IN THE MATTER OF THE HONORABLE RENA G. HUGHES, DISTRICT JUDGE, EIGHTH JUDICIAL DISTRICT COURT, FAMILY DIVISION, DEPARTMENT J, COUNTY OF CLARK, STATE OF NEVADA.

No. 76117

July 16, 2020 467 P.3d 627

Appeal from an order of the Nevada Commission on Judicial Discipline that imposed a public reprimand on a family court judge.

Reversed.

CADISH, J., with whom SILVER, J., agreed, dissented in part.

Law Office of Daniel Marks and *Daniel Marks* and *Nicole M. Young*, Las Vegas, for Rena G. Hughes.

Thomas C. Bradley, Reno; *Nevada Commission on Judicial Discipline* and *Paul C. Deyhle*, General Counsel and Executive Director, Carson City, for Nevada Commission on Judicial Discipline.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

In this opinion, we consider whether a family court judge violated the Nevada Code of Judicial Conduct and examine the appropriate sanction for a violation of the Code of Judicial Conduct where the violation is not knowing or deliberate and aggravating factors are not present. This appeal challenges a decision of the Nevada Commission on Judicial Discipline imposing a public reprimand on Clark County Family Court Judge Rena Hughes and requiring her to take a course at the National Judicial College. The discipline stems from one of Judge Hughes' cases in which she addressed several motions by a father seeking to enforce the court's child custody orders and entered an order purportedly holding the mother in contempt and

changing custody of the minor child from the mother to the father. The Commission found the change in custody was entered as a contempt sanction and concluded that Judge Hughes had thus violated canons of the Code of Judicial Conduct. We do not consider this interpretation of Judge Hughes' orders to be sound. We conclude that the Commission misconstrued her orders by disregarding relevant portions of each, failing to consider their effects, and relying inappropriately on pronouncements in court minutes.

Further, we affirm that by statute, a public reprimand may be given only where a judge has violated the Code of Judicial Conduct in a knowing or deliberate manner or where aggravating factors are present. The Commission, however, did not find that Judge Hughes knowingly or deliberately violated the Code of Judicial Conduct or that aggravating factors were present. The Commission's order thus imposed a public reprimand when it was not permitted under the statute. We conclude, therefore, that the Commission misapplied the statutes governing judicial discipline and accordingly erred in imposing a public reprimand.

FACTS AND PROCEDURAL HISTORY

When she took the bench, Judge Hughes inherited a case in which a divorce decree had already been entered. The divorce decree granted the mother and father joint legal custody over their minor child and granted the mother primary physical custody, with the father to have weekend visitation rights. The father filed several motions to contest the custody arrangement and requested an order to show cause why the mother should not be held in contempt due to her continuing failure to afford him his visitation rights.

On May 12, 2016, Judge Hughes held a status check hearing regarding the parties' participation in the visitation exchanges. While the minutes from that hearing reflect that Judge Hughes admonished the mother that she would be held in contempt if she did not comply with the visitation order and drop the child off for the arranged visitation exchanges, a written order reflecting the minutes was never entered. After learning that the mother continued to fail to comply with prior visitation directives, Judge Hughes entered a June 14, 2016, written order finding that the mother had failed to facilitate the father's visitation rights and thus violated his parental rights and the court's orders. The June 14 order mirrored minutes entered by the court clerk on June 8, 2016. Judge Hughes accordingly issued an order "to show cause" regarding the mother's noncompliance, finding that she was "in contempt" of the May 12 admonishment. Judge Hughes noticed a show-cause hearing for July 28 but also ordered the parties and the child to appear for a follow-up hearing the next day, June 15.

At the June 15 hearing, Judge Hughes had a conversation with the child outside the presence of the parents and explained to the

child that the court was granting the father temporary sole custody because the mother and child had not cooperated with the court-ordered visitation sessions. Judge Hughes entered an order that same day finding that the mother's actions impeded the relationship between the father and the child and were contrary to the child's best interest, and granted the father temporary sole legal and physical custody.

At the July 28 hearing, Judge Hughes declined to hold the mother in contempt because a signed and filed order reflecting the May 12 admonishment was never entered, such that there was no order to violate.[1]

The mother filed a disciplinary complaint against Judge Hughes. The Commission conducted an initial investigation and interviewed Judge Hughes.[2] The Commission's prosecuting officer then filed a formal statement of charges based on Judge Hughes (1) holding the mother in contempt by the June 8 minute order and the June 14 written order without providing an opportunity to be heard and (2) sanctioning the mother by modifying her custody rights. At the disciplinary hearing, Judge Hughes explained that she had not held the mother in contempt but had rather only found a prima facie showing of contempt with an evidentiary hearing to be held later. Judge Hughes further testified that she modified the mother's custody rights because it was in the child's best interest, not as a sanction, and that an evidentiary hearing was not required for a temporary custody modification.

The Commission determined that Judge Hughes improperly held the mother in contempt and sanctioned her by altering custody and that by doing so, Judge Hughes violated five canons of the Code of Judicial Conduct: (1) Canon 1, Rule 1.1, failing to comply with the law; (2) Canon 1, Rule 1.2, failing to promote confidence in the judiciary; (3) Canon 2, Rule 2.2, failing to uphold and apply the law and to perform all duties of judicial office fairly and impartially; (4) Canon 2, Rule 2.5(A), failing to perform judicial and administrative duties competently and diligently; and (5) Canon 2, Rule 2.6(A), failing to accord a party's right to be heard. As discipline, the Commission issued a public reprimand and required Judge Hughes

[1]Judge Hughes held the mother in contempt at the July 28 hearing for failing to have the child math tested per a prior court order and fined her $500. That contempt order is not at issue in the disciplinary proceeding or this appeal, and all subsequent references to contempt concern only Judge Hughes' response to the mother's compliance with visitation orders.

[2]The Commission submitted a list of interrogatories to Judge Hughes, which the parties address in their briefs. In doing so, the Commission exceeded its authority. *See generally Andress-Tobiasson v. Nev. Comm'n on Judicial Discipline*, Docket No. 77551 (Order Granting in Part and Denying in Part Petition for Writ of Mandamus or Prohibition, May 10, 2019) (holding that the Commission lacks the authority to require a judge to answer interrogatories under oath). Accordingly, we have not considered Judge Hughes' answers to these interrogatories.

to take a course at the National Judicial College on managing challenging family law cases. Judge Hughes appeals.

DISCUSSION

In an appeal from a decision of the Commission, we defer to the Commission's factual findings, determining "whether the evidence in the record as a whole provides clear and convincing support for the commission's findings," but we are not bound by its conclusions of law. *In re Fine*, 116 Nev. 1001, 1013, 13 P.3d 400, 408 (2000) (internal quotation marks omitted). We first consider whether clear and convincing evidence supports the Commission's findings before assessing its imposition of discipline based on those findings.

I.

Clear and convincing evidence does not support the Commission's findings that Judge Hughes held the mother in contempt and that Judge Hughes changed the custodial arrangement as a contempt sanction

The Commission concluded that Judge Hughes violated canons of the Code of Judicial Conduct by improperly holding the mother in contempt without prior notice and an opportunity to be heard and by changing custody of the minor as a contempt sanction to punish the mother. On appeal, Judge Hughes argues that the record does not adequately support the Commission's findings and that the Commission cannot impose discipline for an allegedly incorrect legal ruling. She contends that (1) she did not hold the mother in contempt and therefore was not required to provide notice and an opportunity to be heard, (2) she was statutorily authorized to temporarily modify custody based on the child's best interest, and (3) the June 15 order's temporary custody modification was made in the child's best interest even though its findings did not include the statutorily enumerated factors.[3] As discussed below, we conclude that the Commission erred in imposing a public remand against Judge Hughes and therefore reverse.

We must consider the effect of Judge Hughes' orders to review the Commission's findings regarding them. The Commission found that Judge Hughes held the mother in contempt in both the minutes entered on June 8 and the June 14 written order for noncompliance with the court's visitation order.[4] The Commission found that Judge

[3]Judge Hughes also argues that the Commission improperly excluded some of her proffered evidence on relevance grounds. We need not consider that claim in light of our reversal on other grounds.

[4]We consider the Commission's findings regarding the June 8 minutes as applied to the June 14 written order, which corresponded to the June 8 minutes, as the Commission observed. To the extent the Commission relied on pronouncements

Hughes changed the custodial arrangement in the June 15 order as a sanction for this contempt. The June 14 order found that the mother was "in contempt of" the order to facilitate the father's visitation rights but provided that an order to show cause would issue *for that reason* and scheduled a hearing on that show-cause order for July 28. The order may thus be read to indicate either a present holding of contempt or a finding that the mother's conduct warranted a show-cause hearing at which contempt would then be adjudicated and sanctioned; therefore, the order is ambiguous. *See Margrave v. Dermody Props., Inc.*, 110 Nev. 824, 827, 878 P.2d 291, 293 (1994) ("A contract is ambiguous if it is reasonably susceptible to more than one interpretation."); *see also Allstate Ins. Co. v. Thorpe*, 123 Nev. 565, 570, 170 P.3d 989, 992-93 (2007) (applying "the rules of construction that pertain to interpreting other written instruments" in reviewing district court orders). Where a court's ruling is unclear, its interpretation presents a question of law, and we determine its legal effect "by construing the judgment as a whole, and . . . in the case of ambiguity, the interpretation that renders the judgment more reasonable and conclusive and brings the judgment into harmony with the facts and law of the case will be employed." *Allstate Ins. Co.*, 123 Nev. at 570, 170 P.3d at 993.

Interpreting it in light of its effect and the facts of the case, the June 14 order did not hold the mother in contempt. The contempt of court at issue was indirect rather than direct; that is, it did not occur in the judge's presence and thus could not support a summary adjudication and sanction. *See Int'l Union, United Mine Workers of Am. v. Bagwell*, 512 U.S. 821, 827 n.2 (1994) (observing that only direct contempt, which occurs "in the court's presence[,] may be immediately adjudged and sanctioned summarily"); *see also* NRS 22.030. Contempt leads to sanctions that may be either criminal, serving to punish past misbehavior, or civil, seeking to compel future compliance or to remedy the harm caused. *Rodriguez v. Eighth Judicial Dist. Court*, 120 Nev. 798, 804-05, 102 P.3d 41, 45-46 (2004); *State, Dep't of Indus. Relations v. Albanese*, 112 Nev. 851, 856, 919 P.2d 1067, 1070-71 (1996) (recognizing that a civil contempt sanction seeks to remedy the injuries that result from the noncompliance); *see also Warner v. Second Judicial Dist. Court*, 111 Nev. 1379, 1382-83, 906 P.2d 707, 709 (1995) (discussing the distinction between civil and criminal contempt). Civil contempt sanctions must cease on a party's compliance, while criminal contempt sanctions are not affected by future compliance, as they relate to past miscon-

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in the minutes entered by the court clerk, such statements offer no support for its findings regarding written orders Judge Hughes entered. *See Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) (providing that "[t]he district court's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for any purpose").

duct. *Rodriguez*, 120 Nev. at 805, 102 P.3d at 46. Contempt may not issue absent the protections owed to criminal proceedings for criminal contempt or those of notice and an opportunity to be heard for civil contempt. *Bagwell*, 512 U.S. at 826-27.

The context makes clear that the contempt envisioned in the June 14 order was civil contempt, as the gravamen of the dispute was the mother's ongoing noncompliance with court orders, such that Judge Hughes' evident concern was ensuring compliance.[5] And the directive to comply with prior custody and visitation orders imposed by the June 14 order did not amount to a contempt order because it did not impose any sanction to be alleviated by future compliance and could not remedy past deprivations of visitation rights, which could not be recovered. Nor did it imply that the mother's future compliance would not have any effect on any future sanction imposed at the show-cause hearing. Judge Hughes testified that her intent in the June 14 order was to find that the mother's failure to comply with the directive from the May 12 hearing to cooperate with the father's visitation rights established a prima facie case of contempt and that the matter would be adjudicated at the show-cause hearing. *Cf. Blair v. Blair*, 600 S.W.2d 143, 146 (Mo. Ct. App. 1980) (recognizing that a prima facie showing of contempt shifts the burden to the alleged contemnor to present an affirmative defense). Such a prima facie finding of contempt accompanied by notice of a show-cause hearing several weeks later shows that the intent of the finding was to compel compliance with the court's past visitation orders, as would be assessed at the show-cause hearing. Should the mother continue to violate the court's directives, the court would then hold her in contempt *and* impose sanctions at the show-cause hearing. Indeed, this is what occurred, as Judge Hughes considered the matter at the July 28 show-cause hearing. The June 14 order's other directive that the parties appear on June 15 to exchange custody supports this interpretation, as it compelled appearance in order to effect the court's custody order and stated that noncompliance then would be met with a contempt order and a sanction.

