NRS 116.3116, the doctrine of conflict preemption does not apply in this case.

CONCLUSION

HUD/FHA internal regulations anticipate and provide for a state statutory framework conferring superpriority status on HOA liens and expect a mortgagee to protect its interest accordingly. Consequently, the district court erred in concluding that the provisions of NRS 116.3116 were preempted when a homeowner's first mortgage was insured through the FHA insurance program. Therefore, we reverse the decision of the district court granting Lakeview's motion to dismiss and remand for further proceedings consistent with this opinion.

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

K&P HOMES, APPELLANT, *v.*
CHRISTIANA TRUST, RESPONDENT.

No. 69966

July 27, 2017 398 P.3d 292

Certified question under NRAP 5 concerning the retroactivity of this court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014). United States District Court for the District of Nevada; Robert C. Jones, Judge.

Question answered.

The Wright Law Group, P.C., and *John Henry Wright*, Las Vegas, for Appellant.

Wright, Finlay & Zak, LLP, and *Dana Jonathan Nitz* and *Natalie C. Lehman*, Las Vegas, for Respondent.

Brooks Hubley, LLP, and *Michael R. Brooks* and *Jessica Perlick*, Las Vegas, for Amici Curiae Mortgage Bankers Association, Nevada Mortgage Lenders Association, and Nevada Bankers Association.

Fennemore Craig, P.C., and *Leslie Bryan Hart* and *John D. Tennert, III*, Reno; *Arnold & Porter Kaye Scholer LLP* and *Michael A.F. Johnson*, Washington, D.C., for Amicus Curiae Federal Housing Finance Agency.

Wolf, Rifkin, Shapiro, Schulman & Rabkin, LLP, and *Bradley S. Schrager* and *Don Springmeyer*, Las Vegas, for Amicus Curiae Community Associations Institute.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

The United States District Court for the District of Nevada has certified, under NRAP 5, the following question to this court: "Does the rule of *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 334 P.3d 408 (Nev. 2014) that foreclosures under NRS 116.3116 extinguish first security interests apply retroactively to foreclosures occurring prior to the date of that decision?" We answer the question in the affirmative and conclude that our holding in the aforementioned matter applies to all foreclosures conducted since NRS 116.3116's inception.

FACTS AND PROCEDURAL HISTORY

On May 31, 2013, appellant K&P Homes (K&P) purchased property at a homeowners' association's (HOA) nonjudicial foreclosure sale. Respondent Christiana Trust (Christiana) held a first deed of trust on the property. After the sale, Christiana filed a quiet title action against K&P in federal district court, and K&P filed an answer and counterclaims. Thereafter, Christiana filed a motion to dismiss, arguing that its first deed of trust survived the sale because the sale occurred before this court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014) (holding that "NRS 116.3116(2) gives an HOA a true superpriority lien, proper foreclosure of which will extinguish a first deed of trust"). K&P filed a countermotion for summary judgment, arguing that *SFR* applied retroactively.

The district court granted Christiana's motion and denied K&P's countermotion. In so doing, the district court applied the three-factor test established by the United States Supreme Court in *Chevron Oil Co. v. Huson*, 404 U.S. 97 (1971), for determining whether a court's holding applies retroactively. Subsequently, K&P filed a motion to certify the question of *SFR*'s applicability to this court, which the district court granted. We now address the question presented.

DISCUSSION

Christiana employs the *Chevron Oil* factors and argues that *SFR* cannot apply retroactively because (1) this court established a new

principle of law, (2) a retroactive application would not further the purposes of NRS 116.3116, and (3) a retroactive application would produce inequitable results. *See Chevron Oil*, 404 U.S. at 106-07. K&P argues that the *Chevron Oil* factors do not apply, but rather, this court's analysis in *Nevada Yellow Cab Corp. v. Eighth Judicial District Court*, 132 Nev. 784, 383 P.3d 246 (2016), governs the present matter. We agree with K&P.

In *Nevada Yellow Cab*, we addressed whether our decision in *Thomas v. Nevada Yellow Cab Corp.*, 130 Nev. 484, 327 P.3d 518 (2014), applied retroactively.[1] 132 Nev. at 786, 383 P.3d at 247. In resolving that matter, this court acknowledged that "recent Supreme Court jurisprudence has strongly disapproved of the *Chevron Oil* factors when considering federal civil law."[2] *Id.* at 789, 383 P.3d at 249; *see, e.g.*, *Harper v. Va. Dep't of Taxation*, 509 U.S. 86, 98 (1993) (stating that "the legal imperative to apply a rule of federal law retroactively after the case announcing the rule has already done so must prevail over any claim based on a *Chevron Oil* analysis" (internal quotation marks omitted)).

