pitmon was originally charged in three separate cases with multiple counts of attempted lewdness with a child under the age of 14 arising from allegations that he fondled the genitals of three different 4-year-old children on multiple occasions. The charges in two of those cases were eventually consolidated together into a single case (the first case), leaving two cases pending. Following negotiations with the district attorney, Pitmon agreed to enter a plea of guilty in each case to one count of attempted lewdness with a child under the age of 14, and all other pending charges and counts were to be dismissed after rendition of sentence.

The written guilty plea agreements signed by Pitmon in both cases were virtually identical, and both specified that the State retained the right to argue at sentencing. The guilty plea agreements also ac-

[1]The Fourteenth Amendment to the U.S. Constitution and Article 1, Section 8, paragraph 5 of the Nevada Constitution both provide that no person shall be deprived of "life, liberty, or property, without due process of law."

knowledged that the sentencing judge possessed the discretion to order that the sentences be served either concurrently or consecutively.

Prior to sentencing, Pitmon underwent a psychosexual evaluation by psychologist Dr. John Paglini and was classified as a "high" risk to reoffend, which rendered him statutorily ineligible to receive probation. *See* NRS 176A.110. During his interview with Dr. Paglini, Pitmon admitted to inappropriate sexual contact with a fourth child years before the instant offenses. Thus, the presentence investigation report prepared by the Nevada Division of Parole and Probation noted that Pitmon had victimized at least four minor children over the course of a decade.

Pitmon was sentenced in the first case and received the maximum possible sentence, which was a minimum term of 8 years and a maximum term of 20 years' imprisonment. *See* NRS 193.330(1)(a)(1); NRS 201.230(2). Two days later, he appeared for sentencing in the instant case and again received the maximum possible sentence. Additionally, the district judge in the instant case ordered that the sentence be served consecutively to the sentence previously imposed in the first case.

Pitmon failed to file a direct appeal from his conviction, but the district court subsequently found that Pitmon had been improperly deprived of a direct appeal and permitted Pitmon to file the instant appeal pursuant to NRAP 4(c)(1).

DISCUSSION

[Headnotes 1-4]

In general, district judges in Nevada possess wide discretion in imposing sentences in criminal cases. *See Houk v. State*, 103 Nev. 659, 664, 747 P.2d 1376, 1379 (1987) ("The sentencing judge has wide discretion in imposing a sentence . . . ."). On appeal, a sentence imposed in district court will not be overruled absent a showing of "abuse of discretion." *Id.* Thus, appellate courts will refrain from interfering with sentences imposed in district court "[s]o long as the record does not demonstrate prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence." *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976). Furthermore, regardless of its severity, a sentence that is within the statutory limits is not considered to violate the Eighth Amendment's proscription against " 'cruel and unusual punishment unless the statute fixing punishment is unconstitutional or the sentence is so unreasonably disproportionate to the offense as to shock the conscience.' " *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (quoting *Culverson v. State*, 95 Nev. 433, 435, 596 P.2d 220, 222 (1979)); *see Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining that the

Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime).

In this appeal, Pitmon does not contend that his sentence was "cruel and unusual," or that the district court relied upon "impalpable or highly suspect evidence" in imposing his sentence. Pitmon also does not allege that his sentence constituted an "abuse of discretion" under the particular circumstances of this case. Rather, Pitmon argues that NRS 176.035(1) is facially unconstitutional because it affords virtually unfettered discretion to the district court to determine whether sentences for separate offenses should be imposed concurrently or consecutively. Thus, Pitmon argues that NRS 176.035(1) fails to comply with the Due Process Clause because an ordinary citizen facing sentencing for different offenses cannot reasonably understand or anticipate whether the sentences are likely to be imposed concurrently or consecutively. Pitmon further contends that the statute lacks meaningful or specific standards guiding when consecutive sentences may be imposed and permits arbitrary imposition of those sentences by a district court. More broadly, Pitmon also argues that Nevada's sentencing scheme is invalid because it lacks meaningful appellate review of any sentence imposed by a district court, no matter how arbitrary that sentence may have been.

[Headnotes 5-7]

The constitutionality of a statute is a question of law that this court reviews de novo. *See Flamingo Paradise Gaming, LLC v. Chanos*, 125 Nev. 502, 509, 217 P.3d. 546, 551 (2009). Statutes are presumed valid, and the burden therefore falls upon Pitmon to make a "clear showing of invalidity." *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). A statute may be challenged as unconstitutional either because it is vague on its face, or because it is vague as applied only to the particular challenger. *Flamingo Paradise*, 125 Nev. at 509-10, 217 P.3d at 551-52. Here, Pitmon asserts that NRS 176.035(1) is unconstitutional on its face because it is inherently vague with respect to any sentence that could be imposed upon any criminal defendant who stands convicted of multiple offenses.

[Headnote 8]

When analyzing whether a statute is unconstitutionally vague in violation of the Due Process Clause, courts generally apply a two-factor test. *Silvar*, 122 Nev. at 293, 129 P.3d at 685; *see also Kolender v. Lawson*, 461 U.S. 352, 357 (1983). Under this two-factor test, a statute is unconstitutionally vague if it "(1) fails to provide notice sufficient to enable persons of ordinary intelligence to understand what conduct is prohibited and (2) lacks specific stan-

dards, thereby encouraging, authorizing, or even failing to prevent arbitrary and discriminatory enforcement." *Silvar*, 122 Nev. at 293, 129 P.3d at 685.

[Headnotes 9, 10]

To be considered unconstitutional on its face, a statute must be vague "in all of its applications." *Flamingo Paradise*, 125 Nev. at 511-12, 217 P.3d at 552-53. When a challenge is made to a statute that implicates criminal penalties or constitutionally protected rights, the statute is unconstitutional if the vagueness "so permeates the text that the statute cannot meet these requirements in most applications; and thus, this standard provides for the possibility that some applications of the law would not be void, but the statute would still be invalid if void in most circumstances." *Id*.

Pitmon's challenge to NRS 176.035(1) runs as follows. He contends that sentences for different offenses should normally be imposed concurrently because the statute specifies, in its second sentence, that "if the court makes no order with reference thereto, all such subsequent sentences run concurrently." NRS 176.035(1). Pitmon interprets this sentence as an intentional restriction by the Nevada Legislature upon the discretion of district courts to impose consecutive sentences by requiring that such sentences usually be imposed concurrently "by default." Therefore, Pitmon argues that, because a person of ordinary intelligence would understand that all subsequent sentences must normally run concurrently by default, a district court cannot constitutionally deviate from this expectation in the absence of clearly established criteria. Because those clear criteria are missing from the statute, he avers that the statute is unconstitutional unless all subsequent sentences are imposed concurrently.

[Headnotes 11, 12]

The fundamental problem with Pitmon's argument is that it misreads NRS 176.035(1). In analyzing the meaning of a statute, the court must interpret it in a reasonable manner, that is, "[t]he words of the statute should be construed in light of the policy and spirit of the law, and the interpretation made should avoid absurd results." *Desert Valley Water Co. v. State*, 104 Nev. 718, 720, 766 P.2d 886, 886-87 (1988). A statute "should be given [its] plain meaning and must be construed as a whole and not be read in a way that would render words or phrases superfluous or make a provision nugatory." *Mangarella v. State*, 117 Nev. 130, 133, 17 P.3d 989, 991 (2001) (internal quotations omitted).

Pitmon focuses upon a single sentence of NRS 176.035(1) in isolation and ignores the very first sentence of NRS 176.035(1), which expressly states that a district court "may" impose consecutive subsequent sentences. When the first and second sentences of the statute are read together, as they must be, it is clear that NRS 176.035(1) was not intended to restrict the ability of sentencing courts to im-

pose consecutive sentences for separate offenses, but rather was intended to give district courts discretion in determining whether such sentences should be imposed consecutively or concurrently.

[Headnote 13]

When the language of a statute is plain and unambiguous, the court is not permitted to look for meaning beyond the statute and the court will only go to legislative history when the statute is ambiguous. *Estate of Smith v. Mahoney's Silver Nugget, Inc.*, 127 Nev. 855, 857-58, 265 P.3d 688, 690 (2011). We conclude that the plain language of NRS 176.035 is unambiguous. However, even if we were to find that the plain language of the statute was ambiguous, the legislative history clearly demonstrates that NRS 176.035 was intended to give district courts discretion in determining whether such sentences should be imposed consecutively or concurrently.

NRS 176.035 was originally enacted in 1967. Prior to 1987, the statute required that any subsequent offense committed while a defendant was on probation for an earlier offense was required to be imposed consecutively. In 1985, the Governor and the Legislature established a "Commission to Establish Suggested Sentences for Felonies," which studied Nevada's sentencing statutes and issued a report in December 1986 recommending extensive revisions to Nevada's criminal statutes. Some of these recommendations were reflected in Assembly Bill (A.B.) 110, introduced during the 1987 legislative session. Witnesses testified to the Legislature that, among other suggested changes, judges should be given discretion to determine whether sentences for subsequent offenses should be imposed concurrently or consecutively, and that the statute should not impose a "default" requirement either way. (*See* Hearing on A.B. 110 Before the Assembly Judiciary Comm., 64th Leg. (Nev., May 26, 1987)). The Legislature enacted A.B. 110, which revised NRS 176.035(1) to specify that judges have discretion to determine whether sentences for subsequent crimes should be imposed concurrently or consecutively.

More recently, NRS 176.035(1) was further revised by the Legislature in 2013 through Senate Bill (S.B.) 71 (in a manner that became effective in July 2014 and therefore does not apply to Pitmon's conviction). The introduction to S.B. 71 describes the version of NRS 176.035 that applies to Pitmon's conviction as follows:

> Under [pre-2014] law, a person who is convicted of committing more than one crime may be sentenced to serve the sentences imposed for each crime concurrently or consecutively.

S.B. 71, 77th Leg. (Nev. 2013).

Thus, the legislative history of NRS 176.035 makes clear that the Nevada Legislature did not intend NRS 176.035(1) either to limit the discretion of district judges to impose sentences concurrently or consecutively, or to require that such sentences be imposed con-

currently "by default." Quite to the contrary, the 1987 amendments to NRS 176.035(1) were expressly designed to give judges greater discretion over such decisions than they had before 1987 when such sentences were required to be imposed consecutively. Accordingly, it cannot be said that NRS 176.035(1) was intended to require that a person facing sentencing for two different offenses should be awarded concurrent sentences rather than consecutive ones.

[Headnote 14]

If anything, it strikes the court that an ordinary person who chooses to commit two offenses and is convicted of both should reasonably anticipate the possibility, and perhaps even the likelihood, that he or she will have to serve consecutive sentences for each crime. To conclude otherwise would be to effectively reward defendants who commit multiple offenses and require that they be sentenced as if they had only committed one. Nothing in the Due Process Clause demands that defendants who commit multiple crimes must receive the same sentence as defendants who commit only one. *See United States v. Mun*, 41 F.3d 409, 413 (9th Cir. 1994) (defendant does not have a due process right to concurrent sentences); *see also Isreal v. Marshall*, 125 F.3d 837, 839 (9th Cir. 1997) ("[N]o right to concurrency inheres in the Due Process Clause . . . .").