The Commission's interpretation disregards relevant portions of the June 14 and 15 orders. The Commission's rejection of Judge Hughes' explanation that she only found prima facie contempt in order to support a show-cause hearing where contempt could be adjudicated neglects that the June 14 order imposed no sanction and

[5]The Commission and the parties appear to agree that civil contempt was at issue, as it was agreed that sanctions could not proceed absent notice and a hearing, while it was never urged that the mother possessed the protections incumbent on a criminal prosecution. *See Bagwell*, 512 U.S. at 826-27 (recognizing that criminal procedural protections attach to criminal contempt proceedings); *Rodriguez*, 120 Nev. at 804-05, 102 P.3d at 45-46 (recognizing that the Sixth Amendment right to counsel attaches to contempt proceedings where the sanction sought is criminal contempt).

addressed sanctions only as the possible consequence of future noncompliance.[6] Insofar as the Commission determined that the custody change in the June 15 order constituted a sanction for contempt, such a reading strains credulity, as it would segregate the sanction from the noncompliance and frustrate the purpose of civil contempt by obscuring the connection between the sanction and the noncompliance. The Commission accordingly misconstrued the June 14 order as holding the mother in contempt where the facts and the legal effect of the order show otherwise. As the Commission's finding rests on a misconstruction of a legal instrument, clear and convincing evidence does not support the Commission's finding that Judge Hughes held the mother in contempt, let alone without providing notice and an opportunity to be heard.

Clear and convincing evidence also does not support the Commission's finding that Judge Hughes modified the mother's custody rights in the June 15 order as a contempt sanction. The June 15 order found that the mother had "committed extreme parental alienation" against the father that was contrary to the child's best interest and that the court had previously admonished the mother that noncompliance with judicial orders would yield a contempt order and a temporary custody change. The June 15 order scheduled a custody hearing and directed that the father would have temporary sole custody, that the mother would have no contact with the child, and that noncompliance would yield a holding of contempt. At no point did the June 15 order state that the mother was being held in contempt. The June 14 order cannot support such a finding of contempt, as it provided that the according sanction would be addressed at the July 28 show-cause hearing. Part and parcel with its disregard of Judge Hughes' explanation that the contempt and sanction noted in the June 14 order would be addressed at the show-cause hearing, the Commission mistakenly interpreted the June 15 order as providing a contempt sanction.[7] This improperly conflated the two orders, despite the absence of language specifically indicating that the June 15 order sought to add a term of punishment to the June 14 directive. That the two orders both arose from the mother's continued noncompliance did not justify the Commission's conflation. Rather, Judge Hughes provided a simpler explanation: the mother's continued interference with the father's visitation rights and apparent efforts to alienate the child from the father undermined

[6]We agree, however, that Judge Hughes' construction of contempt in both her order and her testimony before the Commission is confusing and note that our caselaw has made clear that the coercive force of a sanction is a necessary element of civil contempt. *See, e.g.*, *Rodriguez*, 120 Nev. at 804-05, 102 P.3d at 45-46. We urge Judge Hughes to discuss the matter more carefully in the future.

[7]The Commission also disregarded that it is customary for a court to discuss matters in a custody dispute with a child outside the presence of the parents in concluding that Judge Hughes did so with punitive intent towards the mother. *Cf.* NRCP 16.215(d).

the best interest of the child, and the temporary custody change thus promoted the best interest of the child. The Commission's finding that the custody change was a contempt sanction thus lacks support by clear and convincing evidence.

Insofar as the Commission reviewed Judge Hughes' determination of the best interest of the child, the scope of her authority to change custody under NRS 125C.0055, or the validity of the order changing the custody arrangement generally, it erred. A challenge to the exercise of judicial discretion to modify child custody is a matter for appellate review, not a judicial discipline complaint. *See* NRS 1.4653(5)(b) (providing that "[w]illful misconduct" as proscribed by judicial discipline proceedings excludes "claims of error or abuse of discretion"); Procedural Rules of the Nevada Commission on Judicial Discipline (PRJDC) 8 (providing that generally "[c]laims of error shall be left to the appellate process"). The exception to this rule lies where the judicial decision involves more serious misconduct, as characterized "by evidence of abuse of authority, a disregard for fundamental rights, an intentional disregard of the law, a pattern of legal error or an action taken for a purpose other than the faithful discharge of judicial duty." NRS 1.4653(5)(b); PRJDC 8. The record before us does not depict judicial malfeasance of that exceptional nature. The Commission exceeds its authority when it reaches the merits of claims that should be contested through the appellate process.

As we determine that the Commission erred in finding that Judge Hughes held the mother in contempt—with or without notice and an opportunity to be heard—and changed custody as a contempt sanction, the Commission accordingly erred in concluding that Judge Hughes violated canons of the Nevada Code of Judicial Conduct on these bases.

II.

The statutes governing judicial discipline do not support the discipline imposed based on the Commission's findings

The Commission publicly reprimanded Judge Hughes and ordered her to take a course on managing difficult family law cases. The Commission's discipline was based on its determination that her offenses were serious and its consideration of mitigating circumstances, specifically Judge Hughes' lack of prior discipline, her character reference letters, and her inexperience at the time of these events. We conclude that the Commission's discipline cannot stand on its record—even if we agreed with its findings of misconduct, which we do not—and therefore disagree further with its order.

Under Nevada statutes, a judge may be admonished, censured, reprimanded, or subject to other discipline for misconduct, depend-

ing on the misconduct's severity. NRS 1.4677. If a violation of the Code of Judicial Conduct is not knowing or deliberate, the range of sanctions available to respond to that conduct is limited. A judge may be publicly reprimanded for a violation that is not knowing or deliberate only if aggravating factors are present, while a reprimand may issue for a knowing or deliberate violation notwithstanding mitigating factors. NRS 1.4677(3). A public reprimand is a "severe" sanction. NRS 1.4294. Public admonishment is a lesser form of discipline that may be imposed absent aggravating factors for a violation that is not knowing or deliberate. NRS 1.4677(2). Where substantial mitigating factors are present, the judge may be censured for the disciplinary violation. NRS 1.4257; NRS 1.4653(2). The statutory scheme envisioned that these responses constituted distinct forms of sanction. *See* NRS 1.4253 (defining admonish); NRS 1.4257 (defining censure); NRS 1.4294 (defining reprimand); NRS 1.4677(1)(a) (providing that as forms of discipline the Commission may "[p]ublicly admonish, publicly reprimand or publicly censure" a judge); *see Bd. of Cty. Comm'rs v. CMC of Nev., Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (noting that a statute should be interpreted to give each word meaning without rendering any part redundant).

There was no evidence, let alone clear and convincing evidence, that Judge Hughes committed a knowing or deliberate violation.[8] In addition, the Commission did not find any aggravating circumstances. This excluded the possibility of imposing a public reprimand. Indeed, the Commission erred further, as it concluded that this severe sanction was apt even after finding that numerous *mitigating* circumstances were present. Where the violation committed was not knowing or deliberate, mitigating circumstances are present, and aggravating circumstances are not, discipline is limited to public admonishment or censure. NRS 1.4257; NRS 1.4677(2). Thus, the Commission failed to correctly apply the statute that provided for the sanction it imposed.[9] We urge the Commission to take care in future proceedings to ensure that it limits the discipline it imposes to that permitted by statute in light of the record before it.

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[8]While the Commission did not expressly address whether a violation was knowing or deliberate, it appears to have implicitly conceded that Judge Hughes did not commit a knowing or deliberate violation in asserting by footnote that it could impose discipline without finding willful misconduct. *See* NRS 1.4653(5)(b) (providing that "willful misconduct" includes conviction of a crime involving moral turpitude or certain "knowing or deliberate" acts of misconduct).

[9]We note that other statutes provide for less severe discipline than a public reprimand. Here, an appropriate resolution may well have been to dismiss the complaint without holding a hearing and issue a non-disciplinary letter of caution, warning Judge Hughes of the need to more closely supervise the clerk in the preparation of the minutes so that the minutes entered do not suggest that the court has held a party in contempt when it has not. *See* NRS 1.4291(2); NRS 1.467(2).

CONCLUSION

A public reprimand may not issue absent a knowing or deliberate violation of a canon of the Code of Judicial Conduct or aggravating factors. The Commission found neither and accordingly imposed discipline contrary to the statutes governing judicial discipline. Further, the statutory scheme and the Commission's rules instruct that disciplinary proceedings generally should not arise from disputes over legal decisions or factual findings, absent exceptional circumstances such as where a judge abuses her authority, disregards fundamental rights, intentionally disregards the law, or exhibits a pattern of error inconsistent with faithfully discharging the judicial function. For claims where relief may ordinarily lie in the appeals process, disciplinary proceedings should be pursued sparingly. Proceeding otherwise risks chilling the exercise of judicial discretion and harms the administration of justice. The Commission also erred in interpreting Judge Hughes' orders, relying inappropriately on court minutes and construing her orders without considering their effect and context. The Commission's discipline here rested on a misappraisal of both the relevant facts and applicable rules and law, finding a violation that did not occur and imposing discipline that could not stand on the record. We therefore reverse.

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

Cadish, J., with whom Silver, J., agrees, concurring in part and dissenting in part:

Respectfully, I concur in part and dissent in part. I agree with the majority's conclusion that the Commission on Judicial Discipline erred in imposing a public reprimand to discipline Judge Hughes. I write separately, however, to urge that some form of discipline was warranted here. While the Commission erred in its application of the relevant statutes, I conclude that the record supports its determination that Judge Hughes violated several canons of the Code of Judicial Conduct and that discipline was therefore warranted. Accordingly, I would reverse and remand for the Commission to reevaluate the appropriate discipline for the violations found, imposing discipline suitable for violations that are not knowing or deliberate and where aggravating factors are not present.

GEORGE STUART YOUNT, Individually, and in His Capacity as Owner of GEORGE YOUNT IRA, Appellant, *v.* CRISWELL RADOVAN, LLC; CR CAL NEVA, LLC; ROBERT RADOVAN; WILLIAM CRISWELL; CAL NEVA LODGE, LLC; POWELL, COLEMAN AND ARNOLD LLP; DAVID MARRINER; and MARRINER REAL ESTATE, LLC, Respondents.

No. 74275

July 30, 2020 469 P.3d 167

Appeal from a final judgment in a contract and tort action. Second Judicial District Court, Washoe County; Patrick Flanagan and Jerome M. Polaha, Judges.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied September 25, 2020]

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod, Abraham G. Smith*, and *Adrienne Brantley-Lomeli*, Las Vegas; *Kaempfer Crowell* and *Richard G. Campbell, Jr.*, Reno, for Appellant.

Howard & Howard Attorneys PLLC and *Martin A. Little, Ryan T. O'Malley*, and *Alexander Villamar*, Las Vegas, for Respondents Criswell Radovan, LLC; CR Cal Neva, LLC; Robert Radovan; William Criswell; Cal Neva Lodge, LLC; and Powell, Coleman and Arnold LLP.

Simons Hall Johnston PC and *Mark G. Simons*, Reno, for Respondents David Marriner and Marriner Real Estate, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

This case arises from an attempt to restore and reopen the historic Cal Neva Lodge, a resort and casino originally constructed in the 1920s, which sits on the California-Nevada border near Lake Tahoe. As the restoration project neared completion, a critical loan unexpectedly fell through. Certain investors in the project ostensibly collaborated to undermine that loan. The entire project subsequently failed, and investor George Stuart Yount sued the developers and others involved in setting up his investment in the project. The defendants asserted affirmative defenses but did not file any counterclaims or request any damages. At the conclusion of trial, the district

court denied relief on Yount's claims and, despite the defendants never seeking to file a counterclaim or requesting damages, awarded the defendants damages. The district court based its award on evidence that Yount was involved with the group of investors that undermined the loan and caused the project to fail, thereby damaging the defendants.

In this opinion, we primarily address whether the district court improperly awarded the defendants damages where no defendant expressly asserted a counterclaim or requested damages. In particular, we address whether the parties tried a counterclaim by implied consent under NRCP 15(b) and whether the damages award can be upheld under NRCP 8(c) or 54(c). We conclude the record neither supports the district court's determination that the parties tried a counterclaim by consent nor supports upholding the damages award. We therefore reverse the damages award and remand for the district court to remove that award from its order. We affirm, however, the district court's decision to deny relief on Yount's claims, as Yount failed to prove he was entitled to relief.