Therefore, this court declined to apply the *Chevron Oil* factors, holding that a prospective application of *Thomas* would "presuppose[ ] a view of our decisions as *creating* the law, as opposed to *declaring* what the law already is." *Nev. Yellow Cab*, 132 Nev. at 790-91, 383 P.3d at 250-51 (internal quotation marks omitted). This court also recognized that the Separation of Powers Clause of the Nevada Constitution precluded it "from having the quintessentially legislat[ive] prerogative to make rules of law retroactive or prospective as we see fit." *Id.* at 791, 383 P.3d at 250 (internal quotation marks omitted).

Christiana argues that *Nevada Yellow Cab* does not apply in this matter because *Thomas* involved a judicial interpretation of a constitutional amendment, whereas *SFR* involves a judicial interpretation of a state statute. However, the United States Supreme Court has stated that "[a] judicial construction of a statute is an authoritative statement of what the statute meant *before as well as after the decision of the case giving rise to that construction*." *Rivers v. Roadway Express, Inc.*, 511 U.S. 298, 312-13 (1994) (emphasis added). Indeed, the Court went on to clarify its holding:

> When Congress enacts a new statute, it has the power to decide when the statute will become effective. The new statute may govern from the date of enactment, from a specified future date,

[1]In *Thomas*, we held that Article 15, Section 16 of the Nevada Constitution (also known as the Minimum Wage Amendment) impliedly repealed NRS 608.250(2)(e)'s exemption of taxicab drivers from minimum wage requirements. 130 Nev. at 489-90, 327 P.3d at 522.

[2]See *Nevada Yellow Cab*, 132 Nev. at 788-89, 383 P.3d at 249-50, for a general discussion of *Chevron Oil* and its subsequent application.

> or even from an expressly announced earlier date. *But when this Court construes a statute, it is explaining its understanding of what the statute has meant continuously since the date when it became law*. In statutory cases the Court has no authority to depart from the congressional command setting the effective date of a law that it has enacted.

Id. at 313 n.12 (emphasis added); *see also United States v. City of Tacoma*, 332 F.3d 574, 580 (9th Cir. 2003) ("The theory of a judicial interpretation of a statute is that the interpretation gives the meaning of the statute from its inception, and does not merely give an interpretation to be used from the date of the decision.").

SFR determined whether the Nevada Legislature, through NRS 116.3116, established "a true priority lien such that its foreclosure extinguishes a first deed of trust on the property." 130 Nev. at 743, 334 P.3d at 409. In concluding that NRS 116.3116 established a true superpriority lien, this court did no more than interpret the will of the enacting legislature. *See Nev. Yellow Cab*, 132 Nev. at 786, 383 P.3d at 247 (stating that "this court's function is to declare what the law is, not to create the law").

Moreover, *SFR* did not overrule any existing precedent. This court had not previously determined whether NRS 116.3116 granted HOAs a true superpriority lien, and the language of the opinion itself does not purport to overrule any existing precedent. In addition, a prospective application is not mandated simply because other courts had reached a different conclusion. *See* 20 Am. Jur. 2d *Courts* § 148 (2015) ("Reliance upon prior misconstruction of a statute by a lower court does not operate to prevent the retrospective application of the state's supreme court's authoritative interpretation of the statute."); *see, e.g.*, *Nev. Yellow Cab*, 132 Nev. 787, 790-92, 383 P.3d at 248, 251 (holding that *Thomas* applied retroactively even though a federal district court had previously held that the Minimum Wage Amendment did not repeal NRS 608.250's exemptions).[3]

Therefore, we hold that the *Chevron Oil* factors do not apply in this matter and that our holding in *SFR* applies retroactively. However, this is not to say that the *Chevron Oil* factors have no place

[3]We also note that several federal district courts have recognized that *SFR* did not create new law or overrule any existing precedent. *See JPMorgan Chase Bank, N.A. v. SFR Investments Pool 1, LLC*, 200 F. Supp. 3d 1141, 1171-72 n.9 (2016) ("*SFR* did not announce a new rule of law. It did not overrule prior precedent or disapprove any procedure or practice approved by prior Nevada Supreme Court case law."); *see also Deutsche Bank Nat'l Tr. Co. v. TBR I, LLC*, No. 3:15-CV-00401-LRH-WGC, 2016 WL 3965195, at *6 (D. Nev. July 22, 2016) ("*SFR* did not announce a new rule of law, it merely clarified an existing statute."); *see also Capital One, N.A. v. Las Vegas Dev. Grp., LLC*, No. 2:15-cv-01436-JAD-PAL, 2016 WL 3607160, at *5 (D. Nev. June 30, 2016) (same).

