tiff must allege and prove that the illegal restraint of trade injured his *competitive position* in the business in which he or she was engaged."). Nevada Recycling does not collect waste and recyclable materials, and therefore, it is not a competitor as to the franchise agreements. Nevada Recycling has not provided any evidence supporting its contention that the ordinances harmed its business. Even if it did, Nevada Recycling, as a noncompetitor, could not show how any alleged injury is the type the antitrust laws were intended to forestall.

Rubbish Runners, on the other hand, is a competitor, as its services include the collection of waste and recyclable materials. However, Rubbish Runners has not provided any evidence supporting its contention that it lost customers due to the franchise agreements. Pursuant to the franchise agreements, Rubbish Runners was allowed to keep its existing customers upon verification of the customers' contracts. Thus, any loss in customers was a direct result of Rubbish Runners' failure to do so.

Based on the foregoing, we conclude that appellants did not make any showing that they suffered any injuries (i.e., damages) from respondents' alleged conspiracy, and thus, they lack antitrust standing. Accordingly, we affirm the district court's order granting summary judgment in favor of respondents.

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

CLARK COUNTY, a Political Subdivision of the State of Nevada, Appellant, *v.* HQ METRO, LLC, an Arizona Limited Liability Company; PROJECT ALTA, LLC, a Nevada Limited Liability Company; PROJECT ALTA II, LLC, a Nevada Limited Liability Company; PROJECT ALTA III, LLC, a Nevada Limited Liability Company; and PROJECT ALTA LIQUIDATING TRUST uad 12/31/09, By and Through MARK L. FINE & ASSOCIATES, a Nevada Corporation, Individually and as Trustee, Respondents.

No. 71877

August 2, 2018 422 P.3d 1243

Appeal from a final judgment in an action for eminent domain. Eighth Judicial District Court, Clark County; Ronald J. Israel, Judge.

Affirmed.

Steven B. Wolfson, District Attorney, and *Leslie A. Nielsen* and *Laura C. Rehfeldt*, Deputy District Attorneys, Clark County, for Appellant.

Law Offices of Brian C. Padgett and *Amy L. Sugden, Brian C. Padgett*, and *Jeremy B. Duke*, Las Vegas, for Respondents.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, CHERRY, J.:

This appeal challenges a district court order apportioning just compensation proceeds in an action for eminent domain. Nevada Power Company, d/b/a Nevada Energy (NV Energy), filed a complaint in eminent domain to obtain an easement for the installation of electrical transmission lines on property owned by respondent HQ Metro, LLC, and leased to appellant Clark County. In October 2013, the district court entered an order allowing NV Energy to occupy the easement area and construct the transmission lines. Before NV Energy physically entered the property to begin construction, however, HQ Metro sold the property to Clark County. The district court concluded that HQ Metro was entitled to compensation for the permanent easement because it was the owner at the time of the order granting occupancy, and the court apportioned the proceeds accordingly. On appeal, HQ Metro and Clark County dispute which one is entitled to compensation for the permanent easement.

We conclude that the right to compensation vested when the district court entered the order granting immediate occupancy in October 2013, which permitted NV Energy to permanently occupy the easement area and to construct and maintain the transmission lines. Thus, the district court properly concluded that HQ Metro, as the property's owner at the time of the taking, was entitled to compensation for the permanent easement.

FACTS AND PROCEDURAL HISTORY

In May 2013, NV Energy filed a complaint in eminent domain to acquire certain easements to construct, operate, and maintain electrical transmission lines on property located at 400 S. Martin Luther King Boulevard in Las Vegas, Nevada. NV Energy sought both a temporary construction easement of 36,863 square feet and a permanent easement of 16,861 square feet for the transmission lines across the property. HQ Metro was named in the complaint as the property's record owner. The complaint also named Clark County as a tenant based on a recorded memorandum of lease and

[1]THE HONORABLE RON D. PARRAGUIRRE, Justice, voluntarily recused himself from participation in the decision of this matter.

purchase option with four Project Alta entities.[2] The lease provided for the development and 30-year lease of office space and a parking garage on the property to Clark County for sublease to the Las Vegas Metropolitan Police Department (LVMPD). The lease also gave Clark County the option to purchase the property three years after LVMPD commenced operations on the property.

After filing the complaint, NV Energy moved for immediate occupancy under NRS 37.100. Negotiations ensued and the parties entered into a stipulation and order for immediate occupancy, conditioned on NV Energy depositing $281,000 with the district court. The stipulation provided that NV Energy was acquiring the easements for public use and authorized NV Energy to immediately occupy both the temporary and permanent easement areas for the purposes of permitting, construction, operation, and maintenance of the transmission lines and associated facilities on the property. The stipulation further restrained and enjoined HQ Metro from interfering with NV Energy's occupancy and performance of the work required for the easements. On October 15, 2013, the district court filed an order granting immediate occupancy pursuant to the stipulation's terms. Shortly thereafter, NV Energy deposited the sum with the court, and the order granting immediate occupancy was recorded against the property.

About a year after the order granting immediate occupancy was entered, but before NV Energy began construction on the project, HQ Metro sold the property to Clark County for $205 million. The September 2014 purchase and sale agreement transferred from HQ Metro to Clark County the real property together with "any and all of [HQ Metro's] rights, easements, licenses and privileges presently thereon or appertaining thereto." Attached to the agreement was a list of title exceptions that included the order granting occupancy, but the agreement did not mention the compensation from the condemnation case or who was entitled to it. The grant, bargain, and sale deed, recorded in October 2014, conveyed title to Clark County subject to an attached list of exceptions, which also included the order granting occupancy to NV Energy.

In January 2015, NV Energy entered the property to begin construction of its facilities. Construction of the transmission lines was completed four months later in May 2015.

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[2]The Project Alta entities identified in the complaint included respondents Project Alta, LLC; Project Alta II, LLC; Project Alta III, LLC; and Project Alta Liquidating Trust U/A/D 12/31/09, by and through Mark L. Fine & Associates. Although the nature of their interest in the property is not entirely clear from the record, they moved collectively with HQ Metro for summary judgment as the prior landowners entitled to the condemnation proceeds. Therefore, we refer to the prior landowners collectively as HQ Metro.

HQ Metro and Clark County each moved for summary judgment and claimed entitlement to the just compensation proceeds. HQ Metro argued that it was entitled to the proceeds as the landowner at the time NV Energy obtained the order granting immediate occupancy on October 15, 2013. Conversely, Clark County asserted that the right to compensation did not vest until NV Energy physically entered the property to install the transmission lines in January 2015.

The district court entered a summary judgment order determining that HQ Metro was entitled to damages for the permanent easement because it owned the property when the permanent construction easement was granted in October 2013. The court also determined that LVMPD was entitled to damages under the temporary construction easement. Thereafter, the parties reached a global settlement for the total amount of $850,000 as compensation due for both the temporary and permanent easements. Consistent with its summary judgment order, the district court apportioned $775,000 to HQ Metro as damages for the permanent easement. Clark County filed this appeal.

DISCUSSION

Under both the Nevada and United States Constitutions, the government may not take private property for public use without the payment of just compensation. Nev. Const. art. 1, § 8(6) ("Private property shall not be taken for public use without just compensation having been first made."); *see also* U.S. Const. amend. V ("[N]or shall private property be taken for public use, without just compensation."). The parties agree that the owner of the property at the time of the taking is entitled to the compensation proceeds but they disagree as to the event that constituted the taking. HQ Metro argues that the taking occurred when the court entered the order granting immediate occupancy in October 2013, whereas Clark County argues that the taking did not occur until NV Energy entered the property to begin construction in January 2015.

Whether a taking has occurred presents a question of law that we review de novo. *See City of Las Vegas v. Cliff Shadows Prof'l Plaza, LLC*, 129 Nev. 1, 11, 293 P.3d 860, 866 (2013). "A taking can arise when the government regulates or physically appropriates an individual's private property. Physical appropriation exists when the government seizes or occupies private property or ousts owners from their private property." *ASAP Storage, Inc. v. City of Sparks*, 123 Nev. 639, 647, 173 P.3d 734, 740 (2007). When a condemnation proceeding is commenced, NRS 37.100 allows the district court to permit a plaintiff, upon a deposit with the court, to occupy the premises sought to be condemned pending the entry of judgment. *See* NRS 37.100(2), (6). The court may "restrain the defendant from hindering or interfering with the occupation of the premises and the

doing thereon of the work required for the easement, fee or property rights." NRS 37.100(8).

The owner of the property at the time of the taking is the one entitled to compensation rather than a subsequent purchaser who owned the property when compensation was paid. *Argier v. Nev. Power Co.*, 114 Nev. 137, 139, 952 P.2d 1390, 1391 (1998). In *Argier*, the power company filed a complaint to obtain an easement across land owned by the Argiers. *Id.* at 138, 952 P.2d at 1390. The district court granted immediate occupancy and the power company installed the power lines, but the Argiers sold the property to the county before the court determined the value of the easement and the amount of compensation. *Id.* at 138, 952 P.2d at 1390-91. Consequently, the power company argued it no longer had a duty to compensate the Argiers for the easement because the property was sold before the taking occurred when the agency received title in the final order of condemnation, whereas the Argiers argued that the taking occurred at the point of physical occupation of the property, before it was sold. *Id.* at 138-39, 952 P.2d at 1391. We held that the power company "effected a taking once it entered upon the land," and that equity mandates that the right to compensation vests when the condemning agency enters into possession of the landowner's property. *Id.* at 141, 952 P.2d at 1392-93. Because the Argiers' right to compensation vested when the power company entered their property, before the sale to the county, the Argiers were entitled to compensation. *Id.* at 142, 952 P.2d at 1393.

The decision in *Argier*, however, is not directly dispositive of the issue before us because, in that case, the power company physically entered the property to install the power lines before the land was sold, and, thus, the *Argier* court made no distinction between the order for immediate occupancy and the physical entry onto the land. Nonetheless, the reasoning in *Argier* is instructive. In particular, the *Argier* court explained that because compensation for a taking is intended as a substitute for the owner's lost interest in the property, the person who owns the property at the time of the taking is entitled to the compensation:

> When the government interferes with a person's possession of his/her property, the owner loses an interest in that property. The award of just compensation is a substitute for that lost interest in the property. When the owner sells what remains of her property, she does not also sell the right to compensation. If she did, the original owner would suffer a loss and the purchaser would receive a windfall.