FACTS

The Cal Neva Lodge redevelopment project

Property developers William Criswell and Robert Radovan purchased the historic Lake Tahoe Cal Neva Lodge (the Lodge) in 2013, intending to renovate and reopen it. As pertinent here, they created the following Nevada limited liability companies: Criswell Radovan, LLC, as a conduit to move money; CR Cal Neva, LLC, as the manager for the Cal Neva project; and, through CR Cal Neva, LLC, Cal Neva Lodge, LLC, to purchase and develop the property.

To raise funds needed for the project, Criswell and Radovan issued a Private Placement Memorandum (PPM) soliciting $20 million in equity investment. Under the PPM, each investment of $1 million would give the investor a "founder's share," amounting to a 3.5% ownership in Cal Neva Lodge, LLC. To subscribe for a founder's share, an investor would sign a subscription agreement with Cal Neva Lodge, LLC. CR Cal Neva purchased two founder's shares, and the subscription agreement allowed CR Cal Neva to sell one of those shares at a future time. The largest investor under the PPM was the Incline Men's Club Investment Group (IMC).

David Marriner lived in nearby Incline Village and became aware of the project. He contacted Criswell and Radovan, who hired Marriner's real estate consulting firm to work on the project. They also asked Marriner to help find investors for the Lodge. Marriner, who was also an investor, knew Stuart Yount socially and introduced Yount to the project, but Yount did not immediately invest.

In July 2015, Marriner informed Yount that only $1.5 million of equity remained available for investment under the PPM. At that

time, the Lodge was set to open in December. Yount spoke with Radovan about the project, and Marriner sent Yount the investment documents, including the PPM. The PPM indicated that the project was over budget and would need to be refinanced, pushing back the schedule. Marriner communicated to Yount in August and September that Criswell and Radovan were trying to close out the final founding membership, as Yount still had not invested.

Soon thereafter, however, Les Busick purchased the final $1.5 million founder's share under the PPM. Simultaneously, Yount—after discussing the investment with his accountant—decided to buy a $1 million founder's share. Criswell and Radovan sold Yount one of their CR founder's shares, as permitted by their subscription agreement. Yount signed a subscription agreement with Cal Neva Lodge, and his investment funded on October 13, 2015. During this same time, Radovan was considering a $55 million refinance of the project to obtain extra funds necessary for its completion.

Cal Neva Lodge's executive committee, consisting of Criswell, Radovan, two IMC members, and Busick, met in early November to discuss the refinance after Mosaic Real Estate Investors, LLC, the company slated to fund it, pressured Radovan to finalize the deal. The executive committee, however, wanted to change certain loan terms and was therefore not ready to complete the refinance deal. Criswell and Radovan then loaned $50,000 to Cal Neva Lodge so that Cal Neva Lodge could deposit those funds with Mosaic to secure a term sheet from Mosaic.

By early December 2015, it was apparent the Lodge would not open on time. Although the hotel was nearly complete, the foundation in the bar area needed rebuilding. The opening was therefore delayed until spring 2016. On December 12, Criswell and Radovan met with the executive committee to explain the cost overruns and seek approval to secure the Mosaic loan. The executive committee did not approve the loan, and the meeting became heated.

The following day, Yount voiced his concerns about the project's failing to Radovan. Around the same time, Yount, the IMC, and another investor, apparently unhappy with Criswell and Radovan, began discussing replacing Mosaic with another financer. Yount asked for the return of his $1 million investment, but that money had already been spent. Yount then learned that he had purchased one of CR's founder's shares—instead of a share under the PPM—and emailed Marriner to complain. Criswell and Radovan then asked Yount to sign documents stating his intent had been to buy a CR share, but Yount refused.

The executive committee finally approved the loan in late January 2016, and Radovan planned to meet with Mosaic a few days later, but Mosaic canceled the meeting via email at the last moment. Mosaic stated that it had met with a group of Cal Neva investors (later

discovered to include IMC members) who "were interested in hearing about the history of Mosaic's involvement in CalNeva," and that Mosaic told them that Mosaic had not heard "much" from Criswell and Radovan for nearly three months. Mosaic said that the investors "explain[ed] a little of the history of the deal from their perspective" and that it appeared to Mosaic as though the project was "a little bit of a mess right now." Mosaic therefore was going to "step back, tear up the executed term sheet," so that the parties running the project had "time to figure things out." Once the Mosaic loan fell through, other lenders withdrew from the project and it failed.

Yount's lawsuit

Yount sued Criswell, Radovan, CR Cal Neva, Criswell Radovan, LLC, the Cal Neva Lodge, LLC, Marriner and his real estate company, and others[1] for breach of contract, breach of fiduciary duty, fraud, negligence, conversion, and securities fraud. Pertinent here, Yount generally alleged that Marriner had misrepresented the project's health and that the defendants, particularly Marriner and Radovan, misinformed Yount that $1.5 million in founder's shares remained available to induce him to invest, despite knowing they had already sold those shares to Busick. Yount alleged that his purchase of a founder's share from Criswell and Radovan, rather than through the same process as the other investors, damaged him in excess of $1 million.[2]

CR answered the complaint and asserted affirmative defenses, including comparative negligence, failure to mitigate damages, unclean hands, and indemnity/contribution, essentially alleging that Yount's own actions or omissions caused the damages he claimed. Marriner similarly responded to Yount's claims by asserting that Yount caused his own damages, if any. Neither CR nor Marriner asserted a counterclaim or requested damages. They also did not request any damages or other affirmative relief in their unsuccessful pretrial motions for summary judgment. Their proposed findings of fact and conclusions of law submitted before trial similarly did not address any counterclaim or damages against Yount.

The case proceeded to a bench trial before Judge Patrick Flanagan. Considerable evidence addressed Yount's involvement with the IMC and its actions to undermine the project's funding involving Mosaic. Emails demonstrated Yount was in contact with the IMC and included in conversations disparaging Criswell and Radovan,

[1]We do not address the parties below who are not parties to this appeal. We will hereinafter refer to Criswell, Radovan, CR Cal Neva, Criswell Radovan, LLC, and the Cal Neva Lodge, LLC, collectively as "CR." We will refer to Marriner and his real estate company collectively as "Marriner."

[2]Yount also requested punitive damages, interest on the judgment, and attorney fees and costs.

but those emails did not show Yount directly undermined the Mosaic loan. CR repeatedly asserted throughout trial, however, that no defendant had asserted counterclaims against Yount and that the case was not about the project's collapse. Marriner did not attempt to correct CR's characterization of the trial issues or assert that he had made claims against Yount.

Yount focused his closing argument on what happened before he funded his investment and argued that CR and Marriner tried to improperly shift the focus of trial to what occurred after Yount purchased his share. Yount ultimately conceded that no functional difference existed between a founder's share and the share he purchased. CR responded that, to the extent Yount was damaged, Yount caused those damages by participating with the other investors in undermining the Mosaic loan, resulting in the project's failure. CR also asserted that the failed project "cost CR Cal Neva over $2 million in damages." Marriner did not argue that Yount directly undermined the Mosaic loan, but nevertheless faulted Yount for failing to warn CR of the IMC's plans to undermine the loan and asserted that Yount's damages arose from the project's failure, rather than from how Yount obtained his founder's share.

At the conclusion of the bench trial, Judge Flanagan stated his detailed oral ruling, finding against each of Yount's claims. Judge Flanagan thereafter addressed "[t]he defendants' counterclaim [of] unclean hands" and found that "it was the intent of the IMC to kill this loan" and "but for the intentional interference with the contractual relations between Mosaic and Cal Neva, LLC, this project would have succeeded." Judge Flanagan ordered judgment in favor of the defendants and sua sponte awarded Radovan and Criswell damages along with attorney fees and costs. In a written "amended order" issued a few days later, Judge Flanagan clarified the award: $1.5 million each to Criswell, Radovan, and Marriner; two years' salary and management fees to Criswell and Radovan; lost development fees to Criswell Radovan, LLC; and lost development fees to CR Cal Neva, LLC. Sadly, Judge Flanagan suddenly fell ill and passed away before entering written findings of fact and conclusions of law.

Yount subsequently appealed the amended order clarifying the damages award, while, in the district court, the case was reassigned to Judge Jerome Polaha. After reviewing the record along with Judge Flanagan's oral ruling, Judge Polaha ordered Yount to pay $1.5 million in compensatory damages to each of Criswell, Radovan, and Marriner. The parties then filed various motions in the district court, with CR moving to amend the judgment; Marriner moving to amend his answer to include a counterclaim; and Yount moving for judgment as a matter of law, for relief from the judgment, to alter and amend the judgment, for a new trial, and for limited post-judgment discovery regarding the Mosaic loan.

This court then filed an order ruling that, as an appeal had been timely taken from Judge Flanagan's written amended order and no post-judgment motions had been filed at that time, "the district court has been divested of its jurisdiction to grant the motions as of the docketing of th[is] appeal." *Yount v. Criswell Radovan, LLC*, Docket No. 74275 (Order, Aug. 24, 2018). The case was reassigned in district court again, this time to Judge Egan Walker, who found he lacked jurisdiction to rule on the parties' post-judgment motions based on this court's order and declined to exercise jurisdiction to grant Yount's motion for post-trial discovery.

DISCUSSION

Yount argues on appeal that the district court erred by awarding damages to respondents when they had not filed a counterclaim or requested damages.[3] For the reasons set forth below, we agree that the district court improperly awarded damages to respondents in the absence of an express or implied counterclaim.[4]

Following a bench trial, we will not overturn the district court's findings of fact "unless they are clearly erroneous or not supported by substantial evidence." *Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018). We review de novo the district court's interpretation of court rules. *Casey v. Wells Fargo Bank, N.A.*, 128 Nev. 713, 715, 290 P.3d 265, 267 (2012). Where a Nevada rule is similar to an analogous federal rule, the cases interpreting

[3]No error arises from Judge Polaha entering a decision based on Judge Flanagan's findings, as those findings were competent. *See Smith's Food King No. 1 v. Hornwood*, 108 Nev. 666, 668-69, 836 P.2d 1241, 1242 (1992) (providing that a successor judge must conduct a new trial if the previous judge failed to issue competent findings of fact). And Judge Walker's order denying post-judgment discovery is not appealable, as it issued after the final judgment and does not alter any rights in that judgment. NRAP 3A(b) (setting forth appealable decisions); *Gumm v. Mainor*, 118 Nev. 912, 913-14, 59 P.3d 1220, 1221 (2002) (addressing special orders).

[4]Yount also argues the district court erred by dismissing certain causes of action. We have carefully reviewed the record and conclude the district court did not err by dismissing Yount's claims. *See Wells Fargo Bank, N.A. v. Radecki*, 134 Nev. 619, 621, 426 P.3d 593, 596 (2018) (providing the standard of review for reviewing a judgment following a bench trial). Specifically, the record supports the finding that Yount failed to prove damages because he sought, and received, a founder's share, and the record does not show that Yount's share was functionally different from a share under the PPM. *See Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006) (breach of contract); *Stalk v. Mushkin*, 125 Nev. 21, 28, 199 P.3d 838, 843 (2009) (breach of fiduciary duty); *Sanchez v. Wal-Mart Stores, Inc.*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009) (negligence); *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 328-29, 130 P.3d 1280, 1287 (2006) (conversion); *Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (fraud). Moreover, we have carefully reviewed the district court's factual findings regarding the additional elements of those claims and determine that they are supported by substantial evidence. We therefore affirm the district court's decision to dismiss Yount's claims.

the federal rule provide persuasive authority as to the meaning of the Nevada rule. *Vanguard Piping Sys., Inc. v. Eighth Judicial Dist. Court*, 129 Nev. 602, 608, 309 P.3d 1017, 1020 (2013).

The record is devoid of evidence that either CR or Marriner expressly asserted any counterclaim before or during trial. To the contrary, CR repeatedly denied asserting a counterclaim. Therefore, the damages award was appropriate only if CR and Marriner raised and proved claims against Yount at trial sufficient to support the damages awards. In assessing this point, we look to the three rules of procedure the parties raise as a possible basis for the award: NRCP 15(b), NRCP 54(c), and NRCP 8(c).[5]

NRCP 15(b)

Each party to this appeal argues at length as to whether CR and Marriner tried a counterclaim at trial by implied consent under NRCP 15(b). Yount contends he was not on notice of a counterclaim; CR and Marriner repeatedly conceded they had no counterclaim; and any evidence relevant to a counterclaim was, instead, adduced to address issues expressly raised by the pleadings. Marriner counters that Yount knew the case focused on his intentional interference with the contractual relationship between Cal Neva Lodge and Mosaic and argues that Yount introduced evidence to minimize his interference with that loan. CR similarly argues that Yount's own evidence was relevant to his interference with the Mosaic loan and that he did not object to the admission of evidence regarding that interference.