in Nevada's jurisprudence. As we noted in *Nevada Yellow Cab*, the "factors may still apply . . . when a court expressly overrules a precedent upon which the contest would otherwise be decided differently and by which the parties may previously have regulated their conduct." *Nev. Yellow Cab*, 132 Nev. at 791 n.5, 383 P.3d at 251 n.5 (internal quotation marks omitted); *see also United States v. Estate of Donnelly*, 397 U.S. 286, 295 (1970) (stating that, "[i]n rare cases, decisions construing federal statutes might be denied full retroactive effect, as for instance *where this Court overrules its own construction of a statute*" (emphasis added)); 20 Am. Jur. 2d *Courts* § 147 (2015) ("A decision overruling a judicial precedent may be limited to prospective application where required by equity or in the interest of justice.").

CONCLUSION

We answer the federal district court's certified question in the affirmative. *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), did not create new law or overrule existing precedent; rather, that decision declared what NRS 116.3116 has required since the statute's inception. Therefore, that decision necessarily applies retroactively. "Having answered this question, we leave the federal district court to apply the law that we have articulated to the facts before it." *Brady, Vorwerck, Ryder & Caspino v. New Albertson's, Inc.*, 130 Nev. 632, 642, 333 P.3d 229, 235 (2014).

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

WYNN RESORTS, LIMITED, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND KAZUO OKADA; UNIVERSAL ENTERTAINMENT CORP.; AND ARUZE USA, INC., REAL PARTIES IN INTEREST.

70050

WYNN RESORTS, LIMITED, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ELIZABETH GOFF GONZALEZ, DISTRICT JUDGE, RESPONDENTS, AND KAZUO OKADA; UNIVERSAL ENTERTAINMENT CORP.; AND ARUZE USA, INC., REAL PARTIES IN INTEREST.

No. 70452

July 27, 2017 399 P.3d 334

Original petitions for writs of mandamus or prohibition from district court orders granting motions to compel the production of documents.

Petition granted (Docket No. 70050); and petition granted in part, with instructions (Docket No. 70452).

[Rehearing denied, Docket No. 70050, September 28, 2017]

Pisanelli Bice, PLLC, and *Todd L. Bice, James J. Pisanelli*, and *Debra L. Spinelli*, Las Vegas; *Wachtell, Lipton, Rosen & Katz* and *Paul K. Rowe* and *Bradley R. Wilson*, New York, New York; *Glaser Weil Fink Howard Avchen & Shapiro, LLP*, and *Robert L. Shapiro*, Los Angeles, California, for Petitioner.

Morris Law Group and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas; *Holland & Hart LLP* and *J. Stephen Peek, Bryce K. Kunimoto*, and *Robert J. Cassity*, Las Vegas; *Buckley Sandler LLP* and *David S. Krakoff, Benjamin B. Klubes*, and *Adam Miller*, Washington, D.C., for Real Parties in Interest.

Before the Court EN BANC.[1]

[1]THE HONORABLE KRISTINA PICKERING and THE HONORABLE RON PARRAGUIRRE, Justices, voluntarily recused themselves from participation in the decision of this matter.

OPINION

By the Court, HARDESTY, J.:

In these related original petitions for extraordinary writ relief arising from the same underlying district court action, we consider whether documents otherwise protected by the attorney-client privilege must be disclosed when the business judgment rule is asserted as a defense and under what circumstances a document may be protected by the work-product privilege even if it is at issue in the litigation. In Docket No. 70050, we conclude that the district court erred when it compelled petitioner Wynn Resorts, Limited, to produce certain documents from its attorneys with the law firm Brownstein Hyatt Farber Schreck, LLP (Brownstein Hyatt) based solely on Wynn Resorts' assertion of the business judgment rule as a defense. Therefore, we grant Wynn Resorts' petition for writ relief in Docket No. 70050.

In Docket No. 70452, we agree with the district court that Wynn Resorts waived the attorney-client privilege by placing a report (the Freeh Report) at issue in the initial litigation. However, the work-product privilege may apply to some of the documents compiled in the preparation of the Freeh Report. We take this opportunity to join the majority of jurisdictions that utilize a "because of" test with a "totality of the circumstances" standard for determining whether work was done "in anticipation of litigation." As such, we grant in part Wynn Resorts' petition for writ relief in Docket No. 70452 and direct the district court to apply the "because of" test to determine whether the work-product privilege applies to the documents underlying the Freeh Report.