[Headnote 15]

Furthermore, the Due Process Clause does not require that every sentencing statute include specifically enumerated and rigorously defined checklists that must be mechanically applied by rote in every case. *See Branch v. Cupp*, 736 F.2d 533, 536 (9th Cir. 1984) (stating that defendant's due process rights were not violated merely because judge failed to articulate specific reasons for imposing sentence). Rather, the nature of criminal sentencing in Nevada is such that judges must be able to exercise discretion in order to match the sentence imposed in each case to the nature of a particular crime, the background of a particular defendant, the potential effect of the crime on any victim, and any other relevant factor. As former Justice Rose observed, "[l]egislatures cannot create enough sentencing law to match the nuances of each crime and perpetrator, and thus they confer on their respective judiciaries some discretion in sentencing." *Sims v. State*, 107 Nev. 438, 443, 814 P.2d 63, 66 (1991) (Rose, J., dissenting). The mere existence of such discretion does not, by itself, render a statute unconstitutionally vague. The Due Process Clause does not require mathematical precision, but only that statutes be comprehensible to persons of ordinary intelligence.

Pitmon contends that many of our sister states have enacted legislation that removes such unbounded discretion from sentencing judges and instead requires that specific findings be made before

consecutive sentences may be imposed.[2] But the fact that many states have chosen to remove such discretion from sentencing judges does not mean that such discretion is constitutionally prohibited or that similar standards are constitutionally mandated in every state.

[Headnote 16]

Further, the failure to require the district court to make specific findings before imposing consecutive sentences does not render the sentence unreviewable on appeal. A sentence may be reversed on appeal either if the record demonstrates "prejudice resulting from consideration of information or accusations founded on facts supported only by impalpable or highly suspect evidence," *Silks v. State*, 92 Nev. 91, 94, 545 P.2d 1159, 1161 (1976), or if the sentence was "so unreasonably disproportionate to the offense as to shock the conscience," *Blume v. State*, 112 Nev. 472, 475, 915 P.2d 282, 284 (1996) (internal quotations omitted). *See Harmelin v. Michigan*, 501 U.S. 957, 1000-01 (1991) (plurality opinion) (explaining that the Eighth Amendment does not require strict proportionality between crime and sentence, but forbids only an extreme sentence that is grossly disproportionate to the crime). Pitmon fails to explain why the Due Process Clause must be read to mandate that appellate courts in Nevada be given more authority than they currently possess to review criminal sentences, or why the existing standards are constitutionally insufficient to protect the rights of a defendant sentenced in Nevada. Pitmon's concerns are more properly left to the Legislature.

On balance, we cannot conclude that the text of NRS 176.035(1) is so "permeated" by vagueness that the imposition of consecutive sentences would be unfair "in most circumstances" whenever a defendant is sentenced for committing two separate crimes. Quite to the contrary, it seems to the court that the imposition of consecutive sentences for the commission of two separate crimes would represent an outcome reasonably to be expected by persons of ordinary intelligence. *See Fierro v. MacDougall*, 648 F.2d 1259, 1260 (9th

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[2]*See* Alaska (Alaska Stat. § 12.55.127 (2014)); Arizona (Ariz. Rev. Stat. Ann. § 13-708 (Supp. 2014)); Arkansas (Ark. Code Ann. § 5-4-403 (2013)); Florida (Fla. Stat. Ann. § 921.16 (West Supp. 2015)); Idaho (Idaho Code Ann. § 18-308 (2004)); Illinois (730 Ill. Comp. Stat. Ann. 5/5-8-4 (West Supp. 2014)); Kansas (Kan. Stat. Ann. § 21-4608 (2007)); Kentucky (Ky. Rev. Stat. Ann. § 532.110 (LexisNexis 2008)); Maryland (Md. Rules § 4-351 (LexisNexis 2015); Md. Code Ann., Corr. Servs. § 9-201 (LexisNexis 2008)); Mississippi (Miss. Code Ann. § 99-19-21 (2007)); Missouri (Mo. Ann. Stat. § 558.026 (West 2012)); Montana (Mont. Code Ann. § 46-18-401 (2011)); New Jersey (N.J. Stat. Ann. § 2C:44-5 (2005)); Texas (Tex. Crim. Proc. Code Ann. § 42.08 (West Supp. 2014)); Utah (Utah Code Ann. § 76-3-401 (LexisNexis 2012)); and Wisconsin (Wis. Stat. Ann. § 973.15 (West 2007)).

Cir. 1981) (concluding that, even where legislature did not authorize the imposition of consecutive sentences, due process clause permitted judge to impose consecutive sentences because "[t]he imposition of consecutive sentences is nothing more than the imposition, for each crime, of the sentence fixed by legislative act. Such sentencing [constitutes] literal compliance with that which the legislature has prescribed.").

[Headnote 17]

To the extent that Pitmon asserts that his sentences were unconstitutional "as applied" to him, we conclude that the sentences imposed did not violate constitutional standards and the district court did not abuse its discretion by ordering that those sentences be served consecutively. Pitmon entered pleas of guilty to only two felony counts even though he was originally charged with committing similar offenses against three different children over a period of several months and admitted to committing additional offenses against a fourth child on prior occasions. Further, his psychosexual evaluation classified him as a "high" risk to reoffend. We conclude that the sentences imposed were not unreasonably disproportionate to the offenses to which Pitmon pleaded guilty, even though he received consecutive maximum sentences.

CONCLUSION

For the reasons discussed above, we conclude that NRS 176.035(1) is not unconstitutionally vague in violation of the Due Process Clause of the U.S. and Nevada Constitutions. Accordingly, we affirm the sentence imposed by the district court.

GIBBONS, C.J., and SILVER, J., concur.

CLINTON HOHENSTEIN, APPELLANT, *v.* NEVADA EMPLOYMENT SECURITY DIVISION, STATE OF NEVADA; CYNTHIA JONES, IN HER CAPACITY AS ADMINISTRATOR OF THE NEVADA EMPLOYMENT SECURITY DIVISION; KATIE JOHNSON, IN HER CAPACITY AS CHAIRWOMAN OF THE NEVADA EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW; AND THE WASHOE COUNTY SCHOOL DISTRICT AS THE EMPLOYER, RESPONDENTS.

No. 58519

April 2, 2015 346 P.3d 365

Appeal from a district court order denying judicial review of an administrative decision denying unemployment benefits. Second Judicial District Court, Washoe County; Robert H. Perry, Judge.

Claimant, who pleaded guilty to possessing marijuana, sought unemployment benefits after he was terminated as teacher by school district. The Employment Security Division denied claimant benefits, and claimant appealed. The district court denied judicial review of administrative decision denying unemployment benefits, and claimant appealed. The supreme court, PICKERING, J., held that teacher's guilty plea to possessing marijuana could not be used to establish misconduct-based grounds for termination for purposes of denying unemployment compensation during teacher's probationary period.

Reversed and remanded with instructions.

Lemons, Grundy & Eisenberg and *Caryn S. Tijsseling*, Reno; *Lewis Roca Rothgerber LLP* and *Darren J. Lemieux*, Reno, for Appellant.

J. Thomas Susich, Senior Legal Counsel, Nevada Employment Security Division, Sparks, for Respondents Nevada Employment Security Division, Cynthia Jones, and Katie Johnson.

Office of General Counsel, Washoe County School District, and *Christopher B. Reich, Randy A. Drake*, and *Sara K. Almo*, Reno, for Respondent Washoe County School District.

1. STATUTES.
   Ordinarily, a statute adopted from another jurisdiction will be presumed to have been adopted with construction placed upon it by the courts of that jurisdiction before its adoption; there is no reason why this rule does not equally apply in uniform law context, when state law upon which a uniform law is based has been interpreted by that state's courts before the uniform law's creation.
2. UNEMPLOYMENT COMPENSATION.
   Teacher's guilty plea to possessing marijuana could not be used to establish misconduct-based grounds for termination for purposes of denying unemployment compensation during teacher's probationary period in light of Uniform Controlled Substances Act provision affording certain first-time drug offenders the opportunity to avoid criminal conviction if offender pleads guilty and then successfully completes a probationary period; Act forestalled final judgment of conviction for purposes of employment if the offender successfully completed probation, the district court suspended teacher's sentence and placed him on probation for a period not to exceed 3 years and, if he fulfilled the conditions of probation, criminal proceedings would be dismissed in accordance with Act, and when Employment Security Division denied teacher unemployment benefits, he was midway through his 3-year probationary period, such that dismissal and discharge of criminal case had yet to occur. NRS 453.3363(4).
3. UNEMPLOYMENT COMPENSATION.
   The supreme court deferentially reviews the Employment Security Division's factual findings, especially misconduct findings, in unemployment compensation case. NRS 612.385.

Before PARRAGUIRRE, SAITTA and PICKERING, JJ.

OPINION

By the Court, PICKERING, J.:

NRS 453.3363 affords certain first-time drug offenders the opportunity to avoid a criminal conviction if the offender pleads guilty, then successfully completes a probationary period. Upon successfully completing probation, the offender is discharged and the charges are dismissed. Addressing the civil consequences of such a plea to the offender who successfully completes probation, NRS 453.3363(4) provides: "[D]ischarge and dismissal under this [statute] is without adjudication of guilt and is not a conviction for purposes . . . of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose." We must decide how this statute applies to a public school teacher who was terminated after pleading guilty but before completing probation, specifically, whether a guilty plea pursuant to NRS 453.3363 may be used to deny unemployment benefits to the terminated teacher in this circumstance. We hold that the guilty plea may not be used as the basis for denying unemployment benefits, and therefore reverse and remand.

I.

Appellant Clinton Hohenstein, then a teacher for the respondent Washoe County School District (WCSD), was arrested for and pleaded guilty to possessing marijuana in his residence in violation of NRS 453.336. Because this was his first offense, the district court did not enter a judgment of conviction. Instead, it suspended Hohenstein's sentence and placed him on probation for a period not to exceed 3 years. Per NRS 453.3363(1), if Hohenstein fulfilled the conditions of probation, the criminal proceedings would be dismissed in accordance with NRS 453.3363(3).

On learning of Hohenstein's arrest the WCSD suspended him and began termination proceedings, during which Hohenstein entered his guilty plea. The WCSD specified its final grounds for terminating Hohenstein, consistent with NRS 391.31297,[1] as: (1) immorality, (2) conviction of a felony or of a crime involving moral turpitude, and (3) any cause which constitutes grounds for revocation of a teaching license.