NRCP 15(b) provides that an issue not raised in the pleadings may nevertheless be tried by the parties' "express or implied consent," and that the court should treat such issues "as if they had been raised in the pleadings." Amending the pleadings to include an issue tried by consent is not required for the outcome on that issue to be valid.[6] NRCP 15(b). We review a district court's determination under this rule for an abuse of discretion. *See State, Univ. & Cmty. Coll. Sys. v. Sutton*, 120 Nev. 972, 987-88, 103 P.3d 8, 18-19 (2004) (addressing a motion to amend); *see also* 6A Charles Alan Wright, Arthur R. Miller & Mary Kay Kane, *Federal Practice and Procedure* § 1493 (3d ed. 2010) (whether an issue has been tried by implied consent is reviewed for an abuse of discretion). By way of example, we have previously determined an issue was tried by con-

[5]We address these rules of procedure as they existed in 2017. The Nevada Rules of Civil Procedure were amended on March 1, 2019. *In re Creating a Comm. to Update and Revise the Nev. Rules of Civil Procedure*, ADKT 522 (Order Amending the Rules of Civil Procedure, the Rules of Appellate Procedure, and the Nevada Electronic Filing and Conversion Rules, Dec. 31, 2018). Those amendments did not substantively change the language at issue here. *See id.*

[6]NRCP 15(b) refutes any argument that NRCP 15(a) or 16(b) requires a party to amend their answer to assert a counterclaim.

sent where the plaintiff questioned witnesses regarding the issue and argued it extensively on the merits. *I. Cox Constr. Co. v. CH2 Invs., LLC*, 129 Nev. 139, 142-43, 296 P.3d 1202, 1204 (2013). In another case, we concluded an issue was tried by consent where the parties explored the issue during discovery, the defendant raised the issue in opening arguments, and the plaintiff referred to it as an issue in the case and did not object to the court admitting evidence regarding the issue at trial. *Poe v. La Metropolitana Compania Nacional de Seguros*, 76 Nev. 306, 353 P.2d 454 (1960).

Nevertheless, implied consent can be "difficult to establish as it depends on whether the parties recognized that an issue not presented by the pleadings entered the case at trial." 6 *Federal Practice and Procedure* § 1493. If evidence relevant to the implied claim is also relevant to another issue in the case, and nothing at trial indicates that the party who introduced the evidence did so to raise the implied claim, courts will generally not find that the parties tried the issue by consent. *Id.* "The reasoning behind this view is sound since if evidence is introduced to support basic issues that already have been pleaded, the opposing party may not be conscious of its relevance to issues not raised by the pleadings unless that fact is made clear." *Id.*

For example, in *Luria Brothers & Co. v. Alliance Assurance Co.*, 780 F.2d 1082, 1088 (2d Cir. 1986), the United States Court of Appeals for the Second Circuit addressed a case where the district court sua sponte awarded the defendants $900,000 in restitution in an indemnity lawsuit. The court addressed implied consent under FRCP 15(b), which turns "on whether [the parties] recognized that the issue had entered the case at trial." *Id*. at 1089. The court acknowledged that, generally, "consent may be implied from failure to object at trial to the introduction of evidence relevant to the unpled issue." *Id*. Based on that, the court determined, the evidence relevant to the unpleaded restitution issue was also relevant to a properly pleaded issue and the plaintiff's failure to object, therefore, did not imply consent "absent some obvious attempt to raise [the unpleaded issues]." *Id*. In reaching this conclusion, the circuit court explained that the record lacked comments "[ ]sufficient to warn [the party] that the trial judge was considering restitution of payment." *Id*. The court explained that the plaintiff "should have been entitled, through normal pretrial discovery, to explore . . . possible defenses to restitution. The absence of any opportunity to do so constitutes sufficient prejudice to warrant reversal of that part of the district court's order . . . ." *Id*. at 1090.

In the present case, the record does not show that the parties tried a counterclaim by implied consent. CR and Marriner failed to mention a counterclaim or propose a damages award in either their motions for summary judgment or their pretrial proposed findings of fact and conclusions of law. CR affirmed at trial that they had not advanced any counterclaim, only affirmative defenses, and Marriner did not contradict CR's characterization of the trial. Moreover, CR

and Marriner never made an obvious attempt to raise a counterclaim at trial, and the trial judge gave no indication, before his ruling, that he was considering awarding damages against Yount. Although evidence was adduced regarding Yount's involvement with the IMC and its efforts to undermine the Mosaic loan, this evidence was relevant to the affirmative defenses that Yount helped cause any damages he claimed. *See, e.g.*, *Las Vegas Fetish & Fantasy Halloween Ball, Inc. v. Ahern Rentals, Inc.*, 124 Nev. 272, 275, 182 P.3d 764, 766 (2008) (holding that, to prove unclean hands to bar the opposing party's claim for relief, it must be shown that the opposing party acted unconscientiously, unjustly, or without good faith in the transaction); *Shuette v. Beazer Homes Holdings Corp.*, 121 Nev. 837, 859-60, 124 P.3d 530, 546 (2005) ("[c]omparative negligence applies . . . to conduct that proximately contributes to an injury's causation," and "mitigation issues exist when the wrongdoer attempts to minimize the damages owed by showing that the harmed person failed to take reasonable care to avoid incurring additional damages"). And we agree with the above authorities that, because this evidence was relevant to pleaded issues, Yount's failure to object to the evidence's admission at trial does not support a conclusion that he consented to, or was on notice of, the trial of an unpleaded counterclaim for damages. *See Luria Bros.*, 780 F.2d at 1089-90; 6 *Federal Practice and Procedure* § 1493.

Underscoring this lack of implied consent is the lack of consensus on which counterclaim was tried. Judge Flanagan linked the damages award to unclean hands and intentional interference with contractual relations in his oral findings, without addressing the elements of either.[7] Judge Polaha's order, however, simply sidestepped naming a counterclaim. And, on appeal, Marriner argues he is entitled to the damages due to intentional interference with contractual relations, while CR argues that Judge Flanagan misspoke regarding an interference with contractual relations and that it instead proved damages based on Yount's tortious interference with a prospective economic advantage.

Even assuming, *arguendo*, that CR and Marriner proved their entitlement to damages on either of these counterclaims, a more troubling fact prevents affirmance here. Namely, the evidence adduced at trial failed to establish the amount of damages or Yount's individual culpability for the project's failure. *See Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) ("[A] party seeking damages has the burden of providing the court with an evidentiary basis upon which it may properly determine the amount of damages."); *see also J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 274, 71 P.3d 1264, 1267 (2003) (addressing intentional interference with contractual relations); *Las Vegas-Tonopah-Reno Stage Line, Inc. v.*

[7]Because we determine the parties did not try a counterclaim by implied consent, we need not address whether the affirmative defense of "unclean hands" can also constitute a claim for relief.

Gray Line Tours of S. Nev., 106 Nev. 283, 287-89, 792 P.2d 386, 388-89 (1990) (addressing damages under a claim for wrongful interference with prospective economic advantage). At trial, the parties introduced numerous emails and substantial testimony regarding Yount's involvement with the IMC. But that evidence did not detail CR's and Marriner's actual monetary losses resulting from the project's failure. Significantly, trial testimony made only passing speculative references to those amounts because no discovery was conducted regarding the testimony. *See Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) (providing that, while a party need not prove exact damages, an evidentiary basis for the amount awarded must exist). CR's post-trial motion for lost management fees only accentuates that they failed to present adequate evidence as to project-loss damages during trial. And the evidence of Yount's involvement with the IMC did not show whether, or the degree to which, Yount was directly involved in undermining the Mosaic loan—a fact Marriner acknowledged to some extent during closing argument. Likely because of the lack of evidence on this point, the district court, while clearly holding Yount culpable, did not explain why Yount, as opposed to the IMC or others, should be liable for those damages or how the court arrived at the award's amount. Under these facts, it would be unfair to determine the parties tried a counterclaim by implied consent and unjust to uphold the damages award against Yount.

In reaching our decision, we are persuaded by the Second Circuit's observation that when a counterclaim has not been tried by implied consent, the defending party is robbed of its "entitle[ment], through normal pretrial discovery, to explore [the counterclaim]. The absence of any opportunity to do so constitutes sufficient prejudice to warrant reversal of that part of the district court's order . . . ." *Luria Bros.*, 780 F.2d at 1090. Likewise here, while we do not opine as to the merits of any potential counterclaim against Yount, the absence of opportunity to conduct discovery specific to the counterclaim was prejudicial and warrants reversal of the damages award.[8] *See id.*

Although we conclude the district court erred by finding a counterclaim and awarding damages, and the error warrants reversal of that award, we briefly address both NRCP 8(c) and NRCP 54(c) and explain why neither of those rules warrant upholding the damages award here.

NRCP 8(c)

CR argues that NRCP 8(c) allows the district court to convert CR's affirmative defense of unclean hands into a counterclaim for

[8]In light of our decision, we need not reach Yount's additional arguments on this point.

tortious interference with a prospective economic advantage. CR implies that Judge Flanagan misspoke by basing the damages award on intentional interference with contractual relations and that a fair reading of the ruling "makes clear" it was based upon tortious interference with a prospective economic advantage, and CR asserts that the evidence supports the award in CR's favor on such a claim. Marriner takes a broader approach, arguing that NRCP 8(c) allows a court to treat an affirmative defense as a plea for affirmative relief where justice so requires and that the facts here support affirmative relief.

NRCP 8(c) addresses affirmative defenses and allows the court to treat an affirmative defense as a counterclaim if the party "mistakenly designated" the counterclaim as an affirmative defense. In addressing FRCP 8(c), the United States Court of Appeals for the District of Columbia Circuit explained that

> affirmative defenses made in response to a pleading are not themselves claims for relief. True, [FRCP] 8(c)(2) provides a potential mechanism for extending jurisdiction to an improperly pled claim . . . . But several of our sister circuits have held that a request for relief that amounts to no more than denial of the plaintiff's demand is properly considered an answer, not a separate claim for affirmative relief that expands the court's jurisdiction.

Akiachak Native Cmty. v. U.S. Dep't of Interior, 827 F.3d 100, 107 (D.C. Cir. 2016) (internal quotation marks and alterations omitted). Thus, while a counterclaim may entitle the defendant to affirmative relief, an affirmative defense generally does not. *See id.* at 107-08; *see also Riverside Mem'l Mausoleum, Inc. v. UMET Tr.*, 581 F.2d 62, 83 (3d Cir. 1978) ("A counterclaim may entitle the defendant in the original action to some amount of affirmative relief; a defense merely precludes or diminishes the plaintiff's recovery. Although the facts underlying some defenses might also support a counterclaim, not all counterclaims are valid defenses. The two concepts are distinct and must be kept so.").

Here, to the extent CR and Marriner argue they mistakenly designated counterclaims as affirmative defenses below, this is belied by the record. CR in particular repeatedly denied asserting any counterclaims against Yount and affirmed that it had only asserted affirmative defenses, including during closing arguments. Marriner likewise asserted that the evidence regarding the Mosaic loan supported his defense that Yount caused his own damages, without mentioning a counterclaim or claiming an entitlement to damages.

To the extent CR argues the district court correctly read into the trial a counterclaim for a tort that neither the parties nor the judge ever named at trial, and to the extent Marriner argues that justice requires treating his affirmative defense as a pleading for affirma-

tive relief, this argument fails for the reasons we rejected affirming under NRCP 15(b). Specifically, where Yount—without warning of the possible damages award—did not have the opportunity to present evidence or argument to counter those damages, justice does not weigh in favor of converting an affirmative defense to a counterclaim.

NRCP 54(c)

CR contends NRCP 54(c) also supports affirmance, as it allows a district court to award a party the relief to which they are entitled—even where the party fails to request such relief. Marriner more particularly argues that NRCP 54(c) allows relief for intentional interference with a contract here because the claim was tried and proven at trial.