FACTS AND PROCEDURAL HISTORY

Real party in interest Kazuo Okada owned approximately half of Wynn Resorts' stock through Aruze USA, Inc., of which he is the principal. Okada also served on Wynn Resorts' board of directors (the Board). Wynn Resorts alleges in the underlying litigation that it developed concerns about the suitability of Aruze, Okada, and Aruze's parent corporation, Universal Entertainment Corp. (collectively, the "Okada Parties"), as shareholders of Wynn Resorts after Okada began developing a casino resort in the Philippines. In particular, the Board asserts that it believed that Aruze's continued ownership of its stock could put Wynn Resorts' gaming licenses at risk.

The Board conducted an investigation over several years into the business climate in the Philippines and Okada's involvement there. The Board alleges it ultimately determined that any involvement by Okada in the Philippines was ill advised; however, Okada advised the Board that he was proceeding with his project in the Philippines.

Wynn retains the Freeh Group

The Board hired former federal judge and FBI director Louis J. Freeh and his firm (the Freeh Group) to investigate and report on Okada's business in the Philippines. The Freeh Group's letter of engagement indicates that the Freeh Group was hired as legal counsel to investigate Okada and present its findings to the Board in order to determine if Okada's activities violated Wynn Resorts' policies and potentially placed Wynn Resorts' gaming licenses in jeopardy.

The Freeh Group's investigation resulted in the 47-page Freeh Report, which included allegations of misconduct by Okada in the development of his Philippines project. The Freeh Group presented its findings to the Board, providing all directors other than Okada with a copy of the Freeh Report. The Board also received advice from two law firms, including Brownstein Hyatt, regarding the contents of the Freeh Report and the Okada Parties' potential suitability issues.

The Board ultimately adopted resolutions finding the Okada Parties to be "[u]nsuitable persons" under Wynn Resorts' Articles of Incorporation, Article VII, § 1(*l*)(iii). It thereafter exercised its "sole discretion" and redeemed Aruze's Wynn Resorts stock, pursuant to Article VII, § 2(a) of its Articles of Incorporation, in exchange for a promissory note with a principal value of $1.9 billion, which the Okada Parties allege is only a fraction of the value of the redeemed stock.

The next day, Wynn Resorts filed a complaint against the Okada Parties for declaratory relief, breach of fiduciary duty, and aiding and abetting breach of fiduciary duty. The complaint stated that the Board relied on the Freeh Report and the advice of its gaming attorneys in redeeming Aruze's shares. The Freeh Report was also attached to the complaint. The Okada Parties filed counterclaims seeking declaratory relief and a permanent injunction rescinding the redemption of the stock, and alleging claims for breach of contract, breach of Wynn Resorts' articles of incorporation, and various other tort-based causes of action.

Wynn Resorts filed notice of its lawsuit with the Securities and Exchange Commission, and attached a copy of the Freeh Report. Wynn Resorts also allegedly provided a copy of the Freeh Report to the *Wall Street Journal*.

Motion to compel: Brownstein Hyatt documents (Docket No. 70050)

In March 2016, the Okada Parties filed a motion to compel Wynn Resorts to produce documents Brownstein Hyatt generated in the course of developing and rendering its advice to the Board. The Okada Parties argued that Wynn Resorts had waived the attorney-client privilege and the attorney-work-product protection, claiming that

Wynn Resorts placed Brownstein Hyatt's advice at issue in the litigation. Wynn Resorts contended that merely stating that the directors sought and received legal advice prior to making their business decision did not place the substance of the legal advice at issue.

The district court granted the Okada Parties' motion to compel, stating that because Wynn Resorts asserted the business judgment rule as a defense,[2] Wynn Resorts put the attorneys' advice at issue, and accordingly ordered Wynn Resorts to produce all documents that Brownstein Hyatt provided for the Board's use in considering Okada's suitability and the possible redemption of shares.[3]

Motions to compel: Freeh Report documents (Docket No. 70452)

In September 2015, the Okada Parties filed a motion to compel Wynn Resorts to produce evidence and documents underlying the Freeh Report. Wynn Resorts had previously responded to the Okada Parties' requests for the documents on which the Freeh Report was based with a privilege log listing approximately 6,000 documents that it withheld or redacted on the basis of the attorney-client privilege or work-product doctrine. The Okada Parties argued that the Freeh Group's work was not protected by either the attorney-client privilege or work-product doctrine because Wynn Resorts attached the Freeh Report to its complaint and provided it to a newspaper to broadcast its accusations against Okada.