Hohenstein sought unemployment benefits. After a hearing, the Employment Security Division (ESD) denied Hohenstein benefits

[1]NRS 391.31297 was numbered NRS 391.312 at the time the WCSD terminated Hohenstein, but the statute has remained substantively the same for purposes of this appeal. 2013 Nev. Stat., ch. 506, § 36.

on finding that his guilty plea established that the WCSD had terminated Hohenstein for "workplace misconduct," to wit: he had committed immoral conduct under NRS 391.31297(1)(b), which disqualified him from eligibility for unemployment benefits under NRS 612.385. Hohenstein filed an unsuccessful petition for judicial review, followed by this appeal.

II.

An ESD appeals referee "shall inquire into and develop all facts bearing on the issues and shall receive and consider evidence without regard to statutory and common-law rules." NRS 612.500(2). At first blush, this standard appears to sanctify the ESD's reliance on Hohenstein's guilty plea as a basis for denying him unemployment benefits. *See also Taylor v. Thunder*, 116 Nev. 968, 973, 13 P.3d 43, 45-46 (2000) ("[E]vidence of a guilty plea or offer to plead guilty from a prior criminal proceeding is admissible in a subsequent civil proceeding, subject to NRS 48.035(1)."). But upon entry of Hohenstein's guilty plea the district court immediately suspended his criminal proceedings in order to afford Hohenstein the opportunity to successfully complete his probationary period and avoid entry of a final judgment of conviction, per NRS 453.3363. Thus, the guilty plea, along with the district court's order, effectively placed Hohenstein's criminal proceedings on hold and brought his case within NRS 453.3363's specific directives.

Among those directives is NRS 453.3363(4), which reads in pertinent part as follows:

> Except as otherwise provided in subsection 5,[2] discharge and dimissal under this section is without adjudication of guilt and is not a conviction for purposes of this section *or for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose*, but is a conviction for the purpose of additional penalties imposed for second or subsequent convictions or the setting of bail. Discharge and dismissal restores the person discharged, in the contemplation of the law, to the status occupied before the arrest, indictment or information.

(Emphasis added.) When the ESD denied Hohenstein unemployment benefits he was midway through his 3-year probationary period, so "dismissal and discharge" of the criminal case had yet to occur. The question is whether, given this statute, the ESD properly used Hohenstein's conditional guilty plea as the basis for denying him unemployment benefits.

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[2]NRS 453.3363(5) allows a professional licensing board to consider a proceeding under the statute when "determining suitability for a license or liability to discipline for misconduct." The WCSD does not argue that NRS 453.3363(5) applies to this matter.

A similar issue confronted the Maryland Court of Special Appeals in *Tate v. Board of Education of Kent County*, 485 A.2d 688 (Md. Ct. Spec. App. 1985). At issue in *Tate* was former Maryland Code, Article 27, § 292 (1987), on which statute the Uniform Law Commission drew in crafting § 414 of the 1990 Uniform Controlled Substances Act (UCSA), on which NRS 453.3363 in turn is modeled.[3] Like NRS 453.3363, section 292 provided that an arrest or conviction expunged under the Maryland statute could not "thereafter be regarded as an arrest or conviction for purposes of employment, civil rights, or any statute or regulation or license or questionnaire or any other public or private purpose." Md. Code, Art. 27, § 292(b)(5) (1987). *Tate* addressed whether, consistent with § 292, a school board could terminate a teacher who had pleaded guilty to possession of marijuana and drug paraphernalia but was in the process of completing her probationary period. 485 A.2d at 689-90. The trial court had held that the teacher's guilty pleas established her guilt, validating the termination. *Id.* at 689. The court of appeals reversed. *Id.* at 691. To read § 292 otherwise, the court reasoned, would

> . . . deprive[ ] the statute of effect during the probationary period. The circuit court's ruling, if allowed to stand, means that § 292(b) would be effective only upon the satisfactory completion of probation, and that during the probationary period the probationer would be totally denied the protection of the statute. The result of the trial court's ruling is that in the instant case, had the disciplinary proceeding before the County Board not been instituted until after Tate satisfactorily completed the 18 months[']probation, the pleas of guilty could not have been used against her. On the other hand, when, as here, proceedings are initiated during the period of probation, § 292(b) would not prevent the guilty pleas[ ] being used as evidence.

Id. at 689-90.

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[3]The Nevada Legislature included the exact dismissal and discharge language contained in the uniform law, save an irrelevant (to this appeal) exception for professional licensing boards. A.B. 222, 66th Leg. (Nev. 1991); 1991 Nev. Stat., ch. 523, § 12, at 1647; UCSA § 414(c), 9 U.L.A. 838 (1990). The commentary to § 414 states that in addition to providing a discretionary alternative to incarceration, the section "provides for confidentiality of the defendant's record upon fulfilling all the terms and conditions of probation. This will preclude any permanent criminal record from attaching to and following the individual in later life." UCSA § 414 cmt., 9 U.L.A. 838 (1990); *see also State v. Alston*, 362 A.2d 545, 547-48 (N.J. 1976) (recognizing a purpose behind allowing the court to dismiss proceedings for first-time drug offenders is to allow that offender to avoid the stigma of criminal conviction). The commentary then goes on to note that the discharge and dismissal language is based on former Maryland Code, Article 27, § 292 (1987). UCSA § 414 cmt., 9 U.L.A. 838 (1990).

Section 292's "obvious goal" was "to afford a degree of protection to first offenders in certain controlled dangerous substance cases." *Id.* at 690. Because the statute mandated that an offender who completes his or her probationary period "shall not" have a criminal record and that an expunged arrest "cannot be taken into account insofar as employment, civil rights or licensing are concerned," the court concluded that § 292 did not permit dismissing the teacher based upon her guilty pleas, despite the fact that she had yet to complete her probationary period. *Id*. Of note, the court did hold that the teacher's testimony before the county school board regarding her alleged misconduct, apart from her arrest and plea, could be considered in the dismissal proceedings as proof of the conduct underlying the pleas. *Id.* at 690-91.

[Headnotes 1, 2]

Tate predated the 1990 UCSA, which, as noted, drew upon § 292 in crafting the uniform law provision that Nevada adopted as NRS 453.3363. Ordinarily, "a statute adopted from another jurisdiction will be presumed to have been adopted with the construction placed upon it by the courts of that jurisdiction before its adoption." *Ybarra v. State*, 97 Nev. 247, 249, 628 P.2d 297, 298 (1981). We see no reason why this rule would not equally apply in the uniform law context, where the state law upon which a uniform law is based has been interpreted by that state's courts before the uniform law's creation. *See also* NRS 453.013 (mandating that the Nevada UCSA "shall be so applied and construed as to effectuate its general purpose and to make uniform the law with respect to the subject of such sections among those states which enact it"). Nothing in the legislative history of NRS 453.3363 suggests that the Legislature intended to depart from the UCSA, or the Maryland precedent on which it was based, on this issue. And though the *Tate* court determined that the guilty pleas could not be used to justify the teacher's dismissal, the same reasoning would apply here to preclude the use of a guilty plea to justify disqualification from unemployment compensation, given that the discharge and dismissal provision prohibits treating the discharge and dismissal as a conviction "for purposes of employment . . . or for any other public or private purpose." NRS 453.3363(4). We therefore adopt the reasoning and interpretation offered in *Tate* and hold that, since NRS 453.3363(4) forestalls a final judgment of conviction "for purposes of employment, civil rights or any statute or regulation or license or questionnaire or for any other public or private purpose" if the offender successfully completes probation, the guilty plea may not be used to establish misconduct-based grounds for termination for purposes of denying unemployment compensation during the probationary period.

Here, the WCSD relied on Hohenstein's guilty plea as grounds both for terminating him and for establishing that his termination

was misconduct-based, making him ineligible for unemployment compensation. In the WCSD's first notice of intent to dismiss Hohenstein, which was issued after his arrest but prior to his guilty plea, the deputy superintendent recommended that Hohenstein be discharged for various reasons, including immorality, unprofessional conduct, insubordination, failure to comply with such reasonable requirements as a board may proscribe, any cause which constitutes grounds for the revocation of a teacher's license, willful neglect or failure to observe and carry out the requirements of this title, and dishonesty. But once Hohenstein entered his NRS 453.3363 plea, the WCSD issued an amended notice of intent informing Hohenstein that "[i]n as much as [sic] you were convicted of Possession of a Controlled Substance in violation of NRS 453.336," it was adding immorality, conviction of a felony or crime involving moral turpitude, and any cause which constitutes grounds for revocation of a teacher's license to the reasons warranting his dismissal. Throughout the ESD proceedings the WCSD likewise maintained that it was Hohenstein's "conviction" that led to and warranted his discharge, and thus also disqualified him from receiving unemployment benefits under NRS 612.385. A WCSD human resources specialist who testified at the administrative hearing—who had no personal knowledge other than from reviewing Hohenstein's termination paperwork and was the only witness to testify on the WCSD's behalf—informed the appeals referee that Hohenstein "was discharged for pleading guilty to a felony" because that plea resulted in a "conviction [for] the possession of [the] illegal substance . . . marijuana." The WCSD representative further explained that an elementary level teacher typically would be terminated for such a conviction, that a felony conviction also would be considered grounds for revoking a teaching license, and that Hohenstein's offense supported the three termination grounds provided in the amended notice of intent to dismiss.

The WCSD thus equated Hohenstein's guilty plea with a felony conviction and persuaded the ESD that Hohenstein's termination was felony-based. The ESD appeals referee seemingly attempted to correct the WCSD's error by noting in his findings that Hohenstein "confessed to the act in the [administrative] hearing," which, along with his guilty plea, demonstrated that he committed acts that warranted his dismissal. But the "act" discussed in the transcript was possession of one or more marijuana plants (the amount is unclear) by Hohenstein in his home for personal medical use. And while such conduct, if indeed Hohenstein's testimony established it, *might* establish a basis to disqualify him from unemployment benefits, whether it did or not was not argued, since the WCSD, which carried the burden to prove Hohenstein was terminated for misconduct connected with his work, focused on the felony label attached to the acts, not the acts themselves. *Clark Cnty. Sch. Dist. v. Bundley*, 122

Nev. 1440, 1447-48, 148 P.3d 750, 755-56 (2006) (employer bears burden to prove disqualifying misconduct); *see also id*. at 1446, 148 P.3d at 755 ("[A]n employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law."); *Clevenger v. Nev. Emp't Sec. Dept.*, 105 Nev. 145, 150, 770 P.2d 866, 868 (1989) ("There are numerous cases where an employee's misconduct is sufficient ground for termination, but does not justify the denial of unemployment benefits because the misconduct was not shown to be connected with his or her work."). Since NRS 453.3363(4) prohibited the WCSD from using Hohenstein's guilty plea to establish misconduct, the ESD's finding that the WCSD terminated Hohenstein for misconduct connected with his work—conviction of a felony—lacks substantial evidentiary support. *Kolnik v. Nev. Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

III.