NRCP 54(c) states, in pertinent part, that every final judgment other than a default judgment "shall grant the relief to which the party in whose favor it is rendered is entitled, even if the party has not demanded such relief in the party's pleadings." This court has explained that the rule "implements the general principle of [NRCP] 15(c), that in a contested case the judgment is to be based on what has been proved rather than what has been pleaded." *Magill v. Lewis*, 74 Nev. 381, 387-88, 333 P.2d 717, 720 (1958) (internal quotation marks omitted). In short, if an "issue was raised and tried, the court [is] empowered by NRCP 54(c) to grant the relief granted, if such relief was legally warranted." *Grouse Creek Ranches v. Budget Fin. Corp.*, 87 Nev. 419, 427, 488 P.2d 917, 923 (1971).

The threshold question here, therefore, is whether CR and Marriner in fact tried a counterclaim during the proceedings. For the reasons set forth above, we conclude the parties did not try a claim against Yount, and, therefore, NRCP 54(c) does not entitle CR and Marriner to relief.[9]

CONCLUSION

NRCP 15(b) allows a party to try a counterclaim by implied consent. NRCP 8(c) and 54(c) provide additional grounds on which a district court may, under certain circumstances, award relief in the absence of a claim or counterclaim. Here, the district court sua sponte awarded respondents damages. The record, however, does not show the parties tried a counterclaim by implied consent or that

[9]Again, we note CR and Marriner's alleged damages were not adequately explored at trial. As to CR, Radovan testified to a damages amount but provided no supporting documentation and did not testify to how he calculated the amount, and CR's post-trial motion seeking to add millions to the amount awarded at trial demonstrates that trial evidence on that issue was severely lacking. As to Marriner, although he argues various documents sufficiently established his damages, he only introduced the evidence to defend against Yount's claims and to support his defenses, not as support for a damages request.

respondents were otherwise entitled to the awarded damages.[10] Accordingly, we conclude the district court abused its discretion by awarding damages to CR and Marriner based upon an untried counterclaim and reverse the damages award. As the record supports the district court denying relief on Yount's claims, we affirm that portion of the decision. We remand to the district court for further proceedings consistent with this opinion.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, Stiglich, and Cadish, JJ., concur.

THE STATE OF NEVADA, Appellant, *v.*
KIMBERLY MARIE NYE, Respondent.

No. 78230

July 30, 2020 468 P.3d 369

Appeal from a district court order granting respondent's motion to suppress. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Affirmed.

Cadish, J., with whom Pickering, C.J., and Silver, J., agreed, dissented in part.

Aaron D. Ford, Attorney General, Carson City; *Tyler J. Ingram*, District Attorney, and *Daniel M. Roche* and *Chad B. Thompson*, Deputy District Attorneys, Elko County, for Appellant.

David D. Loreman, Chtd., and *David D. Loreman*, Elko, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

The State appeals from the district court's grant of respondent Kimberly Marie Nye's motion to suppress drugs and drug paraphernalia police discovered while searching her backpack. The search

[10]In light of our decision, we need not address the remaining arguments on appeal. And, as the parties do not address the district court's attorney fees awards, we decline to address them. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived.").

occurred after officers arrested Nye, placed her inside a patrol car, placed her backpack in the trunk of the patrol car, and transported her to jail. The State argues that the district court erred by suppressing the evidence, maintaining that the contraband was recovered in a lawful search incident to arrest, or otherwise would have been inevitably discovered in a lawful inventory of the backpack's contents. We disagree.

We conclude the district court properly determined that the search of Nye's backpack was beyond the scope of a permissible search incident to arrest. We further conclude that the evidence would not have been discovered through a lawful inventory search, as the booking deputy failed to generate an actual inventory of the backpack's contents, and therefore the evidence was not admissible under the inevitable-discovery doctrine. Accordingly, we affirm the district court's order granting Nye's suppression motion.

FACTS

The State arrested Nye after she refused to leave a casino in Elko County. Officers put her inside a patrol car and put her backpack, which was with her at the time of the arrest, in the trunk. When they arrived at the jail, an officer searched her backpack and found drugs. Shortly thereafter, a jail booking deputy conducted an inventory search of Nye's backpack. Among other items, the booking deputy listed "bag" on the inventory sheet and did not produce an itemized inventory of the contents in the backpack. The State charged Nye with possession of a controlled substance. She moved to suppress the evidence, arguing that the search of her backpack was beyond the scope of a permissible search incident to arrest and that the inevitable-discovery rule did not apply because the State failed to show that the evidence ultimately would have been discovered in a valid inventory search. The State opposed, but the district court granted the motion.

DISCUSSION

Search incident to arrest

The State first challenges the district court's conclusion that the search of Nye's backpack was not a lawful search incident to arrest because Nye was safely under control when the officers searched her backpack. Because the State focuses on the district court's conclusion concerning the constitutionality of the search and not its factual findings, we review this challenge de novo. *See State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013) (explaining that on appeal from an order granting a motion to suppress, "[a] district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review").

"[T]he authority to search incident to arrest derives from the need to disarm and prevent any evidence from being concealed or destroyed." *State v. Greenwald*, 109 Nev. 808, 810, 858 P.2d 36, 37 (1993). Here, the search occurred after officers arrested Nye, secured her inside a patrol car, put her backpack in the trunk, and took her to jail. Thus, at the time of the search, Nye did not pose a threat to officer safety. Nor was there an immediate need to preserve evidence because she had been and remained separated from her backpack. Accordingly, the district court did not err when it concluded that the search of Nye's backpack was not a lawful search incident to arrest. *See Rice v. State*, 113 Nev. 425, 430, 936 P.2d 319, 322 (1997) (relying on the fact "that Rice was placed in the patrol car before [the officer] searched the backpack" as dispositive in finding the search unlawful); *Greenwald*, 109 Nev. at 810, 858 P.2d at 37 (concluding that the search was unlawful because, "[w]ith Greenwald safely locked away in a police car, there was no conceivable 'need' to disarm him or prevent him from concealing or destroying evidence").[1]

Inventory search

Next, the State challenges the district court's conclusion that the inventory search was invalid and its refusal to apply the inevitable-discovery doctrine. Under the inevitable-discovery doctrine, evidence will not be suppressed based on improper police conduct if the prosecution can prove by a preponderance of the evidence that it ultimately would have been discovered by lawful means. *Nix v. Williams*, 467 U.S. 431, 444 (1984); *Proferes v. State*, 116 Nev. 1136, 1141, 13 P.3d 955, 958 (2000) (adopting this doctrine), *overruled on other grounds by Rosky v. State*, 121 Nev. 184, 111 P.3d 690 (2005). An inventory search, if valid, can constitute a lawful means of discovery. *See Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994) (explaining that an inventory search is a well-established exception to the Fourth Amendment's probable cause and warrant requirements). To be valid, however, the officers conducting the search must produce "a true inventory of " personal items found during the search. *Id.* at 289, 871 P.2d at 340.

Here, the district court found that the police department's policy requires the booking deputy to routinely search the contents of containers for contraband, and that the booking deputy adhered to

[1]Although the State urges us to overturn *Rice* and instead adopt a "time of arrest" rule for evaluating the propriety of a search incident to arrest, we see no compelling reason to do so. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) (explaining that under the doctrine of stare decisis, principles of law already examined and decided by this court "hold positions of permanence in this court's jurisprudence" and will not be overturned absent a compelling reason).

this protocol when searching Nye's backpack. However, the district court further found that the inventory search was invalid because the booking deputy merely listed "bag" on the inventory sheet and did not otherwise produce a written inventory detailing the contents of the backpack. For this reason, the district court determined that the booking deputy would not have discovered the contraband through *lawful* means. We agree.

Fundamentally, both the United States and Nevada Constitutions require an inventory search to yield an actual inventory. *See Florida v. Wells*, 495 U.S. 1, 4 (1990) ("The policy or practice governing inventory searches should be designed to produce an *inventory*." (emphasis added)); *Greenwald*, 109 Nev. at 811, 858 P.2d at 38 ("Without an inventory, we can have no inventory search."). Beyond this bedrock principle, we afford police departments considerable deference to craft and implement policies that best serve the purposes of an inventory search within their station houses. *See Illinois v. Lafayette*, 462 U.S. 640, 648 (1983) ("We are hardly in a position to second-guess police departments as to what practical administrative method will best deter theft by and false claims against its employees and preserve the security of the station house."). Before we will defer to a police department's policy, however, the prosecution must first establish that the inventory search was actually conducted pursuant to the operative policy. *See South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) ("The decisions of this Court point unmistakably to the conclusion reached by both federal and state courts that *inventories pursuant to standard police procedures* are reasonable." (emphasis added)).

Here, the booking deputy did not produce an inventory detailing the contents of Nye's backpack, and the State does not contend that the confiscated drugs and drug paraphernalia constituted the only contents in Nye's backpack, such that the entry of "bag" on the inventory list accurately reflected Nye's belongings.[2] Instead, the booking deputy testified that while she does not recall conducting this search, she explained that if there are *too many items* in a container, like Nye's backpack, then the department's general practice is to list the bulk item as "bag" without inventorying its individual contents. The arresting officer also testified that he could not recall *all* the items present in Nye's backpack when he discovered the drugs and drug paraphernalia therein. Because we infer from this testimony that the backpack held more than the confiscated contraband, and because the booking deputy failed to generate an inventory of the backpack wherein the contraband was discovered, we conclude that the proffered inventory list "cannot be fairly and

[2]The booking deputy testified that if she *does* find contraband, she does not list it on the inventory because illegal items are not returned to the arrestee upon release. Thus, if the booking deputy had discovered the contraband, the failure to list it on the inventory sheet would not have rendered the search invalid.

accurately described as a true inventory of [Nye's] personal property." *Weintraub*, 110 Nev. at 289, 871 P.2d at 340 (invalidating a similarly vague inventory following the search of a vehicle); *see also Greenwald*, 109 Nev. at 811, 858 P.2d at 38 ("If [the police officer] was not going to inventory these articles [found in the bag] (and he did not), why, one wonders, did he unzip the toiletry bag and search its contents?").

Furthermore, the State's reliance on the mere existence of the department's policy, without putting forth evidence demonstrating the validity of *this* search pursuant to said policy, compels us to conclude that the State failed to establish that the booking deputy adhered to the department's policy during the search of Nye's backpack.[3] *See Lafayette*, 462 U.S. at 647 (explaining that while "it is not our function to write a manual on administering routine, neutral procedures of the station house[,]" we nevertheless must "assure against violations of the Constitution"). Despite department policy requiring the booking deputy to conduct the inventory search in camera view, the State failed to introduce any video evidence depicting the booking deputy's inspection of the backpack. The record is likewise devoid of any testimonial evidence describing this search. In addition, Nye did not sign the inventory receipt for the property stored, as required by the department's policy, and the State failed to address this omission. Because we determine the State failed to show that the booking deputy conducted the search pursuant to standard procedure, it also cannot be said that the booking deputy's search of Nye's backpack adequately served the purpose of an inventory search. *See Weintraub*, 110 Nev. at 289, 871 P.2d at 340 (explaining that the purpose of an inventory search is to protect personal property, insulate officers from charges of theft, and expose any possible danger).

For these reasons, we hold that the search incident to arrest was invalid, and that the State failed to prove by a preponderance of the evidence that but for the officer's unlawful search, the contraband

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[3]The dissent interprets this conclusion as imposing a separate requirement—that an officer must conform to official procedure in order to establish the validity of an inventory search. We disagree with this characterization. Here, the State *solely* relied on the existence of an official procedure to show the validity of the inventory search but failed to put forth *any* evidence demonstrating that the booking deputy followed the department's policy when searching Nye's backpack. For this reason, we cannot defer to the existence of a policy alone to conclude that the search here was reasonable. *See South Dakota v. Opperman*, 428 U.S. 364, 372 (1976) (explaining "that inventories pursuant to standard police procedures are reasonable").

Moreover, this conclusion is entirely consistent with the dissent's point that an inventory search need not conform to official procedure to be valid, so long as the State can otherwise prove that the search was reasonable. *See Camacho v. State*, 119 Nev. 395, 402, 75 P.3d 370, 375 (2003). But the State never sought to validate the reasonableness of the search. Regrettably, both the State and the dissent lose sight of who bears the burden to salvage the evidence found during an unlawful search when there is a failure to comply with department policy.

would have been inevitably discovered through a *lawful* inventory search. *See Camacho v. State*, 119 Nev. 395, 402, 75 P.3d 370, 375 (2003) (explaining that the inevitable-discovery doctrine permits the introduction of evidence originally obtained by unconstitutional conduct if the prosecution establishes by a preponderance of the evidence that it would have been lawfully discovered). Accordingly, we affirm the district court's order granting Nye's suppression motion.