The district court granted, in part, the Okada Parties' motion to compel the Freeh Report documents. The district court found that some of the documents may be protected under the attorney-client privilege, but that because the Freeh Report documents were not prepared in anticipation of litigation, the work-product doctrine did not apply. The district court also noted that when Wynn Resorts attached the Freeh Report and its appendices to the complaint, it was not a wholesale waiver of privilege. The district court then ordered that Wynn Resorts had 15 days to supplement the privilege log in accordance with the court's findings.

In January 2016, the Okada Parties filed a second motion to compel Wynn Resorts to produce the Freeh Report documents. The Okada Parties argued that Wynn Resorts was withholding documents in

---

[2]Although Wynn Resorts' Articles of Incorporation gave the Board the "sole discretion" to redeem Aruze's shares, both sides nevertheless appear to agree that the Board's actual motivation for redeeming the shares is relevant, thereby implicating the business judgment rule.

[3]While the Okada Parties seek to argue that an at-issue waiver applies to the Brownstein Hyatt documents (Docket No. 70050), the district court did not find there to be an at-issue waiver in relation to the Brownstein Hyatt documents; rather, it based the alleged waiver on Wynn Resorts' assertion of the business judgment rule as a defense. This court "cannot consider matters not properly appearing in the record on appeal." *Carson Ready Mix, Inc. v. First Nat'l Bank of Nev.*, 97 Nev. 474, 476, 635 P.2d 276, 277 (1981).

violation of the district court's prior order, and that those documents were not privileged due to either waiver of the attorney-client privilege or at-issue waiver. After conducting an *in camera* review of approximately 25 percent of the documents, the district court granted the Okada Parties' second motion to compel in part, ordering that because the work was not done in anticipation of litigation, the work-product doctrine did not apply to any Freeh Report documents created prior to February 22, 2012 (the date when preparation of the appendices to the Freeh Report was completed), and that Wynn Resorts waived any attorney-client privilege of the documents by public disclosure of the Freeh Report and under the at-issue waiver doctrine.

DISCUSSION

In these petitions seeking writs of prohibition or mandamus, Wynn Resorts argues that the district court erred in granting, in part, the Okada Parties' motion to compel the production of the Brownstein Hyatt documents (Docket No. 70050), and by granting, in part, the Okada Parties' motion to compel the production of the Freeh Report documents (Docket No. 70452). As part of this argument, Wynn Resorts contends that the district court erred in concluding that by claiming the business judgment rule as a defense, Wynn Resorts waived the attorney-client privilege.

To resolve these petitions, we first determine that the business judgment rule protects action by a board of directors, just as it protects an individual director's action. We must then examine whether, by claiming the business judgment rule as a defense, Wynn Resorts waived any attorney-client privilege as to the Brownstein Hyatt documents. We then determine whether Wynn Resorts waived any attorney-client privilege by placing the Freeh Report at issue in the underlying litigation and whether the work-product doctrine applies to the documents underlying the Freeh Report.

Writ relief is appropriate

"[T]he issuance of a writ of mandamus or prohibition is purely discretionary with this court." *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). This court will not exercise that discretion "unless legal, rather than factual, issues are presented." *Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981).

A writ of prohibition may issue when the district court exceeds its authority, NRS 34.320, and it "is a more appropriate remedy for the prevention of improper discovery than mandamus."[4] *Wardleigh v.*

[4]Accordingly, we deny Wynn Resorts' alternative requests for writs of mandamus.

Second Judicial Dist. Court, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995). To that end, "a writ of prohibition is an appropriate remedy to correct an order that compels disclosure of privileged information." *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 325 P.3d 1259, 1262 (2014).

These petitions merit this court's consideration as they raise important issues concerning the scope of discovery and privilege in relation to the business judgment rule. Further, if the discovery permitted by the district court is inappropriate, a later appeal would not remedy any improper disclosure of the information. *Wardleigh*, 111 Nev. at 350-51, 891 P.2d at 1183-84. Accordingly, we choose to entertain these petitions.

Attorney-client privilege

The attorney-client privilege is a long-standing privilege at common law that protects communications between attorneys and clients. *See Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The purpose of the attorney-client privilege is to encourage clients to make full disclosures to their attorneys in order to promote the broader public interests of recognizing the importance of fully informed advocacy in the administration of justice. *Id*.

Nevada codified the attorney-client privilege at NRS 49.095. For this privilege to apply, the communications must be between an attorney and client, for the purpose of facilitating the rendition of professional legal services, and be confidential. *Id.* "A communication is 'confidential' if it is not intended to be disclosed to third persons other than those to whom disclosure is in furtherance of the rendition of professional legal services to the client or those reasonably necessary for the transmission of the communication." NRS 49.055.