Id. at 140, 952 P.2d at 1392 (recognizing agreement amongst other jurisdictions on the issue).

In this case, the order granting immediate occupancy constituted a substantial governmental interference with HQ Metro's property

rights. "The bundle of property rights includes all rights inherent in ownership, including the inalienable right to possess, use, and enjoy the property." *ASAP Storage*, 123 Nev. at 647, 173 P.3d at 740 (internal quotations omitted). The order authorized NV Energy to permanently occupy the easement area for the purpose of constructing and maintaining the transmission lines and associated facilities on the property, and restrained and enjoined HQ Metro from interfering with NV Energy's occupation and performance of the work required for the easement. The order restricted HQ Metro's full use and enjoyment of the property, and the entitlement to compensation is a substitute for that lost interest. When HQ Metro sold the property, it conveyed title subject to the occupancy order. Thus, we conclude that the order granting immediate occupancy constituted a taking of property rights and the right to compensation vested at that time. Because HQ Metro was the owner of the property, it was entitled to compensation for the permanent easement.[3]

Clark County maintains that a taking did not occur until NV Energy could no longer abandon the proceeding, when construction on the project commenced. We reject this argument because the order granting immediate occupancy constituted an injury to HQ Metro's property rights. *See Argier*, 114 Nev. at 140, 952 P.2d at 1391 ("Damages for the taking of land or for the injury to the land not taken belong to the one who owns the land at the time of the taking or injury, and they do not pass to a subsequent grantee of the land except by a provision to that effect in the deed or by separate assignment." (quoting 29A C.J.S. Eminent Domain § 194 (1992))). Although a plaintiff may abandon the proceeding at any time until 30 days after the final judgment, if the plaintiff has been placed in possession of the premises under NRS 37.100, the defendant is entitled to damages from occupancy of the abandoned property. NRS 37.180(1), (2). Abandonment "merely results in an alteration in the property interest taken—from full ownership to one of temporary use and occupation." *United States v. Dow*, 357 U.S. 17, 26 (1958). Because the order granting occupancy constitutes an injury to property rights, the right to compensation vested at that time. *See Argier*, 114 Nev. at 141, 952 P.2d at 1393 (holding that equity mandates

[3]Clark County cites *Buzz Stew, LLC v. City of North Las Vegas* for the holding that a former property owner had failed to establish that a taking occurred while it owned the property, and therefore, a provision in the sales contract retaining only the right to proceeds from a future condemnation action reserved no property interest in the former owner. 131 Nev. 1, 7, 341 P.3d 646, 650 (2015). *Buzz Stew* is distinguishable, however, because here, the parties entered into a stipulation and order providing that the easements were being acquired for public use and establishing the date of occupancy as October 15, 2013. Thus, a taking occurred and the right to compensation vested while HQ Metro owned the property.

vesting occurs when the condemning agency enters into possession of the landowner's property).

Finally, Clark County argues that allowing HQ Metro to keep the condemnation proceeds will result in a windfall to HQ Metro because there is no evidence that the purchase price was discounted for any taking by NV Energy, and that an appraisal obtained by HQ Metro in 2013 did not mention the condemnation proceeding or the easement. This court will not speculate on whether the purchase price accounted for the property interest taken by the condemnation proceeding as it has no bearing on the legal issue of whether the order granting immediate occupancy constituted a taking of property rights. As we explained in *Argier*, the award of just compensation is a substitute for the owner's loss occasioned by the taking, and the owner sells what remains of her property. 114 Nev. at 140, 952 P.2d at 1392. "Presumably, the purchaser will pay the seller only for the real property interest that the seller possesses at the time of the sale and can transfer." *Brooks Inv. Co. v. City of Bloomington*, 232 N.W.2d 911, 918 (1975). Moreover, Clark County had notice of the condemnation proceeding and stipulated to entry of the order granting immediate occupancy, and Clark County could have contracted for the right to the just compensation proceeds when it purchased the property from HQ Metro. *See Dow*, 357 U.S. at 27 (rejecting an equitable argument where the purchaser had full notice of the condemnation proceeding and had "available contractual means by which he could have protected himself vis-a-vis his grantors against the contingency that his claim" for compensation would be subsequently invalidated under the law). Thus, the equities do not lie in Clark County's favor.

CONCLUSION

We conclude that the right to compensation vested when the district court entered the order for immediate occupancy, permitting NV Energy to occupy the permanent easement area and enjoining HQ Metro from interfering with that occupancy. Consequently, HQ Metro as landowner was entitled to compensation for the permanent easement, and we affirm the district court's order apportioning the proceeds.

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

GAMBINO GRANADA-RUIZ, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE KATHLEEN E. DELANEY, District Judge, Respondents, and THE STATE OF NEVADA, Real Party in Interest.

No. 72446

August 2, 2018 422 P.3d 732

Original petition for a writ of mandamus, or in the alternative, prohibition in a criminal matter.

Petition denied.

David M. Schieck, Special Public Defender, and *Robert Arroyo, Alzora B. Jackson*, and *JoNell Thomas*, Deputy Special Public Defenders, Clark County, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Nicole J. Cannizzaro* and *Kenneth N. Portz*, Deputy District Attorneys, Clark County, for Real Party in Interest.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

Petitioner Gambino Granada-Ruiz stood trial on charges of murder and battery with substantial bodily harm. During a weekend recess in jury deliberations, one juror conducted extrinsic legal research and shared that information with other jurors when deliberations resumed. After considering argument from counsel and canvassing two jurors, the district court declared a mistrial. Granada-Ruiz moved to dismiss the charges based on a constitutional double jeopardy theory. The district court denied the motion and set the matter for a new trial. Granada-Ruiz petitions this court for a writ of mandamus[1] directing the district court to grant his motion to dismiss and bar his re-prosecution following the mistrial. We conclude that double jeopardy does not prohibit Granada-Ruiz's retrial under the totality of the circumstances because he impliedly

[1]Granada-Ruiz alternatively seeks a writ of prohibition; however, a writ of prohibition serves to arrest the proceedings of a court outside of its jurisdiction. NRS 34.320. Because he seeks a writ compelling the district court to grant his motion to dismiss on grounds that the double jeopardy principles mandate such an outcome, we consider his petition under the mandamus standard.

consented to the district court's declaration of a mistrial, and the district court did not abuse its discretion in finding manifest necessity to declare a mistrial. Therefore, we deny Granada-Ruiz's petition on the merits.

FACTS AND PROCEDURAL HISTORY

The State charged Granada-Ruiz with murder and battery resulting in substantial bodily harm. Whether Granada-Ruiz and the victim had a physical altercation was not at issue, and the trial hinged on whether Granada-Ruiz acted in self-defense. The trial proceeded to jury deliberations without incident. On the second day of deliberations, however, the district court received two notes from jurors. The first note was from Juror No. 12 and claimed that Juror No. 3 had performed external legal research on the internet the previous weekend. The second note was from Juror No. 3 and stated that he had researched legal definitions and was unwilling to disregard what he had found.

The district court summoned both parties and, before Granada-Ruiz arrived, informed counsel for both sides of the developments and that the district court would need to determine if further deliberations were possible. The district court stated that it would canvass the jurors to determine whether the information had been shared, the nature and scope of the taint, and whether the deliberative process had been so compromised to necessitate a mistrial.

The State suggested that the district court conduct a two-part inquiry to determine whether the information had been shared and whether the remaining jurors would be able to disregard it. It further posited that, because Juror No. 3 had separated himself from the other jurors, his research may not have affected their deliberations. Granada-Ruiz's counsel disagreed, stating that external research entering the deliberation room was inherently a problem, creating the possibility that it "infect[ed] the jury." The district court again indicated that if canvassing revealed the external research had been shared amongst the jurors, deliberations may be irreparably tainted and whether the trial continued would ultimately be up to the court.

Upon Granada-Ruiz's arrival, the district court apprised him of what had occurred and allowed the parties to present the caselaw they had found in the meantime.[2] To determine the nature and extent of the taint, the district court called the foreperson for canvassing. The foreperson stated that although multiple jurors had informed Juror No. 3 that he should not attempt to discuss his external research, the deliberations throughout the day included discussions about Juror No. 3's external research concerning the definitions of

[2]We note here that the best practice is to wait for the defendant's arrival before discussing crucial issues at trial, however, the district court acted responsibly here by repeating the information upon Granada-Ruiz's arrival.

premeditation and self-defense. The foreperson further stated that Juror No. 3 perceived a difference in what was stated during closing argument about premeditation and what his research revealed, and the deliberations never meaningfully returned to the jury instructions on either issue because "the conversation really got bent more on what Juror No. 3 was saying about premeditation."

After dismissing the foreperson, the district court told both parties that it would question Juror No. 3 but that it appeared external research concerning the central issues presented to the jury had permeated deliberations and led to the exclusion of the jury instructions on two points of law. The district court stated that it struggled to see how deliberations could be untainted, even if the remaining jurors offered assurances that they could disregard the improper research. The district court requested both parties' thoughts on proceeding. The State maintained that the district court could disregard the external research so long as the remaining jurors rejected it and canvassing revealed that the external research did not affect deliberations. Granada-Ruiz's counsel stated that she wanted to hear from Juror No. 3 but that she tended to agree with the court's initial impression that the external research both permeated the deliberations and concerned the central issue of trial.