[Headnote 3]

This court deferentially reviews the ESD's factual findings, especially misconduct findings under NRS 612.385. *Kolnik*, 112 Nev. at 16, 908 P.2d at 729; *Garman v. State Emp't Sec. Dep't*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986). Even so, we cannot uphold a decision denying unemployment benefits for workplace misconduct where the employer relied on a felony conviction that didn't exist to establish the predicate finding. It may be, on remand, that the WCSD can establish a sufficient factual and legal basis to sustain the ESD's denial of benefits but the record does not support such a finding on this appeal. We therefore reverse the district court's order denying judicial review and remand with instructions that the district court remand to the ESD to determine, without considering Hohenstein's guilty plea, whether the WCSD met its burden to demonstrate that Hohenstein committed disqualifying misconduct under NRS 612.385 for which he was terminated.

Parraguirre and Saitta, JJ., concur.

COYOTE SPRINGS INVESTMENT, LLC, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND BRIGHTSOURCE ENERGY, INC., REAL PARTY IN INTEREST.

No. 64623

April 2, 2015 347 P.3d 267

Original petition for a writ of prohibition or mandamus challenging a district court order that required the disclosure of a private communication between a witness and plaintiff's counsel during a deposition.

The supreme court, CHERRY, J., held that communication between counsel and witness was not privileged.

Petition denied.

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli, Debra L. Spinelli, Maria Magali Calderon*, and *Jordan T. Smith*, Las Vegas, for Petitioner.

Kaempfer Crowell and *Peter C. Bernhard* and *Lisa J. Zastrow*, Las Vegas, for Real Party in Interest.

1. PRETRIAL PROCEDURE; PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   Attorneys may confer with witnesses during requested recesses in depositions only to determine whether to assert a privilege; for the attorney-client privilege to apply to these conferences, however, counsel must state on the deposition record (1) the fact that a conference took place, (2) the subject of the conference, and (3) the result of the conference. NRS 47.020(2), 49.095.
2. MANDAMUS; PROHIBITION.
   Prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus.
3. PROHIBITION.
   Although writs of prohibition are generally not available to review discovery orders, writs may be issued to prevent improper discovery orders compelling disclosure of privileged information.
4. PROHIBITION.
   If a discovery order requires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information, as justification for writ of prohibition, because once such information is disclosed, it is irretrievable. NRS 47.020(2), 49.095.
5. PRIVILEGED COMMUNICATIONS AND CONFIDENTIALITY.
   Attorney-client privilege protects communications between clients or client representatives and lawyers when made in furtherance of legal services and applies at all stages of all proceedings. NRS 47.020(2), 49.095.
6. PRETRIAL PROCEDURE.
   Attorneys have a responsibility to prepare witnesses before depositions.

7. Pretrial Procedure.
   Attorneys may confer with witnesses during an unrequested recess or break in a discovery deposition.
8. Pretrial Procedure.
   Attorneys may not request a break to confer with witnesses in a discovery deposition unless the purpose of the break is to determine whether to assert a privilege. NRS 47.020(2), 49.095.
9. Pretrial Procedure; Privileged Communications and Confidentiality.
   Once discovery deposition proceedings resume after a private conference that is requested to determine whether to assert a privilege, the attorney must place the following on the record: (1) the fact that a conference took place; (2) the subject of the conference; and (3) the result of the conference, specifically, the outcome of the decision whether to assert a privilege. NRS 47.020(2), 49.095.
10. Privileged Communications and Confidentiality.
    Following a private conference requested during a discovery deposition to assert a privilege, counsel must make a record of confidential communications promptly after the deposition resumes in order to preserve the attorney-client privilege. NRS 47.020(2), 49.095.
11. Privileged Communications and Confidentiality.
    Communications between counsel and his witness during break in witness's discovery deposition were not privileged, where counsel requested a break in the proceedings to confer with witness, failed to make a record of the result of the conference, such as the outcome of a decision whether to assert a privilege, and failed to make a prompt record of the communications. NRS 47.020(2), 49.095.

Before Hardesty, C.J., Douglas and Cherry, JJ.

OPINION

By the Court, Cherry, J.:

This petition for extraordinary writ relief challenges a district court order requiring a witness for the plaintiff to disclose the substance of communications that took place between the witness and plaintiff's counsel during a break in the witness's deposition. To resolve it, we must decide whether a private communication between a witness and an attorney during a requested break in the witness's deposition is entitled to protection from discovery under the attorney-client privilege.

[Headnote 1]

We hold that attorneys may confer with witnesses during requested recesses in depositions only to determine whether to assert a privilege. For the attorney-client privilege to apply to these conferences, however, counsel must state on the deposition record (1) the fact that a conference took place, (2) the subject of the conference, and (3) the result of the conference. In the instant case, we conclude that the communications between the witness and plaintiff's counsel during the break in the witness's deposition are discoverable be-

cause plaintiff's counsel requested the recess in the deposition and failed to make a sufficient, contemporaneous record of the privileged communications.

FACTS AND PROCEDURAL HISTORY

Petitioner Coyote Springs Investment, LLC, and real party in interest BrightSource Energy, Inc., entered into a lease for BrightSource to develop a solar energy generating facility on Coyote Springs' property. The parties negotiated the terms of the lease through several term sheets exchanged via email. The parties then finalized and executed the lease, and Coyote Springs created a lease summary for its bankers and appraisers. Roughly one year later, BrightSource sought to terminate the lease. In response, Coyote Springs informed BrightSource that the termination was ineffective in the absence of a lease termination fee. A dispute arose regarding the termination terms and whether just one or both of two conditions (the so-called tower height approval and transmission solution achievement conditions) had to be met before a termination fee could be imposed because the term sheets and the lease summary apparently contained language different from the actual lease as to those conditions. Subsequently, Coyote Springs sued BrightSource, arguing that the lease's termination was ineffective without payment of the termination fee.

The deposition discussions at issue

In preparation for trial, the parties deposed Harvey Whittemore, the former co-owner and manager of Coyote Springs. Whittemore testified that he and Coyote Springs' general counsel, Emilia Cargill, negotiated the lease for Coyote Springs. Whittemore was questioned regarding the lease's termination provisions. Specifically, BrightSource's counsel asked Whittemore whether he had agreed to the termination provisions in the lease. Whittemore answered, "I believe that [the provision] appropriately reflects the definitions" of the lease to which the parties agreed. When asked again about the lease's termination conditions, Whittemore stated that they were the business terms agreed upon by both parties.

Whittemore's deposition was continued and resumed nearly six months later, and BrightSource's counsel further questioned Whittemore about his approval of the term sheets and the lease summary. Whittemore testified that he believed that the term sheets were an accurate statement of terms agreed upon before the lease agreement was finalized. And when BrightSource's counsel questioned Whittemore about the lease summary distributed to Coyote Springs' bankers and appraisers, Whittemore testified that he believed he had reviewed earlier versions of the summary for accuracy and approved sending the final draft of the summary.

After BrightSource's counsel completed this round of questioning, Coyote Springs' litigation counsel suggested taking a break and requested a conference room for him, Whittemore, and Cargill. BrightSource's counsel objected to any discussion during the break regarding questions that Whittemore had been asked. Coyote Springs' litigation counsel and Cargill then met with Whittemore in a conference room. After returning from the conference, Coyote Springs' counsel resumed questioning Whittemore. During that questioning, Whittemore clarified that he believed the term sheets were not controlling. Upon further questioning, Whittemore explained his understanding of the lease was that once one of the conditions—tower height approval—was met, the company had earned the termination fee. When Coyote Springs' counsel asked whether he had previously noticed that the lease summary was inaccurate, Whittemore agreed that the lease summary was inaccurate but did not recall whether he had noticed it before.

After Coyote Springs' counsel completed his examination of Whittemore, BrightSource's counsel posed several follow-up questions. Although Whittemore could not indicate specific details or cite to any evidence in support of his statement, he emphasized that, prior to the lease's finalization, the parties agreed that the termination fee would be owed solely upon tower height approval and that a transmission solution would not be required for the termination fee to be due.

BrightSource moves to exclude Whittemore's testimony

Following Whittemore's depositions, BrightSource filed a motion in limine to exclude Whittemore's post-conference testimony and to "elicit at trial the substance of what was said during the private conference." At a hearing on the motion, the district court concluded that "in general . . . you can't do your witness prep during breaks" and explained that "if [Whittemore] talk[ed] about it at a deposition break and it wasn't part of his preparation that was done ahead of time, it may be fair game" for inquiry. After Coyote Springs' counsel questioned whether this would apply to privileged discussion that occurred during the deposition break, the district court exclaimed, "Why on earth would you do that?" The court explained to counsel that "[y]ou are entitled to go inside that privilege[,] [b]ut you're not entitled to do prep as part of a break in a deposition." Nevertheless, the court then indicated that it was "not sure that that particular instance is one where I wouldn't then give you some leeway and give you some protection."

The trial commenced, and during cross-examination of Whittemore, BrightSource's counsel inquired as to what was discussed at the deposition conference. Coyote Springs' counsel objected based on attorney-client privilege. Although noting that the conference

may have addressed privileged information, the court overruled the objection, "given the timing of the communication between counsel and the witness," and allowed the questioning to continue. Coyote Springs' counsel asked to voir dire Whittemore to establish compliance with *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998), a case in which a federal district court addressed the propriety of an in-deposition conference, which the court permitted. Whittemore first confirmed that there was no question pending when he had the private conference during his deposition. Coyote Springs' counsel then asked Whittemore about the substance of the conference, and Whittemore testified that communications he had with Cargill while he was in a leadership role at Coyote Springs were "part of [the] discussion," that whether he misunderstood or misinterpreted either questions or documents presented to him during his examination was "also part of [the] conversation," and that he "[did not] think [they] talked about manners or methods of refreshing [his] recollection at all."

At the close of BrightSource's case, Coyote Springs made an oral motion for reconsideration of the Whittemore deposition issue. The district court denied the oral motion at the time, but the judge stated that she would reconsider after hearing closing arguments. After Coyote Springs' oral motion to reconsider, the district court entered an interim order concerning whether Coyote Springs' contract claims were barred by the doctrine of unilateral or mutual mistake. The court, however, also determined that Whittemore's anticipated testimony about the conference discussion was material to the issue of mistake, and thus stayed the entry of its findings of fact and conclusions of law pending resolution of the instant petition.

DISCUSSION

[Headnotes 2-4]

"[P]rohibition is a more appropriate remedy for the prevention of improper discovery than mandamus." *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). Consequently, we consider this petition under the prohibition standard and deny Coyote Springs' alternative request for a writ of mandamus. Although "writs are generally not available to review discovery orders," this court has issued writs to prevent improper discovery orders compelling disclosure of privileged information. *Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 171, 252 P.3d 676, 678-79 (2011). The reasoning behind the privilege exception is that "if the discovery order requires the disclosure of privileged material, there would be no adequate remedy at law that could restore the privileged nature of the information, because once such information is disclosed, it is irretrievable." *Id.* at 171-72, 252 P.3d 679; *see also Aspen Fin. Servs., Inc. v. Eighth Judicial Dist.*

Court, 128 Nev. 635, 639-40, 289 P.3d 201, 204 (2012) (explaining that writ relief may be available when "it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective"). Here, because Coyote Springs seeks to prevent privileged information from being disclosed to BrightSource, we consider this petition and examine whether the conference between Whittemore and Coyote Spring's counsel was privileged.