Protected communications can be from a lawyer to a client or from a client to a lawyer. *See Upjohn*, 449 U.S. at 390. Mere facts are not privileged, but communications about facts in order to obtain legal advice are. *See id*. at 395-96; *see also Wardleigh*, 111 Nev. at 352, 891 P.2d at 1184. Communications may be disclosed to other persons within a corporation or legal team in order to facilitate the rendition of legal advice without losing confidentiality; however, the disclosure must only be to the limited group of persons who are necessary for the communication, and attempts must be made to keep the information confidential and not widely disclosed. *See Coastal States Gas Corp. v. Dep't of Energy*, 617 F.2d 854, 863 (D.C. Cir. 1980). No privilege exists if the communications are accessible to the general public in other manners, because the communications are therefore not confidential. *See Cheyenne Constr., Inc. v. Hozz*, 102 Nev. 308, 311-12, 720 P.2d 1224, 1226 (1986).

Both the Brownstein Hyatt documents at issue in Docket No. 70050 and the Freeh Report documents at issue in Docket No.

70452 are potentially protected by the attorney-client privilege. *See* NRS 49.095.

Wynn Resorts did not waive the attorney-client privilege as to the Brownstein Hyatt documents by asserting the business judgment rule

Wynn Resorts invoked the business judgment rule in its complaint by alleging that the Board relied on the advice of its gaming attorneys and the Freeh Report in reaching its decision to redeem the Aruze's shares. "The business judgment rule is a presumption that in making a business decision the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 632, 137 P.3d 1171, 1178-79 (2006) (internal quotation marks omitted). Under this rule, a director will not be liable for damages based on a business decision unless it can be shown that the director breached his fiduciary duties and that such breach involved intentional misconduct, fraud, or a knowing violation of the law. NRS 78.138(7). Nevada's business judgment rule is codified at NRS 78.138,[5] which states, in pertinent part, as follows:

> 1. Directors and officers shall exercise their powers in good faith and with a view to the interests of the corporation.
>
> 2. In performing their respective duties, directors and officers are entitled to rely on information, opinions, reports, books of account or statements, including financial statements and other financial data, that are prepared or presented by:
>
> (a) One or more directors, officers or employees of the corporation reasonably believed to be reliable and competent in the matters prepared or presented;
>
> (b) Counsel, public accountants, financial advisers, valuation advisers, investment bankers or other persons as to matters reasonably believed to be within the preparer's or presenter's professional or expert competence; or
>
> (c) A committee on which the director or officer relying thereon does not serve, established in accordance with NRS 78.125, as to matters within the committee's designated authority and matters on which the committee is reasonably believed to merit confidence,
>
> but a director or officer is not entitled to rely on such information, opinions, reports, books of account or statements if the director or officer has knowledge concerning the matter in question that would cause reliance thereon to be unwarranted.

[5]The 2017 Legislature amended NRS 78.138 after the district court issued its order. 2017 Nev. Stat., ch. 559; S.B. 203, 79th Leg. (Nev. 2017). However, the amendments to NRS 78.138 do not change our conclusions.

> 3. Directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation.

The business judgment rule applies to the Board

As a threshold matter in determining whether the Board waived the attorney-client privilege as to the Brownstein Hyatt documents by asserting the business judgment rule as a defense in the underlying district court action, we must address the Okada Parties' argument that the business judgment rule applies only to individual directors and officers and not the Board itself. We disagree.

The business judgment rule does not only protect individual directors from personal liability, rather, it "expresses a sensible policy of judicial noninterference with business decisions and is designed to limit judicial involvement in business decision-making so long as a minimum level of care is exercised in arriving at the decision." 18B Am. Jur. 2d *Corporations* § 1451 (2016). Specifically, it prevents a court from "replac[ing] a well-meaning decision by a corporate board" with its own decision. *Id*.; *see also Lamden v. La Jolla Shores Clubdominium Homeowners Ass'n*, 980 P.2d 940, 945 (Cal. 1999) ("A hallmark of the business judgment rule is that, when the rule's requirements are met, a court will not substitute its judgment for that of the corporation's board of directors.").

This court has previously applied the business judgment rule to board action in *Shoen*, 122 Nev. at 636-37, 137 P.3d at 1181 ("Consequently, a plaintiff challenging a business decision and asserting demand futility must sufficiently show that either the board is incapable of invoking the business judgment rule's protections (*e.g.*, because the directors are financially or otherwise interested in the challenged transaction) or, if the board is capable of invoking the business judgment rule's protections, that that rule is not likely to in fact protect the decision. . . ."). We therefore conclude that the business judgment rule applies to the Board.