The district court then canvassed Juror No. 3. Juror No. 3 stated that he had been confused by something the State had said in closing arguments and decided to research premeditation and self-defense on his own for clarity as to sufficient time lapse for forming a premeditated intent and continuing danger for purposes of self-defense. Juror No. 3 stated that he perceived the other jurors comments about outside research being impermissible to mean that he was not allowed to consider the law and that the law was "stricken from the record." He further stated, "I don't know what I am doing. I don't know what is going on to be honest with you." After Juror No. 3 returned to the deliberation room, the district court stated that Juror No. 3's incoherent statements and fundamental misunderstanding of his duty demonstrate his inability to serve on the jury, and the district court reiterated its concern over the nature and length of discussion involving external research. Counsel for Granada-Ruiz then expressed Granada-Ruiz's frustration after two weeks of trial and said, "[s]o it's my understanding that the Court is going to declare a mistrial. I don't know if we are going to try to go down that road of trying to discuss it." Defense counsel and co-counsel asked the court to "find out [the results of] the 11 to 1" preliminary jury vote, and stated, "I think based on that, we have our opinion. We would just like to know." Not hearing any objections, the district court ordered a mistrial, finding a manifest necessity as there could be no assurances that any further product of deliberations would be fair and impartial and unaffected by the external research. The district court informed the foreperson that it was declaring a mistrial and asked

the foreperson about his earlier note indicating that the jury had voted and deliberations were not moving toward unanimous decision. The foreperson stated that the vote stood at 11 to 1 not guilty. The court then dismissed the jury.

Granada-Ruiz moved to dismiss the charges, arguing that there was no manifest necessity for a mistrial, such that re-prosecution was barred by constitutional double jeopardy principles. The State opposed the motion, arguing that the court acted within its discretion in declaring a mistrial, and Granada-Ruiz did not object to it. After oral arguments, the district court denied the motion and issued the following findings of facts and conclusions of law: (1) neither party requested a mistrial, (2) the court considered alternatives to declaring a mistrial, (3) it had canvassed the jury in order to determine whether a mistrial was necessary, (4) the jurors had discussed the substance of Juror No. 3's research for a lengthy period, (5) the jury never returned to the statements of law in the jury instructions, (6) the court found manifest necessity to order a mistrial because the research pertained to material facts and issues and the jury's deliberation on this research made it impossible to determine what constituted proper deliberation, and (7) that a sua sponte mistrial was necessary in light of the permeation of the extrinsic research. Granada-Ruiz now petitions this court for extraordinary writ relief.

DISCUSSION

Entertaining a petition for a writ of mandamus is within this court's discretion. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). A writ of mandamus serves to compel an act required by law or to control the arbitrary exercise of discretion. *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 931-32, 267 P.3d 777, 779-80 (2011). We will not entertain such a petition if there is an adequate remedy in the ordinary course of law. NRS 34.170. However, a petitioner's ability to raise a double jeopardy argument on appeal from a final judgment following a retrial is not an adequate remedy, as it still subjects the accused to being placed in jeopardy twice. *Gonzalez v. Eighth Judicial Dist. Court*, 129 Nev. 215, 217-18, 298 P.3d 448, 449-50 (2013). As such, we exercise our discretion to consider the merits of Granada-Ruiz's petition.

The Double Jeopardy Clause does not bar the re-prosecution of Granada-Ruiz

The guarantee against double jeopardy provided by the Fifth Amendment of the United States Constitution, which is applicable to the states through the Fourteenth Amendment's Due Process Clause, prevents a defendant from being tried more than once for the same offense. *Oregon v. Kennedy*, 456 U.S. 667, 671 (1982). Where

a mistrial that has not been requested by the defendant prevents the return of a verdict, re-prosecution violates the Double Jeopardy Clause unless the defendant has either consented to the mistrial or the court determines that a mistrial was a manifest necessity. *Glover v. Eighth Judicial Dist. Court*, 125 Nev. 691, 709, 220 P.3d 684, 696 (2009).

The totality of the circumstances demonstrate that Granada-Ruiz impliedly consented to mistrial

Granada-Ruiz argues that he never expressly consented to a mistrial and never had an opportunity to object because the district court stated that the decision of whether a mistrial was necessary was within the court's sole discretion. Citing *Benson v. State*, he also asserts that when looking to the totality of the circumstances, he did not impliedly consent to a mistrial. 111 Nev. 692, 895 P.2d 1323 (1995). We disagree.

Consent to mistrial need not come in the form of a motion from the defendant or verbal approval, but may be implied from the totality of the circumstances. *Benson*, 111 Nev. at 696-97, 895 P.2d at 1326-27 (determining that the totality of the circumstances did not demonstrate the defendant's implied consent where the defendant disputed the prosecution's basis for seeking a mistrial, defense counsel's initial statement that he would not oppose a mistrial was made without consulting the defendant and while under attack from the prosecutor and under threat of contempt, the court did not explore other options before declaring a mistrial, and there was no manifest necessity for a mistrial). Among the facts we look to in considering the totality of the circumstances under *Benson*, this court has previously recognized a defendant's failure to object or argue against a court's declaration of a mistrial as a circumstance that may indicate implied consent. *See Gaitor v. State*, 106 Nev. 785, 788, 801 P.2d 1372, 1374 (1990) (holding that "[t]he failure of defense counsel to object or express an opinion to the district court regarding the propriety of the mistrial implied consent and indicated tacit approval" when the circumstances otherwise supported the district court's conclusion that there was a manifest necessity for a mistrial), *overruled on other grounds by Barone v. State*, 109 Nev. 1168, 866 P.2d 291 (1993). However, consent cannot be implied based on a failure to object where the defendant was not given an opportunity to object or where the circumstances made objection an impracticability. *United States v. Jorn*, 400 U.S. 470, 487 (1971); *Benson*, 111 Nev. at 698, 895 P.2d at 1327-28.

Here, it is clear that Granada-Ruiz never expressly consented to the declaration of mistrial. However, the totality of the circumstances support the conclusion that Granada-Ruiz impliedly consented to a mistrial. Granada-Ruiz did not object to the declaration of a

mistrial. Instead, when informed about the juror's notes to the district court, defense counsel stated that external research entering the deliberation room was an inherent problem, which may have "infect[ed] the jury." When asked by the district court to express an opinion on the appropriateness of declaring a mistrial, Granada-Ruiz and defense counsel seemed amenable to it, and after the canvassing of the foreperson, defense counsel stated that she tended to agree with the district court that the juror's external research both permeated and derailed the deliberations and concerned issues central to trial. Implied consent to a mistrial has serious implications and we do not presume it lightly, *Benson*, 111 Nev. at 696-97, 895 P.2d at 1327, and thus, while some indication of opposition would have weighed on our analysis in considering the totality of the circumstances, it was not present here.

Further, the facts here bear no similarity to situations in which the trial court declared a mistrial without warning and defendants were not given an opportunity to object or in which objection was impracticable. Unlike *Jorn*, in which the United States Supreme Court held that finding implied consent was inappropriate because the defendant was not given an opportunity to object where the trial judge declared a mistrial with no prior warning or consultation with the parties, 400 U.S. at 487, Granada-Ruiz was invited to present his views on whether a mistrial was appropriate, and the district court took steps to investigate the impact of the improper research. Additionally, unlike *Benson*, in which this court concluded that it was inappropriate to interpret defense counsel's acquiescence to a mistrial as consent because defense counsel had previously argued against the State's motion for a mistrial, and his continued opposition was made impracticable by the openly hostile exchanges between defense counsel, prosecution, and the court, 111 Nev. at 698, 895 P.2d at 1328, the basis for a mistrial here was jury misconduct that was brought to the district court's attention by the jury, not a prosecution motion, and the proceedings to resolve that issue were not hostile, but instead driven by appropriate inquiry regarding the integrity of jury deliberations.[3]

Finally, the district court's statement that the decision regarding whether to declare a mistrial would be within its own discretion did

[3]Granada-Ruiz also argues that *Benson* held the failure of defense counsel to discuss the consequences of mistrial with the defendant weighed against a finding of implied consent. While the absence of consultation was a factor supporting the lack of implied consent in *Benson*, 111 Nev. at 698, 895 P.2d at 1328, it was one of several factors considered under the totality of the circumstances. Moreover, it was considered in the context of how hurried and hostile the courtroom atmosphere had become when the court declared a mistrial, *id.*, unlike here, where the district court canvassed jurors, asked for counsel's input, and considered Granada-Ruiz's frustration with the jury misconduct before declaring a mistrial.

not absolve Granada-Ruiz from objecting to the mistrial. The power to order a mistrial rests with the district court but that does not mean counsel need not advocate its positions, and concluding otherwise would contradict this court's holding that it is appropriate to consider a defendant's failure to voice any opposition when determining whether a defendant consented to a mistrial. *See Gaitor*, 106 Nev. at 788, 801 P.2d at 1374. Here, the district court asked for the parties' opinions on whether the juror misconduct permeated the deliberations and impacted the jury's ability to render an impartial decision, and defense counsel stated that she tended to agree with the district court's assessment that it did. Granada-Ruiz was in the courtroom when the jury was canvassed on the matter, and the district court informed him of the misconduct and the possibility of a mistrial. While counsel and Granada-Ruiz expressed frustration with what had transpired at this late stage in the trial, they did not present any objection to the declaration of a mistrial despite being given ample opportunity to do so. These circumstances support that Granada-Ruiz impliedly consented to the district court's declaration of a mistrial, and double jeopardy does not bar a second trial.

The district court did not abuse its discretion in finding manifest necessity to declare a mistrial

Even in the absence of implied consent, the district court did not abuse its discretion in finding manifest necessity to declare a mistrial. Granada-Ruiz argues that the district court employed an incorrect legal standard, as not every exposure to improper research requires a mistrial. Granada-Ruiz further submits that less drastic remedies would have been appropriate, and there was no support for the district court's conclusion that impaneling an alternate juror would not have been adequate. We disagree.