Protection of private communications during deposition breaks

The parties dispute whether the conversation between Whittemore and Coyote Springs' counsel during Whittemore's deposition is entitled to protection based upon the attorney-client privilege. Coyote Springs argues that writ relief is warranted because its attorney-client privilege is not waived when its witness and its counsel have privileged communications during a deposition break. BrightSource asserts that the private conference with Whittemore is not privileged because there was discussion about Whittemore's substantive testimony in order to prepare him for examination or to refresh his recollection. It points out that after the private conference occurred, Whittemore repudiated his previous testimony on a material, contested issue of fact.

[Headnote 5]

The attorney-client privilege, codified in NRS 49.095, protects communications between clients or client representatives and lawyers when made in furtherance of legal services and "appl[ies] at all stages of all proceedings." NRS 47.020(2). Clients and attorneys are generally not permitted to confer in the midst of giving testimony, however, and some jurisdictions have concluded that such conferences may lead to a waiver of the attorney-client privilege. *See Aiello v. City of Wilmington*, 623 F.2d 845, 858-59 (3d Cir. 1980) (holding that plaintiff and counsel could not communicate during breaks in cross-examination during trial); *see also* NRCP 30(c) (requiring that witness examination and cross-examination during a deposition proceed as permitted at trial). Two seminal cases directly address the propriety of conferences between attorneys and witnesses during deposition breaks: *Hall v. Clifton Precision*, 150 F.R.D. 525 (E.D. Pa. 1993), and *In re Stratosphere Corp. Securities Litigation*, 182 F.R.D. 614 (D. Nev. 1998).

In *Hall*, the United States District Court for the Eastern District of Pennsylvania held that "conferences between witness and lawyer are prohibited both during the deposition and during recesses," unless the conference concerns the assertion of a privilege. 150 F.R.D. at 529. If a conference is called during a deposition to determine whether to assert a privilege, the *Hall* court further held that "the conferring attorney should place on the record the fact that

the conference occurred, the subject of the conference, and the decision reached as to whether to assert a privilege." *Id.* at 530. In *Hall*, plaintiff's counsel informed his client-witness that he could request a private conference at any time during his deposition. *Id*. at 526. The deposition was twice interrupted: first, when the plaintiff requested a private conference about the meaning of the word "document," and again when the plaintiff's counsel wished to review a document before his client answered questions pertaining to it. *Id*.

In its ruling, the court referred to Federal Rule of Civil Procedure 30(c), which then stated that " 'examination and cross-examination of witnesses [during deposition] may proceed *as permitted at the trial*.' "[1] *Id*. at 527 (emphasis added) (quoting Fed. R. Civ. P. 30(c) (1987)).[2] The court explained that during a civil trial examination, "a witness and his or her lawyer are not permitted to confer at their pleasure during the witness's testimony. Once a witness has been prepared and has taken the stand, that witness is on his or her own." *Id*. at 528 (citing *Aiello*, 623 F.2d at 858-59). The *Hall* court emphasized the need to protect the underlying purposes of deposition rules, which include eliciting the facts of a case before trial, evening the playing field, and obtaining testimony before the witness's recollection "has been altered by . . . the helpful suggestions of lawyers." *Id*. The court reasoned that depositions serve to find out what a witness saw, heard, did, or thinks, and that lawyers "[are] not entitled to be creative with the facts" but instead "must accept the facts as they develop." *Id.*

[Headnote 6]

The court acknowledged that prohibiting private conferences during depositions may create concerns for a witness's right to an attorney and due process. *Id.* The court stated, however, that it is a lawyer's "right, if not [his or her] duty"[3] to adequately prepare the

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[1]Similarly, the Nevada Rules of Civil Procedure do not contain a rule specifically outlining deposition conference procedure. Rather, deposition conferences are governed by NRCP 30(c), which reads similarly to Fed. R. Civ. P. 30(c): "Examination and cross-examination of witnesses may proceed as permitted at the trial."

[2]The current federal rules states that "[t]he examination and cross-examination of a deponent proceed as they would at trial under the Federal Rules of Evidence."

[3]In support of the view that a lawyer has a duty to adequately prepare a witness before deposition, the court pointed to Pennsylvania Rule of Professional Conduct 1.1, which reads identically to Nevada Rule of Professional Conduct (RPC) 1.1: "Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." *Hall*, 150 F.R.D. at 528 n.4 (citing Pa. Rules of Prof'l Conduct R. 1.1); RPC 1.1. In *In re Stratosphere*, the court commented on the responsibility of an attorney to prepare a client: "The right to prepare a witness is not different before the

witness before a deposition, and any concern after the deposition begins "is somewhat tempered by the underlying goal of our discovery rules: getting to the truth." *Id*. The court therefore determined that the deposing attorney may inquire about any private conferences during depositions in order to ascertain whether there had been any witness coaching and, if so, what that coaching entailed. *Id.* at 529 n.7.

After the *Hall* decision was published, the United States District Court for the District of Nevada concluded that the *Hall* court may have gone too far in its restriction of private conferences during depositions. *In re Stratosphere Corp. Sec. Litig.*, 182 F.R.D. 614, 621 (D. Nev. 1998). The *In re Stratosphere* court held that attorneys may conduct private meetings during unrequested recesses in depositions in order to ensure that the "client did not misunderstand or misinterpret questions or documents," to fulfill their "ethical duty to prepare a witness," *see supra* note 2, or to determine whether to assert a privilege. *Id*. at 621. The *In re Stratosphere* court agreed with *Hall* that if an attorney holds a private conference to determine whether to assert a privilege, it "should [be] place[d] on the record the fact that a conference is held . . . , the subject of the conference . . . , and the decision reached as to whether to assert a privilege." *Id.* at 621-22. In *In re Stratosphere*, the plaintiffs, basing their arguments on *Hall*, filed a motion to establish deposition procedures that prohibited all conferences during the deposition—including conferences during breaks and lunches—and plaintiffs sought to establish that opposing counsel may "inquire into whether they have spoken [during deposition breaks] and, if so, what was discussed." *Id*. at 619.

In resolving the motion, the *In re Stratosphere* court agreed with *Hall* that a "questioning attorney is entitled to have the witness, and the witness alone, answer questions," and the witness should not "seek understanding or direction about how to answer the question from his or her attorney." *Id*. at 621. But the court did not adopt *Hall*'s "strict requirements[,]" which, the court opined, do not differentiate between "preclud[ing] attorney-coaching of witnesses" and "deny[ing] someone the right to counsel." *Id*. The court held that absent a showing of abuse of the deposition process, precluding counsel and witness from communicating once a deposition commences unnecessarily infringes upon the right to an attorney. *Id*. at 620-21.

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questions begin than it is during (or after, since a witness may be recalled for rebuttal, etc., during trial)." 182 F.R.D. at 621. Although neither the caselaw nor the rules further explain an attorney's responsibility to prepare a witness to testify, we believe that the responsibility to prepare the witness clearly exists.

In refusing to adopt *Hall*'s strict guidelines, the court noted that unlike *Hall*'s description of a witness being "on his or her own" during trial, attorneys and clients confer regularly during trial and even when the court calls a recess during the client's testimony. *In re Stratosphere*, 182 F.R.D. at 621; *Hall*, 150 F.R.D. at 528. The court clarified, however, that "[s]uch breaks in the action are usually not taken when a question is pending and are usually not at the instigation of the deponent or counsel." *In re Stratosphere*, 182 F.R.D. at 621. Further, the court emphasized that "consultation between lawyers and clients cannot be neatly divided into discussions about testimony and those about other matters," and adopting strict guidelines would allow for "unfettered inquiry into anything which may have been discussed." *Id*. (internal quotations omitted).

Several jurisdictions have followed *In re Stratosphere*'s reasoning and criticized *Hall*'s guidelines as unnecessarily burdensome on the deponent's right to an attorney. *See, e.g.*, *McKinley Infuser, Inc. v. Zdeb*, 200 F.R.D. 648, 650 (D. Colo. 2001) (concluding that *Hall*'s guidelines, taken to the extreme, could effectively bar a deponent from conferring with his or her attorney from the time of deposition through trial because there could be "coaching" that could alter the deponent's trial testimony, which would be an absurd result); *State ex rel. Means v. King*, 520 S.E.2d 875, 882-83 (W. Va. 1999) (explaining that "[a]n attorney should be able to ensure that his or her client did not misunderstand or misinterpret a question or a document" and that "[t]he right to counsel should not be jeopardized absent a showing that the attorney or the deponent is abusing the deposition process"). Accordingly, these jurisdictions have cited *In re Stratosphere*'s guidelines favorably. *See, e.g.*, *McKinley*, 200 F.R.D. at 650 ("I agree with the reasoning of *In re Stratosphere* . . . that the truth finding function is adequately protected if deponents are prohibited from conferring with their counsel while a question is pending."); *King*, 520 S.E.2d at 882 ("With regard to discovery depositions taken in the course of litigation, we believe that the approach taken in *Stratosphere* is the more logical and fair approach.").

[Headnotes 7-10]

We agree with the reasoning in *In re Stratosphere* that *Hall*'s discovery guidelines—which essentially preclude conversations between counsel and witness at any point between the start of depositions until trial when they involve an issue beyond whether to exercise a privilege—are unnecessarily restrictive. Although the holding in *In re Stratosphere* was limited to unrequested recesses, to the extent that the *In re Stratosphere* court appeared to approve of witness-counsel conferences during requested breaks so long as the break did not occur in the middle of questioning, we decline to adopt that reasoning here. *See In re Stratosphere*, 182 F.R.D. at

621. Accordingly, we hold that attorneys may confer with witnesses during an unrequested recess or break in a discovery deposition. *See id.* Furthermore, we hold that attorneys may not request a break to confer with witnesses in a discovery deposition unless the purpose of the break is to determine whether to assert a privilege. *Id.* We additionally hold that once the deposition proceedings resume after a private conference that is requested to determine whether to assert a privilege, the attorney must place the following on the record: (1) the fact that a conference took place; (2) the subject of the conference; and (3) the result of the conference, specifically, the outcome of the decision whether to assert a privilege. *See id.* at 621-22; *see also Hall*, 150 F.R.D. at 530. We stress that counsel must make a record of the confidential communications promptly after the deposition resumes in order to preserve the attorney-client privilege.

Coyote Springs' assertion of privilege

[Headnote 11]

At trial, Coyote Springs relied upon *In re Stratosphere* and sought to protect the contents of the private conference through voir dire of Whittemore. Coyote Springs argues that the record reflects that it followed the precise practice approved by *In re Stratosphere* and the communications should therefore be protected. We disagree, as Coyote Springs' record of the deposition conference was insufficient.