The business judgment rule precludes judicial interference with decision-making when a director or board of directors acts in good faith

Having concluded that the Board properly invoked the business judgment rule, we must next examine what courts should consider in determining whether a business decision was made in good faith. Because we determine that Nevada's statutory business judgment rule precludes courts from reviewing the substantive reasonableness of a board's business decision, we conclude that an evaluation of the substance of the advice the Board received from its attorney, and thus discovery regarding the substance of that advice, is unnecessary in determining whether the Board acted in good faith.

It is well established that "a court that applies the business judgment rule will not 'second-guess' a particular decision made by a corporation's directors or officers if the requirements of the business judgment rule are satisfied." Joseph F. Troy & William D. Gould, *Advising & Defending Corporate Directors and Officers* § 3.15 (Cal. CEB rev. ed. 2007). As such, "[a] court will review the merits of a director's decision only if" a plaintiff can "rebut the presumption that a director's decision was valid by showing either that the decision was the product of fraud or self-interest or that the director failed to exercise due care in reaching the decision." *Id.* "As a general rule, courts may not inquire into the merits of [a] determination." Clifford R. Ennico, *West's McKinney's Forms Business Corporate Law* § 8:34 (2016).

Nevada's business judgment statute is a modified version of Section 8.30(e) of the Model Business Corporation Act. *Compare* NRS 78.138 *with* 2 Model Business Corporation Act Annotated § 8.30(e) (4th ed. 2011). By a plain reading of both texts, it is apparent that the Legislature adopted a great portion of the Model Act, with the exception of its "reasonableness" standard for judging whether a director's conduct should be protected. *Id*. "This signals legislative rejection of a substantive evaluation of director conduct." *WLR Foods, Inc. v. Tyson Foods, Inc.*, 857 F. Supp. 492, 494 (W.D. Va. 1994).

Determining whether a director or board of directors acted in good faith

While "a reasonableness review of [a director's] actions would be useful in determining good faith," doing so "would thoroughly undermine [the Legislature's] decision . . . to reject the Model Act's substantive component," which "would accomplish by the back door that which is forbidden by the front." *Id*. As such, we conclude that an evaluation of the substantive advice a Board receives from its attorney is unnecessary in showing that the Board acted in good faith. *See, e.g.*, *WLR Foods, Inc. v. Tyson Foods, Inc.*, 65 F.3d 1172, 1187 (4th. Cir. 1995) (where the court held that "[w]e find the district court's decision limiting discovery . . . to be a sound one under Virginia law. Knowledge of the substantive advice given to the WLR Board was not reasonably calculated to lead to a determination regarding good faith . . . and the district court acted within its discretion in limiting Tyson's access to that information.").

Instead, a court can address whether a director acted in good faith without seeking substantive information. The United States District Court for the Western District of Virginia has established factors for determining whether a director acted in good faith, such as through:

> inquiry into the identity and qualifications of any sources of information or advice sought which bear on the decision

> reached, the circumstances surrounding selection of these sources, the general topics (but not the substance) of the information sought or imparted, whether advice was actually given, whether it was followed, and if not, what sources of information and advice *were* consulted to reach the decision in issue.

WLR Foods, 857 F. Supp. at 494. "In short, the statute permits inquiry into the procedural indicia of whether the directors resorted in good faith to an informed decisionmaking process." *Id.* We take this opportunity to adopt the factors developed by the United States District Court for the Western District of Virginia in *WLR Foods* for determining whether an individual director or board of directors acted in good faith and, in turn, whether protection under the business judgment rule is available.

Accordingly, we reiterate that the business judgment rule goes beyond shielding directors from personal liability in decision-making. Rather, it also ensures that courts defer to the business judgment of corporate executives and prevents courts from "substitut[ing] [their] own notions of what is or is not sound business judgment," *Sinclair Oil Corp. v. Levien*, 280 A.2d 717, 720 (Del. 1971), if "the directors of a corporation acted on an informed basis, in good faith and in the honest belief that the action taken was in the best interests of the company." *Aronson v. Lewis*, 473 A.2d 805, 812 (Del. 1984), *overruled on other grounds by Brehm v. Eisner*, 746 A.2d 244, 254 (Del. 2000).

> *The district court erred in finding that Wynn Resorts waived the attorney-client privilege of the Brownstein Hyatt documents (Docket No. 70050)*

In granting the motion to compel, the district court stated that "[t]o the extent that information was provided to the members of the board of directors for their consideration in the decision-making process and their defense related to the business judgment rule the Okada [P]arties are entitled to test whether the director or officer had knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." The district court further stated that "[t]he only way that [the Okada Parties] can get to that part of the statute is by having the information that was provided to the board members." Ultimately, the district court found that "[b]y asserting the [b]usiness [j]udgment [r]ule as a defense, the members of the Board of Directors of Wynn Resorts have put at issue certain advice they received from Brownstein Hyatt" and ordered Wynn Resorts to produce all the documents Brownstein Hyatt provided to the Board in relation to the Okada Parties.