Gibbons, Parraguirre, and Stiglich, JJ., concur.

Cadish, J., with whom Pickering, C.J., and Silver, J., agree, concurring in part and dissenting in part:

I agree with the majority that the search incident to arrest was unlawful, but disagree with the majority's conclusion that the inventory search was invalid. While an officer must produce an inventory list following an inventory search, *see State v. Greenwald*, 109 Nev. 808, 811, 858 P.2d 36, 38 (1993) (holding that "[w]ithout an inventory, we can have no inventory search"), this court's precedent does not require an itemized list of the contents of a container for the inventory search to be valid. And in my view, neither the United States Constitution nor the Nevada Constitution requires such specificity. Rather, "[t]he touchstone of the Fourth Amendment is reasonableness." *Florida v. Jimeno*, 500 U.S. 248, 250 (1991). To that end, our jurisprudence scrutinizing the sufficiency of an inventory search simply focuses on whether the inventory was a ruse or sham to conduct an illegal search. *See, e.g.*, *Diomampo v. State*, 124 Nev. 414, 432, 185 P.3d 1031, 1042 (2008) (observing that an "inventory search must not be a ruse for general rummaging in order to discover incriminating evidence" (quoting *Greenwald*, 109 Nev. at 810, 858 P.2d at 37 (internal quotation marks omitted))); *but cf. Greenwald*, 109 Nev. at 810, 858 P.2d at 37-38 (concluding that a search was merely a ruse where "[t]he contraband . . . was found only after a most intense and minute search of virtually every square inch of Greenwald's motorcycle" and "the officer did not even pretend to prepare a complete inventory of all of the items that were the product of his extensive search").[1]

The majority's decision does not address this jurisprudence, and Nye does not even argue that the booking deputy's inventory search was a ruse for an otherwise illegal investigatory search. On the contrary, the undisputed evidence in the record shows that the inventory search here was *not* such a ruse. The booking deputy testified that the

[1]Federal jurisprudence also addresses the constitutionality of inventory searches in the context of whether the search was merely a ruse for an otherwise impermissible search. For example, in *Florida v. Wells*, 495 U.S. 1, 4 (1990), on which the majority relies, the United States Supreme Court based its holding "on the principle that an inventory search must not be a ruse for a general rummaging in order to discover incriminating evidence."

department's general practice is to "[s]ometimes" "just put 'bag'" as a bulk item instead of providing an itemized list. She also testified that even if the arresting officer does not discover contraband, she must conduct a second search to ensure that no contraband enters the jail. She explained that she would rather *not* find contraband in an arrestee's items because she does not want to become a witness in the case. This testimony is evidence that the booking deputy was *not* conducting the search with the intent to incriminate Nye, nor as a pretext for an otherwise impermissible search. Rather, the testimony and other evidence indicates that she was following established practices in good faith. The district court found this testimony credible, and there is no basis in the record to conclude otherwise.

Further, although I agree with the majority's conclusion that Nye's backpack likely contained items other than the confiscated contraband, I disagree that an inventory that fails to list these items cannot be a *true* inventory. And the majority does not cite any authority supporting such a conclusion. Instead, it cites two cases wherein we invalidated vehicle searches under significantly different circumstances. In *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 339 (1994), an officer impounded Weintraub's vehicle and conducted an inventory search of its contents. Weintraub established that his "vehicle contained approximately one hundred items including valuable items . . . such as Weintraub's wallet which contained money and identification, an additional $150.00 in cash found in the center console, and an adding machine." *Id.* at 289, 871 P.2d at 340. Because the inventory listed only eight items, none of which were Weintraub's valuables, we concluded that the inventory list did not serve the purposes of an inventory search. *Id.* And in *Greenwald*, 109 Nev. at 809, 858 P.2d at 37, the officer conducted an extremely thorough search of Greenwald's motorcycle, "examining the contents of the gas and oil tanks and even dismantling a flashlight." His failure to produce a detailed inventory revealed "that the officer was not doing what he was doing just for the sake of taking inventory of Greenwald's 'valuables,'" *id.* at 810, 858 P.2d at 38, and was instead searching for contraband, *id.* at 809, 858 P.2d at 37.

Here, however, the arresting officer found and confiscated the contraband *before* the inventory search. And the booking deputy's unrefuted testimony makes clear that she was not motivated to incriminate Nye, and in fact would prefer not to. Further, the evidence suggests that Nye was present during the inventory search, after which her items were safely placed in a numbered holding bag. Nye did not argue—let alone establish—that her backpack contained valuable items that warranted inventorying. And in fact she signed the inventory copy upon her release, acknowledging the receipt of all her property. In the absence of any evidence that the booking deputy was acting in bad faith, these procedures adequately served

the purposes of an inventory search. *See Weintraub*, 110 Nev. at 289, 871 P.2d at 340 (describing the purpose of an inventory search as "protecting the . . . owner's property, protecting the police against charges of theft, and protecting the police from possible danger"). Thus, based on these significant differences, *Weintraub* and *Greenwald* do not, in my view, mandate invalidating the inventory search here.

Finally, although the majority focuses on the State's failure to establish that the booking deputy followed official procedure, inventory-search analysis should instead focus on whether the search was *reasonable*, which does not necessarily require adherence to an official procedure. The majority relies on *South Dakota v. Opperman*, 428 U.S. 364, 372 (1976), in which the United States Supreme Court concluded that "inventories pursuant to standard police procedures are reasonable." In doing so, the Court provided a *sufficient* condition for establishing reasonableness, i.e., conformance to police procedures is *sufficient* to establish that an inventory search is reasonable. But the majority seems to misinterpret it as a *necessary* condition, i.e., an inventory search *must* conform to police procedures in order to be reasonable. This is simply illogical. In fact, the Supreme Court reiterated that "[t]he question is rather whether the search was *reasonable* under the Fourth Amendment." *Id.* (quoting *Cooper v. California*, 386 U.S. 58, 61 (1967)). Thus, an inventory search that does not follow official procedures can still be constitutional, so long as it is reasonable. *See, e.g.*, *United States v. Taylor*, 636 F.3d 461, 465 (8th Cir. 2011) ("Even if police fail to adhere to standardized procedures, the search is nevertheless reasonable provided it is not a pretext for an investigatory search."). For the reasons stated above, I would conclude that the search here was reasonable. Thus, even if the booking deputy failed to follow official procedure, the search was nevertheless constitutional. I would therefore apply the inevitable-discovery doctrine here and reverse the district court's suppression of the drugs and drug paraphernalia. *See Davis v. United States*, 564 U.S. 229, 244 (2011) (acknowledging that "[s]uppression would thus be inappropriate . . . if the inevitable-discovery exception were applicable [here]").

CLARK COUNTY, A POLITICAL SUBDIVISION OF THE STATE OF NEVADA; AND THE STATE OF NEVADA EX REL. NEVADA COMMISSION ON PEACE OFFICER STANDARDS AND TRAINING, APPELLANTS, *v.* ROBERT L. ELIASON, AN INDIVIDUAL AND IN HIS OFFICIAL CAPACITY AS CONSTABLE OF NORTH LAS VEGAS TOWNSHIP, RESPONDENT.

No. 78434

July 30, 2020 468 P.3d 817

Certified question under NRAP 5, relating to the procedure for removing a constable from office under NRS 258.007. United States District Court, District of Nevada; Jennifer Dorsey, Judge.

Question answered.

Aaron D. Ford, Attorney General, and *Michael D. Jensen*, Senior Deputy Attorney General, Carson City, for Appellant Nevada Commission on Peace Officer Standards and Training.

Olson, Cannon, Gormley, Angulo & Stoberski and *Thomas D. Dillard, Jr.*, Las Vegas, for Appellant Clark County.

Armstrong Teasdale LLP and *Jeffrey F. Barr*, Las Vegas; *Evans Fears & Schuttert LLP* and *Kelly A. Evans, Chad R. Fears*, and *Lee I. Iglody*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, SILVER, J.:

The United States District Court for the District of Nevada has certified a question to this court regarding the interpretation of NRS 258.007. That statute requires a constable to become certified as a category II peace officer within a certain amount of time or forfeit the office. The federal district court has asked that we clarify whether this statute gives the Clark County Board of Commissioners the power to remove a constable from office, or whether a constable can be removed only through a *quo warranto* action. We conclude NRS 258.007 does not give the Board power to remove a constable from office or necessitate *quo warranto* proceedings, as the statute works an automatic forfeiture of office if the constable fails to become certified as a category II peace officer.

[1]THE HONORABLE ELISSA F. CADISH voluntarily recused herself from participation in the decision of this matter.

I.

NRS 258.007 (2015)[2] requires constables to become certified as a category II peace officer by the Commission on Peace Officer Standards and Training (POST) within a year after the constable takes office. NRS 258.007(1). POST may grant an extension of up to six months. *Id.* If the constable fails to timely certify with POST, "the constable forfeits his or her office." NRS 258.007(2).

Robert Eliason was elected to the office of North Las Vegas Constable in November 2014 and took office in January 2015. Eliason did not obtain POST certification within the specified time, and in September 2015, he sought a six-month extension. POST approved an extension until July 4, 2016. On June 29, 2016, POST sent a letter to the Clark County Board of Commissioners informing them that Eliason would not be able to meet NRS 258.007's certification requirement by the extended deadline and that he would forfeit his office. The Board added an agenda item to its July 2017 meeting that recommended the Board declare Eliason had forfeited his office and discuss whether to abolish the office or fill the vacancy.[3]

Before the Board could meet, Eliason sued Clark County and POST in state district court and moved for a preliminary injunction to prevent the forfeiture of the office at the Board meeting. The state district court granted the preliminary injunction in August 2017. Relying in part on *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), the state district court found that the Board lacked authority to remove Eliason from office and the proper method of declaring a forfeiture of office was a *quo warranto* action by the attorney general.

Eliason then amended his complaint to add a claim for a violation of the Americans with Disabilities Act, and Clark County removed the case to federal court. Eliason moved for declaratory judgment, urging the federal court to adopt the ruling set forth in the state court's order granting a preliminary injunction. The federal district court concluded the heart of the case was the state-law issue of NRS 258.007's application and constitutionality, and certified the following question to this court: Does NRS 258.007 give the [Board] the power to remove a constable from office, or can a constable be removed only with a *quo warranto* action?

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[2]This statute was amended in 2019 and the certification requirement now includes category I or category II POST certification, and requires certification before declaring candidacy for office in certain townships. The amendments, however, do not change our analysis of the relevant certification and forfeiture language discussed herein. *Compare* NRS 258.007 (2015), *with* NRS 258.007 (2019). We note, however, that because the statute's subsections were renumbered with the amendment, all references in this opinion are to the 2015 version of the statute.

[3]Under NRS 258.007(2), NRS 258.030, and NRS 258.010, the Board had the option to either fill the vacancy or abolish the office.

II.

As public officers, constables must be qualified to hold office. *See* 70 Am. Jur. 2d *Sheriffs, Police, and Constables* § 7 (2016). The legislature may prescribe specific qualifications necessary to holding the office, such as educational requirements or physical condition requirements. *Id. Black's Law Dictionary* defines "forfeiture" as "[t]he loss of a right, privilege, or property because of a . . . breach of obligation, or neglect of duty," whereupon "[t]itle is instantaneously transferred to another, such as the government." *Forfeiture*, *Black's Law Dictionary* (11th ed. 2019). At common law, a "forfeiture can be created and declared only by the constitution or a valid statute," and courts are, therefore, "without authority to create and declare a forfeiture of office." 63C Am. Jur. 2d *Public Officers and Employees* § 164 (2018). However, where a statute requires the automatic forfeiture of a public office for misconduct, the facts may need to be established in a judicial proceeding and a judicial declaration of forfeiture may be necessary. 70 Am. Jur. 2d *Sheriffs, Police, and Constables* § 28 (2016). These considerations guide our analysis of the statute at issue.

We consider issues of statutory interpretation de novo. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 609, 427 P.3d 113, 119 (2018). We will not look beyond the statute's plain language if the statute is unambiguous. *Id.*

NRS 258.007, titled "Certification as category II peace officer required in certain townships; forfeiture of office," provides:

> 1. Each constable . . . shall become certified by [POST] as a category II peace officer within 1 year after the date on which the constable commences his or her term of office or appointment unless the Commission, for good cause shown, grants in writing an extension of time, which must not exceed 6 months.
>
> 2. If a constable does not comply with the provisions of subsection 1, the constable forfeits his or her office and a vacancy is created which must be filled in accordance with NRS 258.030.