A sua sponte declaration of a mistrial does not create a bar to re-prosecution on the same charges when there is manifest necessity to declare a mistrial. *United States v. Perez*, 22 U.S. 579, 580 (1824). The finding of manifest necessity is reviewed for an abuse of discretion. *Glover*, 125 Nev. at 703, 220 P.3d at 693. In this context, the abuse of discretion standard turns on the question of whether the finding of manifest necessity is one "a rational jurist could have made based on the record." *United States v. Chapman*, 524 F.3d 1073, 1083 (9th Cir. 2008). The deference extended to the trial court varies based on the circumstances of the case, but great deference is given when the district court declared a mistrial based on its own finding of potential juror bias. *Id.* at 1082; *United States v. Jarvis*, 792 F.2d 767, 769 (9th Cir. 1986). Our purpose on review is to halt irrational decisions, thus we "focus on the procedures employed by the judge," and "[a] determination of manifest necessity may be up-

held even if other reasonable trial judges might have proceeded with the trial despite the error." *Chapman*, 524 F.3d at 1082. In determining whether the trial court exercised sound discretion in declaring a mistrial, we consider whether the court: (1) allowed both parties to voice their opinions on the necessity of a mistrial, (2) considered alternatives to a mistrial, (3) deliberately arrived at the decision to declare a mistrial, and (4) declared the mistrial based on evidence in the record. *Id.*; *Glover*, 125 Nev. at 710, 220 P.3d at 697.

The record shows that the district court acted within its sound discretion in declaring a mistrial. First, the district court solicited the opinions of both parties on three separate occasions following the discovery of the juror misconduct. Thus, both parties had multiple opportunities to apprise the district court of their positions regarding an appropriate remedy and to provide caselaw they found to be instructive.

Second, the record demonstrates the district court considered alternatives to declaring a mistrial. It expressly stated that its course of action would depend on what it discovered while canvassing the jurors. The transcript of the canvassing likewise supports the district court's determination that Juror No. 3's research had permeated the jury room and the jurors did not return to the jury instructions during deliberations, and thus also supports the district court's resulting conclusion that employing alternate jurors would be inadequate.

Third, the district court was deliberate in arriving at its decision to declare a mistrial. Implicit in this factor is whether the district court applied the appropriate legal standards in arriving at its decision. *See, e.g.*, *Glover*, 125 Nev. at 716, 220 P.3d at 701. The primary indicator of behavior that is not deliberate is where the mistrial is declared suddenly, without a hearing, and without giving thought to alternatives. *Chapman*, 524 F.3d at 1082 (citing *United States v. Bates*, 917 F.2d 388, 396 (1990)). Here, the district court not only allowed the parties to present arguments as to the appropriateness of declaring a mistrial, but canvassed the foreperson and the offending juror in order to evaluate the extent to which the improper research had tainted deliberations.

Relatedly, the record does not support Granada-Ruiz's argument that the district court employed an incorrect legal standard in which any spread of the improper research would constitute manifest necessity. The depth of the district court's investigation into the impact of the improper outside influence on the jury's deliberations is reflected in the progression of the district court's questioning of the jurors and its findings of fact in that regard. The district court's determination that the improper research had been shared amongst the jurors and consumed deliberations to the extent that the jury never returned to the proper statements of law in the jury instructions

is supported by the record.[4] Thus, we see no grounds on which to conclude that the district court's factual findings were clearly erroneous. *See Meyer v. State*, 119 Nev. 554, 561, 80 P.3d 447, 453 (2003) ("Absent clear error, the district court's findings of fact will not be disturbed.").

Finally, the decision to order a mistrial was based on evidence in the record. Two notes from jurors revealed that improper outside research was considered in deliberations and Juror No. 3's stated inability to follow the law. The district court's canvass of the jury revealed that the improper research had replaced the jury instructions as the center of jury deliberations, and the jury did not return to the proper statements of law in deliberating on a verdict. The district court relied on this evidence in finding manifest necessity to declare a mistrial.[5] Accordingly, we conclude that the district court did not abuse its discretion in finding a manifest necessity to declare a mistrial.

CONCLUSION

We conclude that the district court properly denied Granada-Ruiz's motion to dismiss. A second prosecution following the district court's declaration of mistrial is not prohibited by double jeopardy as the totality of the circumstances, which include (1) Granada-Ruiz's lack of objection to a mistrial, despite having the opportunity to raise an objection; (2) his agreement with the court's analysis of the juror misconduct; and (3) the possibility of mistrial being raised sua sponte, support Granada-Ruiz's implied consent to mistrial. Further, the district court did not abuse its dis-

[4]Granada-Ruiz contends that the improper research introduced by Juror No. 3 did not differ from the jury instruction, and consequently could not have tainted jury deliberations. Juror No. 3, however, was not able to articulate the legal conclusions he drew from his research, except to state that they differed from what he recalled from trial or understood from the jury instructions. Regardless, his outside research led to prolonged disagreement in the deliberation room, and the fact that the other jurors opposed the introduction of Juror No. 3's improper research does not change the fact that the jury discussed it without returning to the jury instructions. Thus, Granada-Ruiz's argument in this regard does not warrant a different outcome. *See Chapman*, 524 F.3d at 1082 ("A determination of manifest necessity may be upheld even if other reasonable trial judges might have proceeded with the trial despite the error.").

[5]Granada-Ruiz also argues that the trial court was required to canvass each of the jurors to determine the improper research was prejudicial and that replacing the offending juror would be an inadequate remedy. While the district court must determine whether the improper research had an effect on the jury, *Bowman v. State*, 132 Nev. 757, 763-64, 387 P.3d 202, 206 (2016), we have never held that a court must canvass each of the nonoffending jurors to determine whether each, individually, was effected by the improper research. Here, the district court determined the effect of the improper research on the jury by canvassing Juror No. 3 and the foreperson and discovering that the improper research had dominated deliberations and prevented the jury from applying the proper statements of law provided in the jury instructions.

cretion in finding manifest necessity to declare a mistrial, as the court heard the positions of both sides; the record supports that the court explored other options, such as replacing Juror No. 3; the district court was deliberate in investigating the juror misconduct and evaluating the need for mistrial; and the basis for finding manifest necessity was reflected in the record. Therefore, re-prosecution is not barred by double jeopardy and accordingly we deny Granada-Ruiz's petition for a writ of mandamus.

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

SFR INVESTMENTS POOL 1, LLC; and STAR HILL HOMEOWNERS ASSOCIATION, Appellants, *v.* THE BANK OF NEW YORK MELLON fka THE BANK OF NEW YORK, as Trustee for the Certificateholders of the CWABS, INC., Asset-Backed Certificates, Series 2006-6, Respondent.

No. 72931

August 2, 2018 422 P.3d 1248

Certified question, pursuant to NRAP 5, in a quiet title action.

Question answered.

Alverson Taylor Mortensen & Sanders and *Kurt R. Bonds* and *Adam R. Knecht*, Las Vegas, for Appellant Star Hill Homeowners Association.

Kim Gilbert Ebron and *Howard Kim, Diana Cline Ebron*, and *Jacqueline A. Gilbert*, Las Vegas, for Appellant SFR Investments Pool 1, LLC.

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

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Chief Litigation Counsel, Carson City, for Amicus Curiae Nevada Legislature.

Before the Supreme Court, En Banc.

OPINION

By the Court, Cherry, J.:

This case comes before us as a certified question from the United States District Court for the District of Nevada, seeking an an-

swer to "[w]hether NRS § 116.31168(1)'s incorporation of NRS § 107.090 required a homeowner's association to provide notices of default and/or sale to persons or entities holding a subordinate interest even when such persons or entities did not request notice, prior to the amendment that took effect on October 1, 2015." NRS 107.090, which governs trustee sales under a deed of trust, mandates notice to those holding subordinate interests. We conclude that, by requiring application of NRS 107.090 during the homeowners' association foreclosure process, NRS 116.31168(1)[1] required notice to be provided to all holders of subordinate security interests prior to a homeowners' association foreclosure sale and thus answer the question in the affirmative.

FACTS AND PROCEDURAL HISTORY

In 2010, former homeowners became delinquent on their homeowners' association dues, and appellant Star Hill Homeowners Association recorded a notice of delinquent assessments, notice of default, and election to sell in 2010. Star Hill recorded notices of sale in 2011 and 2012. On September 14, 2012, Star Hill held the nonjudicial foreclosure sale pursuant to NRS Chapter 116. It recorded a foreclosure deed transferring the property to the purchaser, SBW Investment, Inc. The deed recitals stated that Star Hill had complied with all statutory notice requirements in conducting the sale. On April 15, 2013, SBW transferred title of the property to appellant SFR Investments Pool 1, LLC.

Respondent Bank of New York Mellon (BNYM) subsequently filed a complaint in the federal district court of Nevada, naming SFR and Star Hill as defendants and requesting a declaration that the foreclosure sale did not extinguish its deed of trust. BNYM alleged that the sale was void as violating due process because NRS Chapter 116 "lacks any pre-deprivation notice requirements." SFR answered the complaint and asserted a counterclaim, seeking the opposite declaration and to quiet title, alleging that BNYM was provided with the notice of default and sale. The federal district court then filed in this court its order certifying the question of law stated above.

DISCUSSION

NRAP 5 permits us to answer the certified question

Preliminarily, we address BNYM's argument that we should not answer the certified question. Existing Nevada precedent does not fully resolve this legal question, and our answer may determine part of the underlying federal case. Thus, answering the question is ap-

[1]Although the relevant provisions of NRS Chapter 116 were amended in 2015, unless otherwise indicated, this opinion addresses and refers to the versions of NRS 116.31163, NRS 116.311635, and NRS 116.31168 in effect from 2010-2012, which apply to the underlying case.

propriate. *See SFR Invs. Pool 1, LLC v. Bank of New York Mellon*, Docket No. 72931 (Order Accepting Certified Question, Directing Briefing and Directing Submission of Filing Fee, June 13, 2017) (citing NRAP 5(a) and *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 750-51, 137 P.3d 1161, 1163-64 (2006)). Although BNYM contends that *Bourne Valley Court Trust v. Wells Fargo Bank, N.A.*, 832 F.3d 1154 (9th Cir. 2016), resolved the question, the Ninth Circuit's interpretation of NRS 116.31168 does not stand in the way of our reaching the merits of the certified question.[2] *See Owen v. United States*, 713 F.2d 1461, 1464 (9th Cir. 1983) (providing that a federal court's construction of a state statute is only binding in the continued absence of a contrary construction by that state's highest court); *see also Cal. Teachers Ass'n v. State Bd. of Educ.*, 271 F.3d 1141, 1146 (9th Cir. 2001) (stating that state courts are the judicial body capable of authoritatively construing state statutes). Accordingly, we decline BNYM's invitation to reject the question.