The trial record reflects that counsel and Whittemore "broke and went into a private office." Had this been placed on the deposition record, it would have satisfied the first requirement of record sufficiency, a record that a conference took place. The trial record next reflects that, during the deposition conference, Coyote Springs' counsel asked Whittemore if he "misunderstood or misinterpreted either questions or documents that had been presented . . . earlier in the examination" and that counsel did not "coach" Whittemore's testimony or refresh his recollection. Had this been placed on the deposition record, this also would have satisfied the second requirement for record sufficiency, a record of the subjects discussed between the attorney and the witness. However, Coyote Springs did not make a record of the result of the conference, such as the outcome of a decision whether to assert a privilege. Therefore, even if the two previous representations had been placed on the deposition record, Coyote Springs still would not be able to assert the privilege because it did not satisfy the third requirement.

Accordingly, the communications between Whittemore and Coyote Springs' counsel during the break in Whittemore's deposition are not privileged because Coyote Springs requested a break in the proceedings, failed to make a record of the result reached in the conference, and failed to make a prompt record of the communications.

CONCLUSION

Coyote Springs requested a recess in order to conduct a private conference with Whittemore. Following the conference, it did not make a prompt, sufficient record of the conference so as to preserve the attorney-client privilege. *Cf. In re Stratosphere*, 182 F.R.D. at 621. Thus, the district court did not abuse its discretion in determining that the conference was not privileged. *Club Vista Fin. Servs., LLC v. Eighth Judicial Dist. Court*, 128 Nev. 224, 228, 276 P.3d 246, 249 (2012). Writ relief is therefore not warranted, and we deny this petition.

HARDESTY, C.J., and DOUGLAS, J., concur.

KAREN BROWN, APPELLANT, *v.* EDDIE WORLD, INC.; AND STAGECOACH HOTEL AND CASINO, INC., RESPONDENTS.

No. 63896

April 16, 2015 348 P.3d 1002

Appeal from a district court order granting a motion to dismiss in a wrongful termination action. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Former employee brought action against former employer for discharge in retaliation for fiancé's complaint to Nevada Gaming Control Board about slot machines on property owned by employer's sister corporation. The district court granted motion to dismiss for failure to state a claim. Employee appealed. The supreme court, PARRAGUIRRE, J., held as a matter of first impression that third-party retaliatory discharge was not actionable.

Affirmed.

Law Office of Daniel Marks and *Daniel Marks* and *Adam Levine*, Las Vegas, for Appellant.

Stephens Gourley & Bywater and *David A. Stephens*, Las Vegas, for Respondents.

1. APPEAL AND ERROR.
   The supreme court reviews de novo an order granting a motion to dismiss for failure to state a claim upon which relief can be granted. NRCP 12(b)(5).
2. APPEAL AND ERROR.
   On appeal of order granting motion to dismiss for failure to state a claim, the supreme court assumes that all facts alleged in the complaint are true and reviews all legal conclusions de novo. NRCP 12(b)(5).

3. Labor and Employment.
   An at-will employee may generally be properly discharged without cause at the will of the employer.
4. Labor and Employment.
   An employer commits a tortious discharge by terminating an employee for reasons that violate public policy.
5. Labor and Employment.
   Tortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy.
6. Labor and Employment.
   Enforcing Nevada's gaming laws is a sufficiently strong and compelling public policy to support a claim for tortious discharge. NRS 463.0129(1).
7. Labor and Employment.
   Third-party retaliatory discharge was not actionable, and, thus, employee could not recover for discharge in alleged retaliation for fiancé's complaint to Nevada Gaming Control Board about slot machines on property owned by employer's sister corporation, even though enforcing gaming laws was a compelling public policy; fiancé whose acts led to the challenged retaliation had no employment relationship with employer.

Before the Court En Banc.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we must determine whether the district court properly refused to recognize a new cause of action under the common law doctrine of tortious discharge in violation of public policy. Specifically, we must decide whether a plaintiff can state a claim for third-party retaliatory discharge, when that discharge tends to discourage reporting violations of Nevada's gaming laws. While enforcing gaming laws is a fundamental public policy in Nevada, we decline to recognize a common law cause of action for third-party retaliatory discharge. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Karen Brown was employed by respondent Eddie World, Inc., as assistant manager of a nut and candy store. The store was located on property owned by respondent Stagecoach Hotel and Casino, Inc., and both respondent corporations (collectively, Stagecoach) were under common ownership and management. Stagecoach knew that Brown was engaged to Donald Allen. Brown does not allege that Stagecoach ever employed Allen. Allen filed a complaint with the Nevada Gaming Control Board (NGCB) regarding some of Stagecoach's slot machines. Shortly after the NGCB in-

formed Stagecoach that Allen filed the complaint, Stagecoach began assigning Brown's job responsibilities to other employees. Within weeks, Stagecoach terminated Brown's employment.

Brown filed a complaint in district court alleging that Stagecoach terminated her employment in retaliation for Allen's complaint to the NGCB and that discharging her was therefore tortious and in violation of public policy. Stagecoach moved to dismiss Brown's complaint for failure to state a claim pursuant to NRCP 12(b)(5). The district court granted Stagecoach's motion because Nevada has not recognized a cause of action for third-party retaliatory discharge. Brown now appeals.

DISCUSSION

On appeal, Brown asks this court to recognize, for the first time, a common law cause of action for third-party retaliatory discharge. For the reasons discussed herein, we decline to do so.

[Headnotes 1, 2]

This court reviews de novo an order granting a motion to dismiss for "failure to state a claim upon which relief can be granted." NRCP 12(b)(5); *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). In doing so, we assume that all facts alleged in the complaint are true, and we review all legal conclusions de novo. *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672.

[Headnotes 3-5]

An at-will employee may generally "be properly discharged without cause at the will of the employer." *K Mart Corp. v. Ponsock*, 103 Nev. 39, 42 n.1, 732 P.2d 1364, 1366 n.1 (1987), *abrogated on other grounds by Ingersoll-Rand Co. v. McClendon*, 498 U.S. 133 (1990). Nevertheless, "[a]n employer commits a tortious discharge by terminating an employee for reasons which violate public policy." *D'Angelo v. Gardner*, 107 Nev. 704, 712, 819 P.2d 206, 212 (1991). Specifically, tortious discharge "arises out of the employer-employee relationship," and we have stated in dicta that tortious discharge occurs "when an employer dismisses an employee in retaliation for *the employee's . . . acts* which are consistent with . . . sound public policy and the common good." *Id.* at 718, 819 P.2d at 216 (emphasis added). "[T]ortious discharge actions are severely limited to those rare and exceptional cases where the employer's conduct violates strong and compelling public policy." *Sands Regent v. Valgardson*, 105 Nev. 436, 440, 777 P.2d 898, 900 (1989).

[Headnote 6]

We have previously stated that "[n]o public policy is more basic than the enforcement of our gaming laws." *Wiltsie v. Baby Grand Corp.*, 105 Nev. 291, 293, 774 P.2d 432, 433 (1989); *see also* NRS 463.0129(1) (stating that the gaming industry is essential to Nevada's economy and welfare, and its success depends on "strict

regulation"). Thus, it cannot be disputed that enforcing Nevada's gaming laws is a sufficiently "strong and compelling public policy" to support a claim for tortious discharge. *Sands Regent*, 105 Nev. at 440, 777 P.2d at 900; *see also Wiltsie*, 105 Nev. at 293, 774 P.2d at 433.

Despite this fundamental public policy, we have yet to determine whether a discharged employee may state a common law claim for third-party retaliatory discharge. Accordingly, we "examine how other jurisdictions have addressed the issue." *Moon v. McDonald, Carano & Wilson LLP*, 129 Nev. 547, 551, 306 P.3d 406, 409 (2013).

Other courts have recognized causes of action for third-party retaliatory discharges arising under federal statutes, but those decisions depended upon broad language in the statutes themselves. *See, e.g.*, *Thompson v. N. Am. Stainless, LP*, 562 U.S. 170, 174-75 (2011) (Title VII); *Kastor v. Cash Express of Tenn., LLC*, 77 F. Supp. 3d 605, 610-11 (W.D. Ky. Jan. 8, 2015) (Family and Medical Leave Act); *Dembin v. LVI Servs., Inc.*, 822 F. Supp. 2d 436, 438-39 (S.D.N.Y. 2011) (Age Discrimination in Employment Act). In contrast to the broad statutes involved in the aforementioned cases, common law "tortious discharge actions are severely limited." *Sands Regent*, 105 Nev. at 440, 777 P.2d at 900. Thus, the fact that some courts have recognized statutory third-party retaliatory discharge claims does not persuade us to recognize such claims at common law.[1]

[Headnote 7]

We have only found one court that has squarely considered whether to recognize a common law cause of action for third-party retaliatory discharge.[2] *See Bammert v. Don's Super Valu, Inc.*, 646 N.W.2d 365, 367 (Wis. 2002). In *Bammert*, the plaintiff's husband, a police officer, assisted in the arrest of the plaintiff's employer's wife for driving under the influence of alcohol, and the plaintiff was discharged shortly thereafter. *Id.* Despite the compelling public policies "favoring the stability of marriage" and "requiring the diligent pursuit and punishment of drunk drivers," the court refused to

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[1]Brown also asks this court to overrule *Pope v. Motel 6*, wherein we concluded that antiretaliation provisions in Nevada's discrimination statutes do not create a statutory cause of action for third-party retaliatory discharge. 121 Nev. 307, 313-14, 114 P.3d 277, 281-82 (2005). Brown relies upon *Thompson*, wherein the U.S. Supreme Court construed a federal antiretaliation statute in Title VII. 562 U.S. at 174-75. Because Brown alleges that her termination amounted to a common law tortious discharge and does not allege that her termination violated a statute or related to discrimination, we could recognize Brown's common law claim without disturbing our holding in *Pope*. We therefore decline to overrule *Pope*. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (stating that this court will not overrule precedent "absent compelling reasons for so doing").

[2]Courts in Idaho and Louisiana have expressly declined to address this issue. *Edmondson v. Shearer Lumber Prods.*, 75 P.3d 733, 739 n.3 (Idaho 2003); *Portie v. Devall Towing & Boat Serv., Inc.*, 634 So. 2d 1324, 1327 (La. Ct. App.), *rev'd in part on other grounds by* 637 So. 2d 1061 (La. 1994).

recognize a common law cause of action for third-party retaliatory discharge. *Id.* at 370-72. Such a cause of action, the court explained, would "have no logical stopping point." *Id.* at 372. Therefore, the doctrine of tortious discharge in violation of public policy would "remain narrow in scope." *Id.* We find this rationale persuasive.

Tortious discharge requires an "employer-employee relationship." *D'Angelo*, 107 Nev. at 718, 819 P.2d at 216. We have also stated, albeit in dicta, that tortious discharge occurs "when an employer dismisses an employee in retaliation for *the employee's . . . acts*." *Id.* (emphasis added). The cases recognizing statutory third-party retaliatory discharge claims have similarly involved retaliation for acts of other employees. *See Thompson*, 562 U.S. at 174-75; *Kastor*, 77 F. Supp. 3d at 607; *Dembin*, 822 F. Supp. 2d at 437-39. This limitation is consistent with the rule that "tortious discharge actions are severely limited," *Sands Regent*, 105 Nev. at 440, 777 P.2d at 900, and we therefore adopt this limitation here. Here, Brown has not alleged that Stagecoach ever employed Allen. Thus, this most basic requirement of an employment relationship involving Allen, the person whose acts led to the challenged retaliation, is not satisfied.