In turn, NRS 258.030 (1997)[4] provides that if the Board does not abolish the office of constable, and "if any vacancy exists or occurs in the office of constable in any township, the board of county commissioners shall appoint a person to fill the vacancy pursuant to NRS 245.170." NRS 245.170 sets forth the procedure the Board must follow in filling a vacancy, including appointing a replacement or placing the position on the ballot where appropriate.

[4]NRS 258.030 was also amended in 2019, but those amendments do not substantively affect the language at issue here. *Compare* NRS 258.030 (1997), *with* NRS 258.030 (2019). Nevertheless, we look at the language in effect at the time of the events at issue here.

Both parties acknowledge NRS 258.007 does not expressly provide the Board with authority to remove a constable from office, but they disagree as to the statute's implementation. Clark County argues that the statute creates a self-executing forfeiture and requires Clark County to fill or abolish the vacant office. Eliason argues that the statute is not self-executing and that declaring forfeiture is necessarily a judicial function.

We conclude NRS 258.007(2)'s plain language makes the forfeiture self-executing where the constable fails to timely certify as a category II peace officer. Subsection 1 plainly requires all constables to become POST-certified as a condition of holding office, and subsection 2 states that a constable forfeits his or her office by failing to comply with the requirement. Nothing in the statute suggests that the county, the Board, or any other party must take any action to effect or formalize the forfeiture or that the constable has any right to retain office after failing to timely obtain POST certification. To the contrary, applying the plain language results in an automatic forfeiture where the constable fails to timely certify.[5] *See* NRS 258.007(2); *cf.* 70 Am. Jur. 2d *Sheriffs, Police, and Constables* § 7 (2016) (noting legislatures generally have power to prescribe eligibility qualifications for peace officers, including educational and physical condition requirements).

Importantly, too, we distinguish NRS 258.007, which sets forth a requirement for holding office, from other statutes that designate events or circumstances as triggering forfeiture.[6] With the latter, judicial proceedings are likely necessary to establish the facts triggering the forfeiture and provide the officer with due process. *See* 70 Am. Jur. 2d *Sheriffs, Police, and Constables* § 28 (2016). Here, however, POST certification is an eligibility requirement, and unless the constable contests POST's determination—which Eliason does not do here—judicial proceedings are unnecessary to determine whether the constable has met that statutory requirement for holding office.[7]

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[5]We note the Legislature's failure to denote an actor in both NRS 258.007(2) ("a vacancy is created") and NRS 258.030 ("if any vacancy . . . occurs") further supports our interpretation that no person or organization declares the vacancy, but that the vacancy occurs automatically.

[6]In particular, we distinguish this statute from others Eliason raises, notably NRS 35.010(2) and NRS 283.040. Critically, NRS 258.007 establishes a requirement to hold the specific office of constable. In contrast, NRS 35.010 permits a *quo warranto* action to be brought against a public official, and NRS 283.040 lists grounds for removing a public official from office and declaring the office vacant. Moreover, these are general statutes and do not control over NRS 258.007, which applies specifically to this situation. *See State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 129 Nev. 775, 778, 312 P.3d 475, 478 (2013) ("A specific statute controls over a general statute." (quoting *State, Tax Comm'n v. Am. Home Shield of Nev., Inc.*, 127 Nev. 382, 388, 254 P.3d 601, 605 (2011))).

[7]We note the legislative history shows the Legislature wanted to enable a constable's swift removal from office where the constable failed to obtain POST

We therefore answer the first part of the certified question—whether NRS 258.007 gives the Board the power to remove a constable from office—in the negative, as the forfeiture is self-executing. As our decision necessarily resolves the second part of the certified question—whether a constable can be removed from office only with a *quo warranto* action[8]—we do not separately address that issue.[9]

III.

The plain language of NRS 258.007 provides that a constable must become POST-certified and the failure to do so works a forfeiture of the office. Thus, under NRS 258.007, the Board has neither the authority nor the need to declare a forfeiture because that forfeiture occurs automatically upon the constable's failure to timely certify as a category II peace officer.

Pickering, C.J., and Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.

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certification and intended for the Board to oversee the removal. *See* Hearing on S.B. 462 Before the Senate Comm. on Gov't Affairs, 80th Leg. (Nev., Apr. 1, 2019) (addressing concerns with constables misusing their powers of office and expressing a desire to strengthen the POST-certification requirements); Hearing on A.B. 223 Before the Assembly Comm. on Judiciary, 77th Leg. (Nev., Apr. 12, 2013) ("Section 8 of the bill authorizes county commissioners to penalize constables who fail to file a report or any other documentation with the county or the Nevada Commission on Peace Officer[ ] Standards and Training (POST). . . . [N]o one seemed to know whose jurisdiction it was to oversee the constable's office. This makes it clear that it is the county commission." (statement of Assemblywoman Marilyn Kirkpatrick)); Hearing on A.B. 223 Before the Senate Comm. on Gov't Affairs, 77th Leg. (Nev., May 13, 2013) (explaining the bill "authorizes a board of county commissioners to penalize constables" who did not demonstrate they met the POST-certification requirements (statement of Assemblywoman Marilyn Kirkpatrick)).

[8]The parties agree, on appeal, that a *quo warranto* action is not the sole means of removing a constable from office.

[9]Although the district court relied in part on *Heller v. Legislature*, 120 Nev. 456, 93 P.3d 746 (2004), in granting Eliason's preliminary injunction, we note that case is distinguishable and not controlling here. In *Heller*, our discussion of *quo warranto* actions was dicta, as we had already concluded that a lack of standing resolved that case. 120 Nev. at 460-63, 93 P.3d at 749-51; *see also City of Oakland v. Desert Outdoor Advert., Inc.*, 127 Nev. 533, 539, 267 P.3d 48, 51-52 (2011) ("Dictum is not controlling. A statement in a case is dictum when it is unnecessary to a determination of the questions involved." (citations omitted) (internal quotation omitted)). Furthermore, *Heller* was limited to whether such actions were the sole method to challenge a legislator's ability to concurrently be a government employee, 120 Nev. at 458, 93 P.3d at 748, not whether such actions were the sole method to remove an elected official from his or her office.

JAMES TAYLOR; NEVADA GAMING CONTROL BOARD; AND AMERICAN GAMING ASSOCIATION, APPELLANTS, *v.* DR. NICHOLAS G. COLON, RESPONDENT.

No. 78517

July 30, 2020, as amended December 31, 2020 482 P.3d 1212

Appeal from a district court order denying an anti-SLAPP motion to dismiss. Eighth Judicial District Court, Clark County; Linda Marie Bell, Judge.

Reversed and remanded.

[Rehearing denied February 25, 2021]

[En banc reconsideration denied May 6, 2021]

Aaron D. Ford, Attorney General, and *Theresa M. Haar*, Special Assistant Attorney General, Carson City, for Appellants James Taylor and Nevada Gaming Control Board.

McDonald Carano LLP and *Jeffrey A. Silvestri* and *Jason B. Sifers*, Las Vegas, for Appellant American Gaming Association.

Nersesian & Sankiewicz and *Robert A. Nersesian* and *Thea M. Sankiewicz*, Las Vegas, for Respondent.

Before the Supreme Court, GIBBONS, STIGLICH and SILVER, JJ.

AMENDED OPINION

By the Court, STIGLICH, J.:

We are asked to consider for the first time whether Nevada's anti-SLAPP statutes, which include a procedural mechanism to summarily dismiss meritless lawsuits aimed at chilling speech, violate the constitutional right to a jury trial. We hold that they do not, and therefore determine that the district court did not err in concluding that Nevada's anti-SLAPP statutes are constitutional and proceeding to consider an anti-SLAPP motion to dismiss. However, we determine that the district court erred in denying appellants' anti-SLAPP motion to dismiss, because appellants demonstrated that appellant James Taylor's presentation at the Global Gaming Expo was a good-faith communication. Accordingly, we reverse the district court's order and remand for further proceedings on the motion.

BACKGROUND

On October 2, 2017, appellant James Taylor, as Deputy Chief of the Enforcement Division of appellant Nevada Gaming Con-

trol Board (GCB), gave a presentation entitled *Scams, Cheats, and Blacklists* to approximately 300 attendees at the Global Gaming Expo, an event organized by appellant American Gaming Association (AGA). The purpose of Taylor's presentation was to identify the types of scams, cheating, and cheating devices that GCB investigated.

During a section of the presentation on the use of cheating devices, Taylor presented a nine-second video clip depicting an individual playing blackjack while holding a standard tally counter device under the table. The individual was only visible from the neck down, and Taylor did not mention the individual by name. Nonetheless, respondent Nicholas Colon, a well-known gambler who attended the presentation, claims that many attendees were able to identify the depicted individual as himself. Appellants do not dispute that Colon was depicted in the video clip.

Taylor proceeded to identify the counting device and explain that it was the only device GCB recovered that year. Colon alleges that Taylor also stated that the person depicted in the video clip was arrested for his behavior and was a cheater and criminal, although appellants dispute Taylor saying such statements.

Colon sued Taylor, GCB, and AGA for defamation. He claimed that the video clip was presented untruthfully as an alleged exemplar of cheating. Although Colon admitted that he possessed the counting device, he maintained that such device could not be used to cheat at blackjack. He therefore asserted that the video clip and Taylor's accompanying comments were defamatory.

Appellants filed an anti-strategic lawsuit against public participation (anti-SLAPP) motion to dismiss, arguing that Taylor's presentation was a good-faith statement made in direct connection with a matter of public concern in a public forum, and that Colon could not demonstrate with prima facie evidence a probability of prevailing on his defamation claim. In support of their motion, appellants attached Taylor's declaration. Taylor first attested that he acquired all of the information, videos, and photographs contained in his presentation through GCB investigations. Second, he stated that the information contained in his presentation was true and accurate. Third, he declared that he did not state that Colon was a cheater, but rather focused his presentation on the counting device recovered by GCB. Colon opposed the motion, arguing that Nevada's anti-SLAPP statutes violated his constitutional right to a jury trial and that appellants failed to show that Taylor's presentation was made in good faith.

The district court denied appellants' anti-SLAPP motion to dismiss. Although it concluded that Nevada's anti-SLAPP statutes do not violate Colon's constitutional right to a jury trial, it found that Taylor's presentation was not made in good faith. In doing so, the district court relied on declarations attached to Colon's opposition to appellants' anti-SLAPP motion to dismiss, which stated that the

counting device could not be used to cheat at blackjack. The court also relied on the fact that Taylor did not dispute this contention in his own declaration. The district court therefore concluded that Taylor's presentation was neither truthful nor made without knowledge of its falsehood, and denied appellants' anti-SLAPP motion to dismiss under the first prong of the anti-SLAPP analysis. This appeal followed.

DISCUSSION

In this appeal, we first evaluate whether Nevada's anti-SLAPP statutes violate Colon's constitutional right to a jury trial. We then consider whether the district court erred in denying appellants' anti-SLAPP motion to dismiss.

Nevada's anti-SLAPP statutes do not violate Colon's constitutional right to a jury trial

Nevada's constitution provides that "[t]he right of trial by Jury shall be secured to all and remain inviolate forever." Nev. Const. art. 1, § 3. The constitution "guarantees the right to have factual issues determined by a jury." *Tam v. Eighth Judicial Dist. Court*, 131 Nev. 792, 796, 358 P.3d 234, 238 (2015) (internal quotation marks omitted). Colon argues that Nevada's anti-SLAPP statutes violate his constitutional right to a jury trial.

We review the constitutionality of statutes de novo. *Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 292, 129 P.3d 682, 684 (2006). "Statutes are presumed to be valid, and the challenger bears the burden of showing that a statute is unconstitutional." *Tam*, 131 Nev. at 796, 358 P.3d at 237-38 (internal quotation marks omitted). "In order to meet that burden, the challenger must make a clear showing of invalidity." *Id.* at 796, 358 P.3d at 238 (internal quotation marks omitted). Moreover, "for a statute to violate the right to trial by jury, a statute must make the right practically unavailable." *Id.* The right to a jury trial is not violated where a plaintiff has not stated a claim on which relief may be granted. *See Etalook v. Exxon Pipeline Co.*, 831 F.2d 1440, 1447 (9th Cir. 1987) ("The very existence of a summary judgment provision demonstrates that no right to a jury trial exists unless there is a genuine issue of material fact suitable for a jury to resolve.").