NRS 116.31168 required homeowners' associations to provide notice to all holders of subordinate interests in the event of foreclosure

SFR argues that this court recognized in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), that NRS 116.31168(1) mandated homeowners' associations to mail notices of default and sale to first security interest holders through incorporation of NRS 107.090.[3] SFR contends that, regardless, banks such as BNYM have continued to argue in federal district court that they have been deprived of due process because notice is not required under NRS Chapter 116. SFR points out that, in so doing, banks rely on *Bourne Valley*, which stated that the incorporation of NRS 107.090 would "render the express notice provisions of NRS Chapter 116 entirely superfluous," and that NRS 116.31168 could not be read to require notice outside of its opt-in scheme. *See Bourne Valley*, 832 F.3d at 1159. SFR asserts that *Bourne Valley* was wrongly decided and notes that this court has since reaffirmed in unpublished orders the incorporation of NRS 107.090.

BNYM argues that NRS Chapter 116 merely required that notice be given to lienholders who had requested such notice from

[2]BNYM argues that, even if this court concludes that NRS 116.31168 mandated notice to first deed of trust holders who had not opted-in by requesting such notice in advance, the Ninth Circuit would still find the required notice to fall short of the requirements of due process unless the homeowners' association was required to provide notice of the amount of the lien that was granted superpriority status. In *Bourne Valley*, however, the Ninth Circuit based its due process conclusion on its contrary interpretation of NRS 116.31168's notice requirement. Thus, to the extent that BNYM contends that answering the certified question constitutes a circumvention of the certiorari petition process, we reject the argument.

[3]Star Hill joined in SFR's briefing.

the HOA, as evidenced by the chapter's continual reference to requests for notice. *See* NRS 116.31163(2). It seeks to invalidate Star Hill's foreclosure on the basis that NRS Chapter 116 required notice only to parties that had opted-in to NRS Chapter 116's notice provisions and was thus held to violate due process by the Ninth Circuit in *Bourne Valley*. We disagree with this interpretation of NRS 116.31168.

If a statute is unambiguous, this court interprets the statute according to its plain language. *Williams v. United Parcel Servs.*, 129 Nev. 386, 391-92, 302 P.3d 1144, 1147 (2013). We look beyond plain language if a statute is ambiguous or silent on the issue in question, and we read statutes within a common statutory scheme harmoniously with one another whenever possible. *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009). Where a statute's language lends itself to conflicting interpretations, with one being constitutional and the other being unconstitutional, this court will choose the constitutional interpretation. *Sheriff, Washoe Cty. v. Wu*, 101 Nev. 687, 689-90, 708 P.2d 305, 306 (1985).

NRS 116.3116 to NRS 116.3117 governs homeowners' association liens and the procedures for foreclosing on them. NRS 116.31163 required homeowners' associations foreclosing on such liens to provide notice to each person who requested it pursuant to NRS 116.31168 or NRS 107.090. NRS 116.31168(1), governing "Foreclosure of liens: Requests by interested persons for notice of default and election to sell," stated "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed. The request must identify the lien by stating the names of the unit's owner and the common-interest community." The statute did not, however, indicate whether it incorporated all or some of NRS 107.090's provisions.

NRS 107.090(1) defines a "person with an interest" as "any person who has or claims any right, title or interest in, or lien or charge upon, the real property described in the deed of trust, as evidenced by any document or instrument recorded in the office of the county recorder." NRS 107.090(2) allows "[a] person with an interest or any other person who is or may be held liable for any debt secured by a lien on the property desiring a copy of a notice of default or . . . sale under a deed of trust with power of sale upon real property" to request a copy of the notices by filing such a request in the office of the county recorder where the subject property is located. NRS 107.090(3) requires, in the event of the recording of a notice of default on the property, that notice be provided to "[e]ach person who recorded a request for a copy" pursuant to NRS 107.090(2) and "[e]ach person with an interest whose interest or claimed interest is subordinate to the deed of trust." NRS 107.090(4) requires the trustee or person authorized to make the sale to mail the notice of sale to all persons entitled to notice under NRS 107.090(3).

NRS 116.31168's incorporation of NRS 107.090 was previously before the Ninth Circuit in *Bourne Valley*, 832 F.3d 1154. The Ninth Circuit was similarly evaluating a quiet title action following nonjudicial foreclosure by a homeowners' association under NRS Chapter 116. *Id.* at 1156-57. *Bourne Valley* recognized that while a deed of trust ordinarily has priority over homeowners' association liens, NRS 116.3116(2) gave homeowners' association liens superpriority, making a portion of the homeowners' association lien senior to a deed of trust, *id.* at 1157 (citing *SFR Invs. Pool 1*, 130 Nev. at 744-50, 334 P.3d at 410-14), and as a result, foreclosure on a homeowners' association lien extinguished the mortgage lender's first deed of trust. *Id.*

It further interpreted NRS 116.31163(2) as requiring a mortgage lender to "opt-in" to receive notice in the event of foreclosure by a homeowners' association, despite NRS 116.31168's incorporation of NRS 107.090. *Id.* at 1157-59. The court reasoned that if NRS 107.090's notice requirements were fully incorporated into NRS 116.31168, mandating that notice be given to "mortgage lenders whose rights are subordinate to a homeowners' association super priority lien," the "express notice provisions of Chapter 116" would be rendered "superfluous." *Id.* at 1159. In doing so, the *Bourne Valley* court concluded that such an opt-in notice scheme violated due process because it placed the burden of learning about the foreclosure action on the mortgage lender. 832 F.3d at 1158-60.

However, NRS 116.31168 incorporated the notice requirements of NRS 107.090 and consequently required that notice be provided to all persons whose interests were subordinate to a homeowners' association superpriority lien, which is " 'prior to' a first deed of trust." *See SFR Invs. Pool 1*, 130 Nev. at 745, 334 P.3d at 411 (explaining the HOA lien has priority over the first security interest in the amount of "unpaid . . . dues and maintenance and nuisance-abatement charges"). In stating that "[t]he provisions of NRS 107.090 apply to the foreclosure of an association's lien as if a deed of trust were being foreclosed," without any accompanying language to limit the incorporation, NRS 116.31168(1) manifested intent to have all notice provisions apply and that the parties requiring notice would be the same as those that would require notice in foreclosing on a deed of trust. Replacing the deed of trust with the homeowners' association superpriority lien within the language of NRS 107.090 then requires that the homeowners' association provide notice to the holder of the first security interest as a subordinate interest.

Furthermore, the complete incorporation of NRS 107.090 does not render NRS 116.31168's opt-in notice provisions superfluous. The parties required to receive notice as recorded holders of subordinate interests and those who may request notice are not coextensive, as not every party who may request notice is entitled to

notice under due process. *See* 1 Grant S. Nelson et al., *Real Estate Finance Law* § 7.25 (6th ed. 2014) (providing that while parties whose interest in a property is reasonably ascertainable must receive notice, a request-notice statute "protects the due process rights of those parties whose interests and addresses are not 'reasonably ascertainable'"). This fact is similarly reflected in NRS 107.090(3) itself, which creates the distinction between parties entitled to notice and parties that must request it. Consequently, incorporation of NRS 107.090's mandatory notice requirements does not offend the express provisions of NRS 116.31168.

Yet finding that NRS 116.31168 merely incorporated NRS 107.090's opt-in provisions would itself pose a redundancy. At the time, NRS 116.31163(1) stated that it required notice to all parties who requested it under NRS 107.090 or NRS 116.31168. Because NRS 116.31163(1) already incorporated NRS 107.090's notice provisions for parties requesting it, NRS 116.31168's incorporation of NRS 107.090 exclusively for its opt-in provision would have been unnecessary. *See Harris Assocs. v. Clark Cty. Sch. Dist.*, 119 Nev. 638, 642, 81 P.3d 532, 534 (2003) (holding that statutes are construed in a way that "give[s] meaning to all of their parts and language . . . within the context of the purpose of the legislation" (internal quotation marks omitted)).

Finally, NRS 116.31168's use of "request[s]" for notice in both its title and first subsection does not limit its incorporation of NRS 107.090's notice requirement to its opt-in provision. Though NRS 116.31168 was titled "Foreclosure of liens: Requests by interested persons for notice of default and election to sell," it had a similar title, "Requests for notice of default and sale," prior to its 1993 amendment when it explicitly required the homeowners' association to provide notice to all known lienholders, regardless of whether they had requested notice. NRS 116.31168 (1991). Therefore, the fact that the statute's title referred to requests for notice did not contradict its mandatory notice requirements in the eyes of the Legislature, and we will not presume that the title does more now.[4] Similarly, though the second sentence of NRS 116.31168(1) identified "the request," it can plainly be read as adapting the opt-in notice provision of NRS 107.090(2) to the context of a homeowners'

[4]We also note that the removal of NRS 116.31168's requirement to provide notice to all known lienholders in addition to its incorporation of NRS 107.090, 1993 Nev. Stat., ch. 573, § 40, at 2373, followed the amendment of NRS 107.090, requiring notice to all junior lienholders and others in deed-of-trust foreclosure sales rather than only those requesting it, 1989 Nev. Stat., ch. 306, § 1, at 644. The removal of the additional notice requirement from NRS 116.31168, therefore, eliminated the redundancy of both incorporating NRS 107.090 and requiring notice to all known lienholders and further supports the conclusion that the incorporation of NRS 107.090 includes its requirement to provide notice to all with recorded subordinate interests.

association foreclosure, instead of precluding notice requirements outside of parties who had requested it.

For the aforementioned reasons, we decline to follow the majority holding in *Bourne Valley*, 832 F.3d at 1159. NRS 116.31168 fully incorporated both the opt-in and mandatory notice provisions of NRS 107.090 and, to the extent NRS Chapter 116 was ambiguous in this regard, legislative history and the principles of statutory construction support this conclusion.[5]

CONCLUSION

We answer the certified question in the affirmative, concluding that even before the October 1, 2015, amendment to NRS 116.31168, the statute incorporated NRS 107.090's requirement to provide foreclosure notices to all holders of subordinate interests, even when such persons or entities did not request notice.