Moreover, as in *Bammert*, if we were to recognize Brown's claim, the theory of third-party retaliatory discharge would "have no logical stopping point." *Bammert*, 646 N.W.2d at 372. Allen was neither a Stagecoach employee nor under any obligation to report perceived violations of Nevada's gaming regulations to the NGCB.[3] Because "tortious discharge actions are severely limited," *Sands Regent*, 105 Nev. at 440, 777 P.2d at 900, we cannot countenance recognition of Brown's common law claim for third-party retaliatory discharge.

CONCLUSION

Although enforcing gaming laws is indisputably a compelling public policy in Nevada, we decline to recognize a common law cause of action for third-party retaliatory discharge in violation of public policy. Therefore, the district court properly dismissed the complaint for failure to state a claim pursuant to NRCP 12(b)(5), and we affirm.

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

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[3]The dissent in *Bammert* proposed recognizing a "narrow" cause of action for third-party retaliatory discharges that arise from "police officers acting lawfully in their capacity." 646 N.W.2d at 373 (Bablitch, J., dissenting). We neither consider nor decide whether to recognize such an exception to the rule announced herein.

BRANCH BANKING AND TRUST COMPANY, A NORTH CAROLINA BANKING CORPORATION, APPELLANT, *v.* WINDHAVEN & TOLLWAY, LLC, A NEVADA LIMITED LIABILITY COMPANY; STANLEY H. WASSERKRUG, AN INDIVIDUAL; SUSAN S. WASSERKRUG, AN INDIVIDUAL; STANLEY HOWARD WASSERKRUG AND SUSAN SCHWARTZ WASSERKRUG, AS TRUSTEES OF THE WASSERKRUG FAMILY TRUST DATED NOVEMBER 13, 2003; KEITH K. LYON, AN INDIVIDUAL; KEITH K. LYON, AS TRUSTEE OF THE KEITH K. LYON LIVING TRUST, DATED OCTOBER 29, 2003; STACY M. RUSH, AN INDIVIDUAL; ADRIENNE J. RUSH, AN INDIVIDUAL; STACY M. RUSH AND ADRIENNE J. RUSH, AS TRUSTEES OF THE STACY AND ADRIENNE RUSH FAMILY TRUST DATED MARCH 22, 1993; THOMAS B. ACEVEDO, AN INDIVIDUAL; AND GREENSTREET PROPERTIES, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 59638

BRANCH BANKING AND TRUST COMPANY, APPELLANT, *v.* WINDHAVEN & TOLLWAY, LLC, A NEVADA LIMITED LIABILITY COMPANY; STANLEY H. WASSERKRUG, AN INDIVIDUAL; SUSAN S. WASSERKRUG, AN INDIVIDUAL; STANLEY HOWARD WASSERKRUG AND SUSAN SCHWARTZ WASSERKRUG, AS TRUSTEES OF THE WASSERKRUG FAMILY TRUST DATED NOVEMBER 13, 2003; KEITH K. LYON, AN INDIVIDUAL; KEITH K. LYON, AS TRUSTEE OF THE KEITH K. LYON LIVING TRUST, DATED OCTOBER 29, 2003, A TRUST; STACY M. RUSH, AN INDIVIDUAL; ADRIENNE J. RUSH, AN INDIVIDUAL; STACY M. RUSH AND ADRIENNE J. RUSH, AS TRUSTEES OF THE STACY AND ADRIENNE RUSH FAMILY TRUST DATED MARCH 22, 1993; THOMAS B. ACEVEDO, AN INDIVIDUAL; AND GREENSTREET PROPERTIES, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 60527

April 30, 2015 347 P.3d 1038

Consolidated appeals from a district court summary judgment in a deficiency action and from a post-judgment district court order awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Following nonjudicial foreclosure sale, deed of trust beneficiary brought deficiency action against grantor and guarantors. The district court granted summary judgment in favor of grantor and guarantors. Beneficiary appealed. The supreme court, HARDESTY, C.J., held that deficiency judgment was not precluded following nonjudicial foreclosure conducted pursuant to another state's laws.

Reversed and remanded.

[Rehearing denied July 23, 2015]

GIBBONS, J., with whom CHERRY and SAITTA, JJ., joined, disssented.

Holland & Hart, LLP, and *Frank Z. LaForge* and *Jeremy J. Nork*, Reno, for Appellant.

Bogatz Law Group and *I. Scott Bogatz, Charles M. Vlasic, III*, and *YanXiong Li*, Las Vegas, for Respondents Windhaven & Tollway, LLC; Stanley H. Wasserkrug; Susan S. Wasserkrug; Keith K. Lyon; Stacy M. Rush; Adrienne J. Rush; and Greenstreet Properties, LLC.

Law Offices of John M. Netzorg and *John M. Netzorg*, Las Vegas, for Respondent Thomas B. Acevedo.

O'Mara Law Firm, P.C., and *David C. O'Mara*, Reno, for Amicus Curiae Nevada Bankers Association.

1. APPEAL AND ERROR.
   Statutory interpretation is a question of law, which the supreme court reviews de novo.
2. STATUTES.
   In interpreting a statute, the supreme court looks to the plain language of the statute and, if that language is clear, the court does not go beyond it.
3. STATUTES.
   When interpreting a statute, each section of a statute should be construed to be in harmony with the statute as a whole.
4. APPEAL AND ERROR.
   The supreme court reviews a district court order granting summary judgment de novo.
5. MORTGAGES.
   Statute that permitted creditor or deed of trust beneficiary that was unable to fully recover its investment through foreclosure to seek deficiency judgment did not preclude deficiency judgment when beneficiary nonjudicially foreclosed upon property located in another state and the foreclosure was conducted pursuant to that state's laws instead of Nevada law; statute contained no language that required an out-of-state trustee's sale to comply with Nevada law nor did it expressly preclude a deficiency judgment in Nevada when a nonjudicial foreclosure sale was conducted pursuant to the laws of another state. NRS 40.455(1), 107.080.

Before the Court EN BANC.

OPINION

By the Court, HARDESTY, C.J.:

NRS 40.455(1) permits a creditor or deed-of-trust beneficiary who is unable to fully recover its investment through foreclosure to

bring an action for a deficiency judgment after "the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively." In this appeal, we determine whether NRS 40.455(1) precludes a deficiency judgment when the beneficiary nonjudicially forecloses upon property located in another state and the foreclosure is conducted pursuant to that state's laws instead of NRS 107.080. We hold it does not, and we therefore reverse the district court's order and remand for further proceedings consistent with this opinion.

FACTS

In 2007, respondent Windhaven & Tollway, LLC, borrowed nearly $17 million from appellant Branch Banking and Trust Company's predecessor-in-interest.[1] The loan was secured by various assets, including real property located in Texas. The parties agreed that Nevada law would govern the note and that the courts in Clark County, Nevada, and Collin County, Texas, would have jurisdiction over future disputes. The remaining respondents to this action (collectively referred to as the Guarantors) entered into a guaranty agreement to pay any debt remaining if Windhaven defaulted.

Windhaven defaulted on the loan, and Branch Banking sent it and the Guarantors a demand letter requesting repayment. Four months later, Branch Banking mailed Windhaven and the Guarantors a notice of trustee's sale, stating that it would foreclose on the Texas property if payment was not received. Windhaven and the Guarantors failed to remit payment and the property was sold at a nonjudicial foreclosure sale under Texas law for $14,080,000. At that time, the total indebtedness remaining on the loan was $16,675,218.61. Branch Banking then sought a deficiency judgment against Windhaven and the Guarantors under Nevada law, asserting claims for breach of guaranty and breach of the implied covenant of good faith and fair dealing.

Following discovery, Branch Banking moved for summary judgment, but before the district court could rule on the motion, Windhaven and the Guarantors also moved for summary judgment, on the ground that Branch Banking's deficiency action was precluded by NRS 40.455(1) because that statute requires all nonjudicial trustee's sales to be conducted pursuant to NRS 107.080.[2] The district court granted summary judgment in favor of Windhaven and the Guarantors, finding that Branch Banking's nonjudicial foreclosure in Texas did not comply with the terms of NRS 107.080 because Branch Banking did not record a notice of breach and election to sell or provide notice in accordance with NRS 107.080. The district court also concluded that Branch Banking could have sought a

[1]The predecessor-in-interest, Colonial Bank, is not a party to these appeals.

[2]The parties do not dispute that the Texas foreclosure did not comply with NRS 107.080.

deficiency judgment in Texas or conducted the Texas trustee's sale in a manner that complied with NRS 107.080.[3] Further, the district court ruled that because NRS 40.455(1) prohibited Branch Banking from seeking a deficiency award against Windhaven, Branch Banking could not seek a deficiency judgment against the Guarantors. Branch Banking appeals.

DISCUSSION

The primary issue before this court is whether the district court erred by granting summary judgment in favor of Windhaven and the Guarantors on the basis that NRS 40.455(1) prohibits deficiency judgments following a nonjudicial foreclosure not conducted in accordance with NRS 107.080.

NRS 40.455(1) provides, in pertinent part, that

> upon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

Each party argues that the language of the statute clearly supports its interpretation and that the contrary interpretation would lead to absurd results. Primarily, they argue over the interpretation of the phrase "held pursuant to NRS 107.080."

[Headnotes 1-4]

Statutory interpretation "is a question of law, which this court reviews de novo." *Kay v. Nunez*, 122 Nev. 1100, 1104, 146 P.3d 801, 804 (2006). In interpreting a statute, this court looks to the plain language of the statute and, if that language is clear, this court does not go beyond it. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010). Each section of a statute should be construed to be in harmony with the statute as a whole. *Smith v. Kisorin USA, Inc.*, 127 Nev. 444, 448, 254 P.3d 636, 639 (2011); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:5 (7th ed. 2014). We presume that a statute does not modify common law unless such intent is explicitly stated. *See* 3 Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 61:1 (7th ed. 2008). Statutes that operate

[3]The district court also denied Branch Banking's motion for summary judgment.

in derogation of the common law should be strictly construed, and, if there is any doubt as to the statute's meaning, the court should interpret the statute in the way that least changes the common law. *Id*. Additionally, this court reviews a district court order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

NRS 40.455(1) does not require an out-of-state trustee's sale to comply with NRS 107.080, nor does it preclude a deficiency judgment in Nevada when a nonjudicial foreclosure sale is conducted pursuant to the laws of another state

[Headnote 5]

The parties dispute whether NRS 40.455(1)'s phrase "trustee's sale held pursuant to NRS 107.080" permits a deficiency judgment in Nevada when a nonjudicial foreclosure takes place in another state and the beneficiary of the deed of trust does not comply with the requirements of NRS 107.080. Windhaven argues that the clause requires that a trustee's sale comply with Nevada law before the beneficiary of the deed of trust may seek a deficiency judgment. Branch Banking argues that the clause is merely illustrative, that the statutory scheme does not support Windhaven's interpretation, and that to interpret the statute to require out-of-state nonjudicial foreclosures to comply with NRS 107.080 would lead to absurd results.[4]

Thus, we turn to whether NRS 40.455(1) precludes deficiency judgments in Nevada when a nonjudicial foreclosure sale is conducted pursuant to the laws of another state. In *U.S. Bank National Ass'n v. Palmilla Development Co.*, we recognized NRS 40.455(1) as applicable when one is seeking a deficiency judgment. 131 Nev. 72, 74, 343 P.3d 603, 604 (2015). However, while we addressed whether "foreclosure sale" encompasses a receiver sale of real property securing a loan, we did not address the extent of the definition of "foreclosure sale" as it applies here.