Nevada's anti-SLAPP statutes provide "defendants with a procedural mechanism to dismiss meritless lawsuit[s] . . . before incurring the costs of litigation." *Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019) (first alteration in original) (internal quotation marks omitted). Specifically, NRS 41.660 allows a party to file an anti-SLAPP motion to dismiss and sets forth a two-pronged test for determining whether the district court should grant or deny such motion.

Under prong one, the defendant must show by a preponderance of the evidence that the plaintiff's claim is based upon a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). Under prong two, the burden shifts to the plaintiff to demonstrate "with prima facie evidence a probability of prevailing on the claim." NRS 41.660(3)(b).

Colon argues that the district court superseded the jury's role because it was required to make findings of fact as to whether Taylor's presentation was a good-faith communication under prong one of the anti-SLAPP analysis and would have to evaluate Colon's likelihood of success on his defamation claim under prong two. We disagree.

Nevada's anti-SLAPP statutes "have undergone a series of legislative changes to ensure full protection and meaningful appellate review." *Coker*, 135 Nev. at 10, 432 P.3d at 748. Prior to 2013, NRS 41.660 instructed courts to treat the anti-SLAPP motion to dismiss as a motion for summary judgment. *Id.* In October 2013, the Legislature removed the language likening the anti-SLAPP motion to dismiss to a motion for summary judgment and added a burden-shifting framework that placed a distinct burden of proof on each party. *Id.* Specifically, plaintiffs bore a higher "clear and convincing evidence" burden of proof under prong two. *Id.* However, in 2015, the Legislature decreased the plaintiff's burden of proof, requiring a plaintiff to demonstrate "with prima facie evidence a probability of prevailing on the claim." 2015 Nev. Stat., ch. 428, § 13, at 2455. As amended, the anti-SLAPP motion to dismiss "again functions like a summary judgment motion procedurally." *Coker*, 135 Nev. at 10, 432 P.3d at 748.

In their current form, we determine that Nevada's anti-SLAPP statutes do not violate Colon's constitutional right to a jury trial. Under prong one, the court must only decide whether the *defendant* met his burden to demonstrate that the relevant communications were made in good faith. *See* NRS 41.660(3)(a). Because the district court need not make any findings of fact specifically regarding a plaintiff's underlying claim and cannot defeat a plaintiff's underlying claim under prong one, we determine that prong one itself does not render the jury-trial right practically unavailable.

Under prong two, the court must only decide whether the plaintiff demonstrated with prima facie evidence a probability of prevailing on the claim. *See* NRS 41.660(3)(b). The court does not make any findings of fact. Rather, prong two merely requires a court to decide whether a plaintiff's underlying claim is legally sufficient. *See Briggs v. Eden Council for Hope & Opportunity*, 969 P.2d 564, 574-75 (Cal. 1999) (holding that California's equivalent anti-SLAPP statutes only require the court to determine whether the plaintiff stated and substantiated a legally sufficient claim); *see also* NRS 41.665(2)

(stating that a plaintiff's burden under prong two is the same as a plaintiff's burden under California's anti-SLAPP law). In other words, the prima facie evidence standard requires the court to decide whether the plaintiff met his or her burden of production to show that a reasonable trier of fact could find that he or she would prevail.

We do not make light of the right to a civil jury trial, which has served as a check against unbridled despotism throughout American history and is protected as a fundamental right under Nevada's constitution. But Nevada's anti-SLAPP statutes do not interfere with the jury's ability to make findings of fact as to a plaintiff's underlying claim. Rather, they function as a procedural mechanism, much like summary judgment, that allows the court to summarily dismiss claims with no reasonable possibility of success. Upon making the requisite showing under prong two, a plaintiff can proceed to a jury trial on the underlying claim. A plaintiff who has failed to meet this burden would not have been entitled to a jury trial, even absent an anti-SLAPP motion to dismiss. The right to a jury trial is therefore still available.

Our interpretation of Nevada's anti-SLAPP statutes is consistent with numerous other jurisdictions' conclusions regarding their own equivalent anti-SLAPP statutes. *See Briggs*, 969 P.2d at 574-75 (implying that California's anti-SLAPP statutes do not violate the right to a jury trial); *Competitive Enter. Inst. v. Mann*, 150 A.3d 1213, 1236 (D.C. 2016) (interpreting Washington, D.C.'s equivalent anti-SLAPP statutes as complying with a plaintiff's right to a jury trial where dismissal requires determining that a plaintiff could not succeed as a matter of law); *Handy v. Lane Cty.*, 385 P.3d 1016, 1024-26 (Or. 2015) (noting concerns about the right to a jury trial raised in the legislative history and interpreting Oregon's equivalent anti-SLAPP statutes as to only require a plaintiff to submit sufficient evidence from which a reasonable trier of fact could find that a plaintiff met his or her burden of production); *Landry's, Inc. v. Animal Legal Def. Fund*, 566 S.W.3d 41, 67 (Tex. App. 2018) (determining that a movant's burden to establish a valid defense by a preponderance of the evidence under Texas' equivalent anti-SLAPP statutes does not violate a plaintiff's right to a jury trial).

Notably, Colon's reliance on the Minnesota Supreme Court's and Washington Supreme Court's decisions, which held that Minnesota's and Washington's anti-SLAPP statutes violated the constitutional right to a jury trial, is misguided. *See Leiendecker v. Asian Women United of Minn.*, 895 N.W.2d 623, 636 (Minn. 2017); *Davis v. Cox*, 351 P.3d 862, 874-75 (Wash. 2015), *abrogated on other grounds by Maytown Sand & Gravel, LLC v. Thurston Cty.*, 423 P.3d 223 (Wash. 2018). Both Minnesota's and Washington's anti-SLAPP statutes included the higher burden of "clear and convincing evidence" under prong two of the anti-SLAPP analysis, whereas Nevada's anti-SLAPP statutes in their current form only require a plaintiff to

demonstrate "with prima facie evidence a probability of prevailing on the claim." While the "clear and convincing" burden might interfere with a jury's fact-finding abilities, the Nevada court's threshold determination on whether a claim is legally sufficient does not. We therefore hold that Nevada's anti-SLAPP statutes do not violate Colon's constitutional right to a jury trial.

Appellants demonstrated that Taylor's presentation was made in good faith

Taylor argues that the district court erred in denying his anti-SLAPP motion to dismiss under prong one of the anti-SLAPP analysis. We review a district court's grant or denial of an anti-SLAPP motion to dismiss de novo. *Coker*, 135 Nev. at 11, 432 P.3d at 749. In making such a determination, we conduct an independent review of the record and consider affidavits concerning the facts upon which liability is based. *Id.* We do not weigh the evidence, but instead accept the plaintiff's submissions as true and consider only "whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law." *Id.* (internal quotation marks omitted). The defendant's evidence, especially a declaration regarding the defendant's state of mind, is likewise entitled to be believed at this stage, at least "absent contradictory evidence in the record." *Stark v. Lackey*, 136 Nev. 38, 43, 458 P.3d 342, 347 (2020).

Under prong one, a defendant must show by a preponderance of the evidence that the plaintiff's claim is based upon a "good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). NRS 41.637 further defines "good faith communication" as one of four types related to public concern; relevant here is a "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum, which is truthful or is made without knowledge of its falsehood." NRS 41.637(4);[1] *Shapiro v. Welt*, 133 Nev. 35, 40, 389 P.3d 262, 268 (2017) ("[N]o communication falls within the purview of NRS 41.660 unless it is truthful or made without knowledge of its falsehood." (internal quotation marks omitted)).

It is clear that Taylor's presentation about cheating in the gaming industry for 300 attendees of an international gaming conference

[1]Taylor also cites NRS 41.637(3), defining a good-faith communication as a "[w]ritten or oral statement made in direct connection with an issue under consideration by a legislative, executive, or judicial body, or any other official proceeding authorized by law . . . which is truthful or is made without knowledge of its falsehood." NRS 41.637(3). However, because Taylor failed to present any argument below or on appeal as to how his presentation was a good-faith communication under this definition, we need not consider this alternative. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . is deemed to have been waived and will not be considered on appeal.").

was made in direct connection with an issue of public interest in a public forum. *See Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (adopting guiding principles on what constitutes public interest); *Coker*, 135 Nev. at 14, 432 P.3d at 751 (reasoning that the definition of public interest should be construed broadly); *see also Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205, 209, 212 (Ct. App. 2000) (holding that a "public forum" is defined as a place that is open to the public or where information is freely exchanged, regardless of whether it is uninhibited or controlled). The remaining question is therefore: did appellants demonstrate that Taylor's presentation was truthful or made without knowledge of its falsehood, such that it was made in good faith?

In *Rosen v. Tarkanian*, we held that "in determining whether the communications were made in good faith, the court must consider the 'gist or sting' of the communications as a whole, rather than parsing individual words in the communications." 135 Nev. 436, 437, 453 P.3d 1220, 1222 (2019). In other words, the relevant inquiry is "whether a preponderance of the evidence demonstrates that the gist of the story, or the portion of the story that carries the sting of the [statement], is true," *id*. at 441, 453 P.3d at 1224 (alteration in original) (internal quotation marks omitted), and not the "literal truth of each word or detail used in a statement," *id.* at 440, 453 P.3d at 1224 (internal quotation marks omitted). Furthermore, in determining good faith, this court considers "all of the evidence submitted by the defendant in support of his or her anti-SLAPP motion."[2] *Id.* at 439, 453 P.3d at 1223.

First, we note that the "gist or sting" of the challenged portion of Taylor's presentation was undeniably that a player had been caught using a cheating device in violation of NRS 465.075(1). Taylor's presentation was entitled *Scams, Cheats, and Blacklists*. It showed a video clip of a player holding the device underneath a blackjack table during a section of the presentation devoted specifically to cheating devices. Taylor's denial that he specifically called the individual in the video a "cheater" invites the court to "pars[e] individual words in the communications" to undermine a "gist or sting" that is otherwise clear. *See id.* at 440, 453 P.3d at 1224.

However, we further hold that appellants demonstrated that Taylor's presentation was made in good faith. Taylor's declaration states that he acquired all of the information, videos, and photographs used in his presentation through GCB investigations, and that the information contained in his presentation was true and accurate. Taylor also stated that he was aware Colon had been arrested for cheating

[2]We recognize that the district court did not have the benefit of our decision in *Rosen* when it denied appellants' anti-SLAPP motion to dismiss in February 2019. The parties, however, did have the opportunity to present arguments based on *Rosen* in their briefs to this court on appeal.

on that day and had later pleaded to a lesser offense as the result of negotiations. This declaration shows that the gist of Taylor's presentation—that the player in the video had been caught with a cheating device—was either truthful or made without knowledge of its falsehood. *See Delucchi v. Songer*, 133 Nev. 290, 300, 396 P.3d 826, 833 (2017) (holding that a defendant demonstrated that his communication was true or made without knowledge of its falsehood when, in a declaration, he stated that the information contained in his communication was truthful to the best of his knowledge and he made no statements he knew to be false).

Although "contradictory evidence in the record" may undermine a defendant's sworn declaration establishing good faith, *Stark*, 136 Nev. at 43, 458 P.3d at 347, Colon failed to contradict Taylor's claim of good faith. Colon points to declarations that, if believed, would establish that the specific counting device he was caught with cannot be used to cheat at blackjack.[3] But these declarations did not address the correct issue at prong one, which is whether Taylor *believed* Colon had been caught with a cheating device, and not whether he was correct. Accordingly, because appellants demonstrated that Taylor's presentation was truthful or made without knowledge of its falsehood, the district court erred in denying appellants' anti-SLAPP motion to dismiss.

CONCLUSION

We hold that Nevada's anti-SLAPP statutes do not violate Colon's right to a jury trial, and therefore, the district court properly considered appellants' anti-SLAPP motion to dismiss. Because appellants sufficiently demonstrated that Taylor's presentation was made in good faith, however, we hold that the district court erred in denying that motion under prong one of the two-part inquiry. We therefore reverse the district court's order and remand for the district court to proceed to prong two of the anti-SLAPP analysis and for any further proceedings thereafter.

Gibbons and Silver, JJ., concur.

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[3]These declarations claim that, in order to be useful for card counting, a device must have the ability to both add low cards and subtract high cards. They further claim that a simple crowd counter such as the one depicted in Taylor's presentation can only add, not subtract. While the presentation used a stock photo, Colon stated in a declaration that the specific device he possessed was indeed a crowd counter.