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

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[5]BNYM also requests that, if we determine that NRS 116.31168 required notice to secured lenders that had not opted in, we also determine that NRS 116.31168 incorporated the formal notice requirements found in NRS 107.090. While this court may rephrase certified questions, *Progressive Gulf Ins. Co. v. Faehnrich*, 130 Nev. 167, 170-71, 327 P.3d 1061, 1063 (2014), the scope of our answer must still be limited to that which may be determinative of the underlying case, *Volvo*, 122 Nev. at 750-51, 137 P.3d at 1164. Similarly, we do not make factual findings outside of those presented by the certifying court in answering the question. *In re Fontainebleau Las Vegas Holdings*, 127 Nev. 941, 956, 267 P.3d 786, 795 (2011). Here, the certifying court made no findings as to whether any notice occurred. Whether the formal requirements of notice will be at issue going forward is entirely speculative, and we have no basis on which to conclude that expanding our answer to reach that issue may be determinative. We, therefore, decline to address that question here.

IN THE MATTER OF THE PARENTAL RIGHTS AS TO S.L.; N.R.B.; H.R.B.; AND W.C.B.

DONALD B., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S.L.; N.R.B.; H.R.B.; AND W.C.B., MINORS, RESPONDENTS.

No. 71873

IN THE MATTER OF THE PARENTAL RIGHTS AS TO S.L.; N.R.B.; H.R.B.; AND W.C.B.

MELISSA L., APPELLANT, *v.* STATE OF NEVADA DEPARTMENT OF FAMILY SERVICES; S.L.; N.R.B.; H.R.B.; AND W.C.B., MINORS, RESPONDENTS.

No. 71889

August 2, 2018 422 P.3d 1253

Consolidated appeals from a district court order terminating appellants' parental rights as to their four children. Eighth Judicial District Court, Family Court Division, Clark County; Cynthia N. Giuliani, Judge.

Affirmed.

Law Offices of Michael I. Gowdey and *Michael I. Gowdey*, Las Vegas, for Appellant Melissa L.

Turco & Draskovich, LLP, and *Robert M. Draskovich*, Las Vegas, for Appellant Donald B.

Steven B. Wolfson, District Attorney, and *Janne M. Hanrahan*, Deputy District Attorney, Clark County, for Respondent Nevada Department of Family Services.

Legal Aid Center of Southern Nevada, Inc., and *Stephen J. Dahl* and *Amy B. Honodel*, Las Vegas, for Respondent S.L.

Morris Anderson and *Lauren D. Calvert*, Las Vegas, for Respondents N.R.B., H.R.B., and W.C.B.

Before the Supreme Court, CHERRY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, CHERRY, J.:

Appellants' parental rights were terminated because their oldest child was physically and mentally abused over a period of years

while in appellants' home, the younger children witnessed the abuse and were instructed to lie about it, and appellants failed to address the abuse in therapy and continued to insist that the child's injuries were self-inflicted. On appeal, appellants argue that termination of parental rights based on their refusal to admit to the abuse violated their Fifth Amendment rights against self-incrimination. We conclude that although appellants cannot be compelled to admit to a crime, they can be required to engage in meaningful therapy designed to ensure the children's safety if returned to the home. Because appellants did not engage in meaningful therapy and did not demonstrate the insight and behavioral changes necessary to protect the children from future abuse, we conclude that there was no violation of their Fifth Amendment rights. We further conclude that substantial evidence supports the district court's findings of parental fault and that termination was in the children's best interests.

FACTUAL AND PROCEDURAL BACKGROUND

Appellants Donald B. and Melissa L. have four children: S.L., N.R.B., H.R.B., and W.C.B.[1] In December 2013, then-15-year-old S.L. appeared at school with a black eye and disclosed to a friend that Donald had hit her. When Child Protective Services (CPS) interviewed S.L., she claimed that she had hit her eye on a cabinet when unloading the dishwasher. A subsequent investigation revealed that S.L. had multiple abrasions and bruises that were consistent with abuse. All four children were removed from the home and placed in the custody of respondent Clark County Department of Family Services (DFS) in January 2014. The children were later placed in their current foster home in May 2014. Once in foster care, the children began to make disclosures to their foster mother about the nature and extent of the abuse S.L. endured while in appellants' home.

DFS filed a protective custody petition alleging that the children were in need of protection because Donald physically abused S.L., Melissa knew of the ongoing abuse but failed to protect S.L., and the three younger children were unsafe in the home. The petition also alleged that Donald had been convicted of felony manslaughter and corporal punishment of a child for the death of his infant child in the 1980s.

Donald and Melissa entered pleas of no contest to the petition and were given court-approved case plans. Donald's case plan noted that Donald denied abusing S.L. and required that he acknowledge that S.L. was physically abused and the emotional damage that it has caused the children, provide a home free from physical abuse, complete physical abuse classes and follow all recommendations, show

[1]S.L. is Melissa's daughter and her father is unknown but she has lived with Donald since a young age, and the three other children are the children of both appellants.

behavioral changes, and develop an appropriate discipline plan. Melissa's case plan noted that she feels that S.L. is to blame for the family's problems and required that Melissa complete non-offending parenting classes and follow all recommendations, and that she acknowledge that S.L. was physically abused and identify where she did not provide adequate protection.

Donald and Melissa engaged in the requirements of their case plans including an assessment at Red Rock Psychological Services, successful completion of the ABC Therapy program, and participation in individual therapy at Healthy Minds. The assessments from Red Rock found both parents at a high risk for physical abuse/neglect recidivism and recommended individual therapy to address Donald's abuse and Melissa's position of denial. Both parents continued to deny that Donald had abused S.L., and they insisted that the child's injuries were self-inflicted. In the meantime, a criminal case was filed against appellants, and the criminal court entered an order for no contact between appellants and the children. Recorded calls between appellants while incarcerated on the criminal charges contained disparaging remarks about S.L., including Melissa's remarks that she is a "killer kid" and "has a brain of a fucking peanut," and that Melissa "feels sorry for the poor sap who ends up with her."

By the time of the permanency and placement review hearing in January 2015, DFS recommended termination of parental rights because, even though appellants were engaged in services, they had not provided an explanation for S.L.'s injuries or a plan for preventing their reoccurrence. The district court changed the permanency plan to termination of parental rights.

At the termination trial, S.L. testified that Donald began abusing her around the time when she was in third grade. The abuse included hitting her across the back and face with a belt and buckle causing multiple bruises and black eyes, cutting her wrist with a knife, shooting her hand with a BB gun, knocking out her front tooth, making her lie on the floor and jumping on her chest while wearing his work boots until she passed out, requiring her to stand on her head for 30 minutes at a time, denying her food, and otherwise treating her differently than the other children. S.L. testified that the abuse occurred on a regular basis and Melissa knew of the abuse and covered the injuries on S.L's face with make-up. S.L. stated that Donald would have her and the other children rehearse stories about how her injuries occurred until they could repeat them without hesitation, and that she had denied the abuse to CPS out of fear of her parents.

N.R.B. and H.R.B. testified about Donald's abuse toward S.L. that left bruises on her back and eyes and caused a broken tooth but that their punishments included standing in the corner or a spanking with the hand. Both children indicated they wanted to live with their

parents as long as there was no more hitting. The children's foster mother testified that the children disclosed to her instances when Donald abused S.L. and that Melissa was present, and that S.L. had sustained three injuries while in foster care that included two injuries while playing school sports and one injury from a bike accident requiring stitches.

A DFS case manager maintained that neither parent had completed their case plans because they had not acknowledged that there was physical and emotional abuse in the home that impacted the children. Donald and Melissa's family therapist at Healthy Minds, David Gennis, testified that they had completed numerous therapy sessions, and, in his opinion, the children would not be at risk from physical harm if reunited with appellants and it was in their best interests to return home. Dr. Gennis acknowledged that he had never spoken with the children and had not seen S.L.'s injuries, and he believed Donald's representations that he had not committed the acts of physical abuse. Dr. Gennis provided two safety plans that included a full-time nanny approved by DFS and installation of video cameras in the home, but he indicated that this monitoring was to protect appellants from further allegations of abuse by S.L.

In December 2016, the district court entered an order terminating appellants' parental rights. The court found parental fault based on clear and convincing evidence that Donald had physically and mentally abused S.L. over a period of years and the injuries were not self-inflicted. The court noted that appellants' therapy did not address the physical abuse and neither parent had shown the insight or behavioral change to protect the children from future abuse. The court also found that the presumptions under NRS 128.109 applied because the children had been in foster care for 30 months, and that termination served the children's best interest because they needed a home free from violence and they had integrated into their foster family, which was an adoptive resource. Donald and Melissa filed these consolidated appeals from the order.[2]

DISCUSSION

Because the termination of parental rights is tantamount to the imposition of a civil death penalty, an order terminating parental rights is subject to close scrutiny by this court. *In re Parental Rights as to N.J.*, 116 Nev. 790, 795, 8 P.3d 126, 129 (2000). We review questions of law de novo and the district court's factual findings for substantial evidence. *In re Parental Rights as to A.L.*, 130 Nev. 914, 918, 337 P.3d 758, 761 (2014). To terminate parental rights,

[2]S.L. joined in the appellate brief filed by DFS, and the three younger children have joined in the briefing by appellants.

the district court must find clear and convincing evidence that (1) at least one ground of parental fault exists, and (2) termination is in the child's best interest. NRS 128.105(1); *N.J.*, 116 Nev. at 800-01, 8 P.3d at 132-33. The purpose of terminating parental rights "is not to punish parents, but to protect the welfare of children." *Id*. at 801, 8 P.3d at 133.