NRS 40.455 governs applications for deficiency judgments by "the judgment creditor or the beneficiary of the deed of trust," made within six months "after the date of the foreclosure sale or the trustee's sale held pursuant to NRS 107.080, respectively." Windhaven argues that "foreclosure sale" refers only to a judicial foreclosure. With respect to the use of that term in NRS 107.080, we agree. The word "respectively" is used to pair words or phrases in the correct order. *Merriam-Webster's Collegiate Dictionary* 1061 (11th ed. 2007) (defining respectively as "[i]n the order given"); *Merriam-Webster's Dictionary of English Usage* 816 (1994) (noting that respectively is commonly used to join "two words in matching

[4]The parties also disagree about the effect of the lack of offsetting commas in the phrase "trustee's sale held pursuant to NRS 107.080." However, as this effect is not essential to our determination, we do not address it here.

sets of things in the correct order"); *Black's Law Dictionary* 1311 (6th ed. 1990) (defining respective as "[r]elating to particular persons or things, each to each"). The use of "respectively" in the first part of NRS 40.455(1) pairs "foreclosure sale" with "judgment creditor" and "trustee's sale held pursuant to NRS 107.080" with "beneficiary of the deed of trust."[5] Because "foreclosure sale" is specifically tied to "judgment creditor," the foreclosure sale described here is a judicial foreclosure.[6]

However, we disagree that the statute limits deficiency judgments to judicial foreclosures and trustee's sales held in accordance with NRS 107.080. NRS 40.455(1) has no such limiting language. While it clearly governs deficiencies arising from judicial foreclosures and those trustee's sales that are held pursuant to NRS 107.080, it does not indicate that it precludes deficiency judgments arising from nonjudicial foreclosure sales held in another state. In fact, the statutory scheme contemplates that a party may nonjudicially foreclose in another state and still bring an action in Nevada to recover the deficiency. Specifically, NRS 40.430, Nevada's one-action rule, creates an exception for proceedings "[t]o enforce a mortgage or other lien upon any real or personal collateral located outside of the State [of Nevada] which does not, except as required under the laws of that jurisdiction, result in a personal judgment against the debtor." NRS 40.430(6)(c).

Moreover, NRS 40.455(1) is an antideficiency statute that "derogate[s] from the common law," and this court construes such provisions narrowly, in favor of deficiency judgments. *Key Bank of Alaska v. Donnels*, 106 Nev. 49, 53, 787 P.2d 382, 385 (1990). Common law allows a lienholder to seek a deficiency judgment against the person(s) liable on the lien, *see, e.g.*, Restatement (Third) of Prop.: Mortgs. § 8.4 (1997), and we decline to interpret NRS 40.455 in such a way that would interfere with this common-law right, when the statute does not expressly limit deficiency suits arising from nonjudicial foreclosures conducted pursuant to the laws of another state. Furthermore, since the purpose of NRS 40.455 is to create fairness for both creditors and debtors,[7] *see First Interstate Bank*

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[5]A second such pairing occurs at the end of NRS 40.455(1) when "respectively" is used to tie together "judgment creditor" with "sheriff's return," and "the beneficiary of the deed of trust" with "the recital of consideration in the trustee's deed."

[6]Moreover, were we to hold that "foreclosure sale" could reference all judicial and nonjudicial foreclosures, we would negate the purpose of the phrase "trustee's sale held pursuant to NRS 107.080," a result that would run contrary to well-established rules of statutory construction. *See In re Parental Rights as to S.M.M.D.*, 128 Nev. 14, 24, 272 P.3d 126, 132 (2012) (stating that statutes should not be interpreted to "render[ ] language meaningless or superfluous" (internal quotations omitted)).

[7]Although the legislative history is silent concerning out-of-state nonjudicial foreclosures, it reveals that the Legislature was concerned about protecting

of Nev. v. Shields, 102 Nev. 616, 618, 730 P.2d 429, 431 (1986) ("Nevada's deficiency legislation is designed to achieve fairness to all parties to a transaction secured in whole or in part by realty."), interpreting NRS 40.455(1) to deny deficiency judgments to creditors who nonjudicially foreclose on out-of-state property pursuant to another state's law would undermine the purpose of the statute. Because NRS 40.455 does not prohibit deficiency judgment actions from being brought in Nevada when the nonjudicial foreclosure in another state did not comply with NRS 107.080, we conclude that the district court erred in precluding Branch Banking from pursuing a deficiency judgment against Windhaven and the Guarantors.[8]

Accordingly, we reverse the district court's judgment in favor of Windhaven and the Guarantors and remand this matter for further proceedings consistent with this opinion.[9]

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

GIBBONS, J., with whom CHERRY and SAITTA, JJ., join, dissenting:

In my view, the critical issue on appeal—what is meant by the phrase "trustee's sale held pursuant to NRS 107.080" in NRS 40.455(1)—is fairly straightforward.

To address this issue, two facts warrant rehashing. First, Branch Banking sued Windhaven for a deficiency judgment under NRS 40.451-40.463. Second, as pointed out by the district court, the parties agreed that "Branch Banking was a beneficiary of a deed of trust, and not a judgment creditor, as the property was sold at

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unsuspecting debtors from creditors who sought large deficiency judgments years after the foreclosure sale occurred. Hearing on A.B. 493 Before the Assembly Judiciary Comm., 55th Leg. (Nev., March 13, 1969). Moreover, the Legislature enacted NRS Chapter 40's debtor protections so that debtors would not have to undergo the timely and expensive judicial foreclosure process. *Id*.

[8]The question of whether a court should, in such situations, apply Nevada law or the law of the state where the foreclosure was held is a conflict-of-laws question that will depend upon the particular facts of the case. *See* Restatement (Second) of Conflict of Laws § 229 (1971); Robert A. Brazener, Annotation, *Conflict of Laws as to Application of Statute Proscribing or Limiting Availability of Action for Deficiency After Sale of Collateral Real Estate*, 44 A.L.R. 3d 922 (1972). Here, however, the parties' agreement allows them to litigate future disputes under either Texas or Nevada law, and because there is no argument or evidence that the parties acted in bad faith or to evade Texas law by filing suit in Nevada, Nevada law may govern the deficiency judgment. *See Key Bank of Alaska v. Donnels*, 106 Nev. 49, 52, 787 P.2d 382, 384 (1990) ("We have held that '[i]t is well settled that the expressed intention of the parties as to the applicable law in the construction of a contract is controlling if the parties acted in good faith and not to evade the law of the real situs of the contract.'" (alteration in original) (quoting *Ferdie Sievers & Lake Tahoe Land Co. v. Diversified Mortg. Investors*, 95 Nev. 811, 815, 603 P.2d 270, 273 (1979))).

[9]Based on our decision to reverse the district court's summary judgment, we conclude that the district court's order awarding costs to Windhaven and the Guarantors is premature. Accordingly, we reverse the district court's award of costs and attorney fees.

a trustee's sale and not through a judicial foreclosure sale." *See also* Branch Banking's Complaint ("Plaintiff is the successor in interest and holder of the Note, the beneficiary under the Deed of Trust . . . . [T]he Property was sold at a non-judicial foreclosure sale to Plaintiff . . . in partial satisfaction of the indebtedness secured by the Deed of Trust.").

Once competing motions for summary judgment were filed, the district court naturally looked for what requirements Branch Banking's deficiency judgment claim needed to satisfy under Nevada law. This inquiry led the district court to NRS 40.455.

NRS 40.455 "governs the award of deficiency judgments." *U.S. Bank Nat'l Ass'n v. Palmilla Dev. Co.*, 131 Nev. 72, 73, 343 P.3d 603, 604 (2015). Specifically, NRS 40.455(1) states:

> [U]pon application of the judgment creditor or the beneficiary of the deed of trust within 6 months after the date of the foreclosure sale *or the trustee's sale held pursuant to NRS 107.080*, respectively, and after the required hearing, the court shall award a deficiency judgment to the judgment creditor or the beneficiary of the deed of trust if it appears from the sheriff's return or the recital of consideration in the trustee's deed that there is a deficiency of the proceeds of the sale and a balance remaining due to the judgment creditor or the beneficiary of the deed of trust, respectively.

(Emphasis added.) As pointed out by the majority, NRS 40.455 splits into two categories: (1) foreclosure sale and (2) trustee's sale, as delineated by the statute's consistent use of "respectively."

Because the parties agreed that "Branch Banking was a beneficiary of a deed of trust, and not a judgment creditor, as the property was sold at a trustee's sale and not through a judicial foreclosure sale," the district court properly looked to NRS 40.455's trustee's sale requirements: namely, what is the effect of NRS 40.455's language, "trustee's sale held pursuant to NRS 107.080."

To solve this quandary, only the most basic rule of statutory interpretation is necessary: "[W]hen the language of a statute is plain and unambiguous, a court should give that language its ordinary meaning and not go beyond it." *Emp'rs Ins. Co. of Nev. v. Chandler*, 117 Nev. 421, 425, 23 P.3d 255, 258 (2001).

As found by the district court, I conclude that this language—"trustee's sale held pursuant to NRS 107.080"—means that before Branch Banking could obtain a deficiency judgment from a trustee's sale pursuant to Nevada law, it would have to satisfy the requirements of NRS 107.080. Branch Banking fell well short of fulfilling NRS 107.080's requirements. Thus, Branch Banking's deficiency claim under NRS 40.451-40.463 failed as a matter of law.

Justice Elena Kagan recently stated in her dissent in *Yates v. United States* that:

> Resolution of the pros and cons of whether a statute should sweep broadly or narrowly is for Congress. If judges disagree with Congress's choice, we are perfectly entitled to say so—in lectures, in law review articles, and even in dicta. But we are not entitled to replace the statute Congress enacted with an alternative of our own design.

135 S. Ct. 1074, 1101 (2015) (Kagan, J., dissenting) (internal quotation omitted). The majority undertook its own design of NRS 40.455. The district court interpreted the statute as written and, in my view, did so correctly. Therefore, I respectfully dissent.