Fifth Amendment rights

Appellants first contend that the district court erred by finding parental fault based on their failure to admit to the abuse of S.L., which violated their Fifth Amendment privilege against self-incrimination. Appellants maintain that an admission of abuse was not necessary since they completed all assessments and counseling required by their case plans, and their therapist testified that an admission of abuse was unnecessary for reunification. DFS argues there was no Fifth Amendment violation because even though parents cannot be compelled to incriminate themselves, they can be required to demonstrate that the children would be safe in their care, which appellants failed to do.

The Fifth Amendment to the United States Constitution provides that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V. It applies to the states through the Fourteenth Amendment. *Allen v. Illinois*, 478 U.S. 364, 368 (1986). The privilege may be invoked in any criminal or civil proceeding when the testimony may incriminate the person in future criminal proceedings. *Lefkowitz v. Turley*, 414 U.S. 70, 77 (1973). The state may not compel a person to surrender the privilege by threatening to impose potent sanctions. *Lefkowitz v. Cunningham*, 431 U.S. 801, 805-06 (1977).

Because the parent-child relationship is a fundamental liberty interest, we have held that "a parent may not be compelled to admit a crime under the threat of the loss of parental rights." *In re Parental Rights as to A.D.L.*, 133 Nev. 561, 566, 402 P.3d 1280, 1285 (2017). In *A.D.L.*, a mother's two children were removed from her care after the youngest child suffered a burn to the face from a clothing iron, and the mother maintained that the burn was accidental and occurred when the hot iron fell from the bedroom dresser while she was preparing for work in the attached bathroom. *Id.* at 562, 402 P.3d at 1282-83. A petition for protective custody was filed, the mother denied the allegations in the petition, and after an adjudicatory hearing, the juvenile court concluded that the injury was nonaccidental and approved a case plan that, among other things, required the mother to explain the sequence of events that led to the physical abuse and articulate how she would ensure no future abuse occurred. *Id.* at 562-63, 402 P.3d at 1283. Over the course of treat-

ment, the mother made substantial progress and her therapist saw no signs that she was an abusive parent. *Id.* at 563-64, 402 P.3d at 1283-84. The mother successfully completed all aspects of her case plan except for admitting that she physically abused the child by holding the iron to the child's face, and she demonstrated to the department of family services' satisfaction that she could effectively parent her children, but the district court terminated her parental rights because she continued to insist that the injury was accidental despite evidence to the contrary. *Id.* at 564-65, 402 P.3d at 1284. On appeal, we held that termination of parental rights based solely on a parent's refusal to admit that she intentionally harmed the child violated the mother's Fifth Amendment right against self-incrimination. *Id.* at 565, 402 P.3d at 1285. Nevertheless, we acknowledged that a parent could be required to engage in meaningful therapy for family reunification and treatment of the problems that led to removal, which may be ineffective without an acknowledgment of the abuse and that a failure to reunify for that reason may not be protected under the Fifth Amendment. *Id.* at 566-67, 402 P.3d at 1285-86.

We conclude that the facts in this case are distinguishable from those in *A.D.L.* In *A.D.L.*, the child suffered an isolated injury, the report from family services confirmed that the mother's therapy was effective without an admission, and the termination of the mother's parental rights was based entirely on her refusal to admit the abuse. *Id.* Here, however, the termination of appellants' parental rights was not based simply on their refusal to admit to the abuse. The evidence of abuse in this case was significantly more egregious and pervasive and showed that Donald physically and emotionally abused S.L. in the home repeatedly over several years, Melissa was aware of the abuse, and the children had been instructed to lie about it. Additionally, the Red Rock assessments indicated that appellants were at high risk to reoffend, and the district court found that they did not meaningfully address the abuse in therapy and continued to insist that S.L's injuries were self-inflicted. Moreover, although Dr. Gennis testified that appellants could reunify despite maintaining their denial of abuse, he admitted that he had not spoken with the children or their therapists about the abuse, he had not seen the injuries, he believed the abuse allegations were unsubstantiated, and his proposed safety plan was intended to protect *appellants* from future allegations of abuse. The district court was in a better position to weigh the testimony, and we will not substitute our judgment for that of the district judge. *See In re Parental Rights as to J.D.N.*, 128 Nev. 462, 477, 283 P.3d 842, 852 (2012). Thus, the district court did not terminate appellants' parental rights merely because they refused to admit to child abuse but instead because appellants did not engage in meaningful therapy designed to ensure that the children could be safe if returned to appellants' home. The risk of

losing one's children for failure to undergo meaningful therapy is not a penalty imposed by the state but "is simply a consequence of the reality that it is unsafe for children to be with parents who are abusive and violent." *In re J.W.*, 415 N.W.2d 879, 884 (Minn. 1987). Thus, we conclude that the district court's findings of parental fault did not violate appellants' Fifth Amendment rights against self-incrimination.[3]

Parental fault

The district court found four grounds of parental fault: unfitness, failure to adjust, token efforts, and risk of serious injury to the children if returned to appellants' care. *See* NRS 128.105(1)(b). Because the children had been residing outside the home for 30 months by the time of trial, the district court also found applicable the NRS 128.109 presumption that appellants had made only token efforts to avoid being unfit parents and to eliminate the risk of serious injury. *See* NRS 128.109(1)(a) (providing that if a child is placed outside the home for 14 of any 20 consecutive months, it must be presumed that the parent has demonstrated only token efforts). The district court found that appellants failed to rebut this presumption with a preponderance of the evidence. *In re Parental Rights as to J.L.N.*, 118 Nev. 621, 625-26, 55 P.3d 955, 958 (2002).

Appellants argue they rebutted the NRS 128.109(1)(a) presumption of token efforts because they actively engaged in the requirements of their case plans and their failure to reunify with the children within the statutory time frame resulted solely from their refusal to admit to the abuse. We agree with the district court that appellants failed to rebut the presumption of token efforts. *See In re Parental Rights as to D.R.H.*, 120 Nev. 422, 432-33, 92 P.3d 1230, 1236-37 (2004) (concluding that the presumption of token efforts was not re-

[3]DFS asserts that at the time appellants were given their case plans, they were offered immunity for any statements made during the course of treatment. Appellants argue that the stipulation regarding immunity was not in writing and was not applicable to disclosures made to DFS. We note that other courts have observed that a grant of immunity can avoid a Fifth Amendment issue. *See In re Amanda W.*, 705 N.E.2d 724, 727 (Ohio Ct. App. 1997) (stating that "to avoid a Fifth Amendment infringement, the state was required to offer [the parents] protection from the use of any compelled statements and any evidence derived from those answers in a subsequent criminal case against either one or both of them"); *Dep't of Human Servs. v. K.L.R.*, 230 P.3d 49, 54 (Or. Ct. App. 2010) (observing that "a properly crafted grant of immunity may ease the friction between the Fifth Amendment right of a parent or caretaker to avoid self-incrimination and the state's authority to advance the best interests of a dependent and at-risk child"). Because the record is limited as to the nature and scope of the immunity offered, we decline to decide whether the immunity in this case eliminated a Fifth Amendment issue.

butted where the parents had failed to adequately address their drug and anger management problems despite being provided extensive services). Appellants participated in services under their case plans but did not meaningfully address the abuse in therapy. Without acknowledging that circumstances in the home needed to change, appellants could not demonstrate that the circumstances would, in fact, change and that the children would be safe from violence and abuse. We further conclude that the district court's other findings of parental fault are supported by substantial evidence. *See In re Parental Rights as to K.D.L.*, 118 Nev. 737, 746-47, 58 P.3d 181, 187 (2002) (finding parental unfitness and a risk of serious injury based on the nature of the father's violent behavior and the potential danger he presented to the children).

Children's best interests

Appellants assert that the district court erred in concluding that termination of parental rights was in the children's best interests because the evidence demonstrated that appellants had completed the assessment and counseling requirements of their case plans, the younger three children wanted to return to their home, and Dr. Gennis opined that reunification was in the children's best interests.

Before terminating parental rights, the district court must find that doing so would serve a child's best interests. NRS 128.105(1)(a). NRS 128.005(2)(c) provides that "[t]he continuing needs of a child for proper physical, mental and emotional growth and development are the decisive considerations in proceedings for termination of parental rights." If the child has been out of the home for 14 of any 20 consecutive months, there is a rebuttable presumption that termination is in the child's best interests. NRS 128.109(2). The district court must consider the needs and wishes of the child, the services offered to and the efforts made by the parents, and whether additional services would bring about lasting change. NRS 128.107. If the child was placed in a foster home, the district court must consider whether the child has become integrated into the foster family and the family's willingness to be a permanent placement. NRS 128.108.

The district court found that the foster family had provided a safe and loving home for the children for over two years, the children were doing well and had bonded with and integrated into the foster family, and the foster parents were willing to adopt them. N.R.B. and H.R.B.'s wish to return to appellant's custody was conditioned on there being no more violence in the home, and Dr. Gennis' testimony was based on his belief that no abuse had occurred. The district court found that appellants had not addressed the physical abuse such that they could provide a home free from violence. We, therefore, conclude that substantial evidence supports the district

court's decision that termination of appellants' parental rights was in the children's best interests.

For the reasons set forth above, we affirm the district court's order terminating appellants' parental rights.

Parraguirre and Stiglich, JJ., concur.

NORTHERN NEVADA HOMES, LLC, a Nevada Limited Liability Company, Appellant, *v.* GL CONSTRUCTION, INC., a Nevada Corporation, Respondent.

No. 71899

August 2, 2018 422 P.3d 1234

Appeal from an order awarding attorney fees and costs. Second Judicial District Court, Washoe County; Lidia Stiglich, Judge.

Affirmed.

Rusby Clark, PLLC, and *Christopher M. Rusby*, Reno, for Appellant.

Law Office of James Shields Beasley and *James Shields Beasley*, Reno, for Respondent.

Before the Supreme Court, Cherry and Parraguirre, JJ., and Saitta, Sr. J.[1]

OPINION

By the Court, Cherry, J.:

In this appeal, we consider a district court's award of attorney fees and costs to defendant GL Construction, Inc. (GL) on its counterclaim against plaintiff Northern Nevada Homes, LLC (NNH). The question presented is whether the district court properly determined GL to be the "prevailing party" following bifurcated trials, in which the parties settled as to damages on NNH's claims in an amount that exceeds GL's damages judgment on its counterclaim. We conclude that the district court did not abuse its discretion with regard to the award of attorney fees and costs for two reasons. First, we note that

[1]The Honorable Nancy M. Saitta, Senior Justice, was appointed by the court to sit in place of The Honorable Lidia Stiglich, Justice, who is disqualified from participation in this matter. Nev. Const. art. 6 § 19(1)(c); SCR 10.

no statute or court rule requires the trial court to offset a damages judgment on one party's counterclaim by the amount recovered by another party in settling its claim to determine which side is the prevailing party. Second, we conclude that the most reasonable interpretation of NRS 18.010(2)(a) and 18.020(3) precludes the use of settlement recovery for this purpose.

FACTS AND PROCEDURAL HISTORY

NNH and Cerberus Holdings, LLC, filed a complaint against Gordon Lemich and his company, GL.[2] NNH alleged that GL and Lemich trespassed on its property by dumping dirt and other waste. GL later filed a counterclaim against NNH for breach of contract regarding unpaid invoices for construction work it had performed on separate projects. The district court bifurcated the case into a jury trial concerning NNH's claims against GL and Lemich, and a bench trial concerning GL's counterclaim against NNH. On day three of the jury trial, the district court indicated it was inclined to enter judgment as a matter of law in favor of NNH as to liability on its tort-based claims, and shortly thereafter, the parties settled NNH's claims for $362,500. After the bench trial on GL's counterclaim, the district court found in favor of GL, awarding $7,811 in damages.

GL then moved for $67,595 in attorney fees and $2,497.33 in costs. NNH opposed, arguing in part that GL was not the prevailing party under NRS 18.010 and 18.020 because NNH obtained a net recovery from the settlement. The district court awarded GL $10,000 in attorney fees and $390 in costs, finding that (1) GL was a prevailing party within the meaning of NRS 18.010 and 18.020 with respect to its counterclaim; (2) the settlement amount was not relevant to the prevailing party determination because the facts underlying the counterclaim were largely unrelated to NNH's claim; and (3) $10,000 was a reasonable amount for attorney fees[3] and $390 in costs was appropriate as NNH did not dispute them.

DISCUSSION

Standard of review

"An award of attorney fees is reviewed for an abuse of discretion." *MB Am., Inc. v. Alaska Pac. Leasing*, 132 Nev. 78, 88, 367

[2]Cerberus and NNH settled their claims against GL and Lemich, and only the attorney fee and costs award on GL's counterclaim against NNH is challenged in this appeal.

[3]NNH claims that "the [district] court arbitrarily determined $10,000 was a reasonable amount." However, NNH fails to present cogent argument or supporting authority in this regard, and we, therefore, decline to consider this issue. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

P.3d 1286, 1292 (2016). A decision made "in clear disregard of the guiding legal principles can be an abuse of discretion." *Id.* (internal quotation marks omitted).

Questions of law and statutory interpretation are reviewed de novo. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006); *Smith v. Crown Fin. Servs. of Am.*, 111 Nev. 277, 284, 890 P.2d 769, 773 (1995). As to statutory interpretation, if the plain language of a statute is ambiguous, "it is the duty of this court to select the construction that will best give effect to the intent of the legislature." *Smith*, 111 Nev. at 284, 890 P.2d at 773-74.

Attorney fees and costs under NRS 18.010 and NRS 18.020

NNH argues that the district court abused its discretion by determining that GL was the prevailing party under NRS 18.010(2)(a) and 18.020(3), because NNH received the net monetary recovery in this case when the parties' recoveries were offset under *Parodi v. Budetti*, 115 Nev. 236, 241, 984 P.2d 172, 175 (1999), and other courts' precedents.

NRS 18.010(2)(a) is the result of "[t]he legislat[ive] inten[t] . . . to afford litigants in small civil suits the opportunity to be made whole." *Smith*, 111 Nev. at 286, 890 P.2d at 774.[4] Under NRS 18.010(2)(a), a "court may make an allowance of attorney's fees to a *prevailing party* . . . [w]hen the prevailing party has not recovered more than $20,000." (Emphasis added.) Similarly, under NRS 18.020(3), "[c]osts must be allowed . . . to the *prevailing party* against any adverse party against whom judgment is rendered . . . [i]n an action for the recovery of money or damages, where the plaintiff seeks to recover more than $2,500." (Emphasis added.) "A party to an action cannot be considered a prevailing party within the contemplation of NRS 18.010, where the action has not proceeded to judgment." *Works v. Kuhn*, 103 Nev. 65, 68, 732 P.2d 1373, 1376 (1987), *disapproved of on other grounds by Sandy Valley Assocs. v. Sky Ranch Estates Owners Ass'n*, 117 Nev. 948, 35 P.3d 964 (2001); *cf. Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep't of Health and Human Res.*, 532 U.S. 598, 604 n.7 (2001) (rejecting private settlement agreements as sufficient grounds for establishing prevailing party status, unless such settlements are enforced through a consent decree, because "[p]rivate settlements do not entail the judicial approval and oversight" as consent decrees, "[a]nd federal jurisdiction to enforce a private contractual settlement will often be lacking unless the terms of the agreement are incorporated into the order of dismissal").

[4]Although the Nevada Legislature amended NRS 18.010 after *Smith*, NRS 18.010(2)(a) is unaffected by the amendment. *See* 2003 Nev. Stat., ch. 508, § 153, at 3478.

In *Parodi*, this court considered whether a district court must look at the "separate and distinct claims" of parties within the same case and determine the award separately for each claim, or whether the claims should be considered "as a whole and let the total net award govern the outcome [of the prevailing party analysis] of NRS 18.010 and 18.020." 115 Nev. at 241, 984 P.2d at 175. There, the jury awarded both parties damages, and the parties made competing motions for attorney fees and costs as the prevailing party under NRS 18.010 and NRS 18.020. *Id.* at 239, 984 P.2d at 174. This court held:

> the trial court must offset all awards of monetary damages to determine which side is the prevailing party and whether or not the total net damages exceed the $20,000 threshhold [sic]. The trial court would then award costs to the prevailing party pursuant to NRS 18.020 and proceed with the discretionary analysis under NRS 18.010(2)(a) to determine if attorney's [sic] fees are warranted.

Id. at 241-42, 984 P.2d at 175.

Although this court has never done so, other courts have held that parties who recover through settlement are the prevailing party within the meaning of their respective attorney fee statutes. *See, e.g.*, *DeSaulles v. Cmty. Hosp. of Monterey Peninsula*, 370 P.3d 996, 1003-04 (Cal. 2016). In *DeSaulles*, the California Supreme Court held that its attorney fee statute, defining the prevailing party as the party "with a net monetary recovery," contemplated settlement recovery. *Id.* at 1004. It reasoned that (1) settlement money is a "recovery" because it is ultimately "gained by legal process," and (2) California's attorney fee statute's "basic purpose [was] imposing costs on the losing party" generally. *Id.* at 1003 (internal quotation marks omitted); *see also Maher v. Gagne*, 448 U.S. 122, 129 (1980) (analyzing a specific statute's legislative history to determine that a "prevailing party" includes "prevail[ing] through a settlement"); *Daisy Mfg. Co. v. Paintball Sports, Inc.*, 999 P.2d 914, 917 (Idaho Ct. App. 2000), *abrogated on other grounds by BECO Constr. Co. v. J-U-B Eng'rs Inc.*, 233 P.3d 1216 (Idaho 2010) (holding that Idaho's statutory language mandating consideration of the "resultant judgment" for an award of attorney fees to the prevailing party included "a settlement reached by the parties").

Here, NNH provides no Nevada authority establishing that the district court should have offset the settlement recovery on NNH's claims from GL's damages award on its counterclaim to determine whether GL was the prevailing party on its counterclaim under NRS 18.010(2)(b) and 18.020(3). Because *Parodi* only requires the district court to consider judgments for monetary damages when determining the prevailing party for the purposes of NRS 18.010(2)(a)

and 18.020(3), we conclude that the district court did not err in its refusal to aggregate NNH's settlement recovery and GL's judgment for damages under that case. 115 Nev. at 241, 984 P.2d at 175 (holding that the trial court must "offset all *awards of monetary damages*" before determining the prevailing party and then determine whether the "total net *damages* exceed the $20,000 threshhold" (emphasis added)).

To the extent that there is any ambiguity as to the method of determining the prevailing party when faced with both settlement and damages recovery, we are unpersuaded by the other courts' holdings. For one, none of the cases NNH cites employed a net monetary recovery analysis that considered a settlement recovery by one party and a damages recovery by the other party. Further, we note that, although *DeSaulles* reasoned that settlement money was a "recovery" within the meaning of California's attorney fees statute, the California Supreme Court did so with the intent of comporting with its "basic purpose of imposing costs on the losing party." *See* 370 P.3d at 1003-04. Conversely, this court has stated that NRS 18.010(2)(a) was intended to afford litigants in small civil claims the opportunity to be made whole. *See Smith*, 111 Nev. at 286, 890 P.2d at 774. Allowing judgments for damages on distinct counterclaims to be aggregated with distinct settlements would not provide the opportunity for defendants with comparatively small counterclaims to be made whole when asserting their counterclaim, which we believe goes against NRS 18.010(2)(a)'s legislative intent. Therefore, we hold that NRS 18.010(2)(a) and NRS 18.020(3) do not intend for the district court, in determining the "prevailing party," to compare a monetary settlement of one party's claim against a judgment for damages on another party's counterclaim.

CONCLUSION

There is no Nevada statute or court rule that requires the trial court to offset a judgment for damages on an independent claim by one party with a settlement recovery on the other party's claim to determine which side is the prevailing party, and the most reasonable interpretation of NRS 18.010(2)(a) and 18.020(3) precludes the use of settlement recovery for this purpose. We, therefore, conclude that the district court did not abuse its discretion by failing to aggregate the settlement recovery and damages award in this case and affirm the court's order awarding attorney fees and costs.

Parraguirre, J., and Saitta, Sr. J., concur.