Wynn Resorts argues that the district court's interpretation and application of NRS 78.138 is flawed because the statute does not in-

dicate that asserting the business judgment rule as a defense waives attorney-client privilege. Further, to read such a waiver into the statute discourages board members from making informed decisions, which ultimately undermines the policy behind the rule.

Statutory interpretation is a question of law that this court reviews de novo. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). This court has established that when the language of a statute is unambiguous, the courts are not permitted to look beyond the statute itself when determining its meaning. *See Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). NRS 78.138 is unambiguous. The plain language of the statute is clear as to two vital contentions in this case: (1) the Board is "presumed to act in good faith, on an informed basis and with a view to the interests of the corporation," and (2) the Board can establish that it meets that presumption by relying on "reports" and "[c]ounsel," as long as the Board did not have "knowledge concerning the matter in question that would cause reliance thereon to be unwarranted." NRS 78.138(2)-(3). Nothing in the statute's plain language indicates that in meeting the requirements of Nevada's business judgment rule as codified in NRS 78.138, the Board waives attorney-client privilege. Rather, Wynn Resorts is entitled to the presumption that it acted in good faith, such as by receiving outside counsel in reaching a decision.

NRS 78.138(2) is consistent with principles from the American Law Institute. *See* 1 *Principles of Corporate Governance* § 4.01 (Am. Law Inst. 1992). In comment (c) to Section 4.01(c), the commentators suggest that "[r]eliance on written reports, opinions, and statements of officers and employees of the corporation (and of other persons) will, of course, often be both necessary and desirable." Further, "[t]he great weight of case law and commentator authority supports the proposition that an informed decision (made, for example, on the basis of explanatory information presented to the board) is a prerequisite to the legal insulation afforded by the business judgment rule." *Id*. at cmt. e.

Several Delaware cases further support our conclusion that a party is not required to waive the attorney-client privilege as the price for receiving the protection of the business judgment rule. *See, e.g.*, *Minn. Invco of RSA # 7, Inc. v. Midwest Wireless Holdings LLC*, 903 A.2d 786, 797-98 (Del. Ch. 2006) (holding no waiver of privilege; "evidence at trial shows that each [director] approved the [action], upon the advice of counsel . . . . Therefore, the court concludes that the board members were fully informed and acted in the best interest of [the company]."); *In re Walt Disney Co. Derivative Litig.*, 907 A.2d 693, 778 (Del. Ch. 2005) (holding no waiver of privilege; "[the chief executive officer] weighed the alternatives, received advice from counsel and then exercised his business judgment in the man-

ner he thought best for the corporation"); *In re Comverge, Inc. Shareholders Litig.*, No. 7368-VCP, 2013 WL 1455827 at *3 (Del. Ch. April 10, 2013) (holding no waiver of privilege; "the examination of privileged communications is not required . . . because the . . . [d]efendants merely seek to rely on the fact that they sought and obtained legal advice rather than that they relied on the substance of privileged communications to prove that the Board was fully informed").

We agree that "it is the existence of legal advice that is material to the question of whether the board acted with due care, not the substance of that advice." *In re Comverge, Inc.*, 2013 WL 1455827, at *4. Accordingly, the district court erred when it compelled Wynn Resorts to produce any attorney-client privileged Brownstein Hyatt documents on the basis that Wynn Resorts waived the attorney-client privilege of those documents by claiming the business judgment rule as a defense. *See WLR Foods*, 857 F. Supp. at 494. Thus, we grant Wynn Resorts' petition for writ relief in Docket No. 70050 and instruct the district court to vacate the order compelling the production of any attorney-client privileged Brownstein Hyatt documents.

Wynn Resorts waived attorney-client privilege by placing the Freeh Report at issue in the initial litigation (Docket No. 70452)

The at-issue waiver doctrine applies where the client has placed at issue the substance or content of a privileged communication. *See Wardleigh*, 111 Nev. at 354, 891 P.2d at 1186 (discussing the doctrine in terms of whether the client has placed "at-issue the *subject matter* of privileged material" or "seeks an advantage in litigation by *revealing part of a privileged communication*" (emphases added) (internal quotation marks omitted)); *see also Rockwell Int'l Corp. v. Superior Court*, 32 Cal. Rptr. 2d 153, 161 (Ct. App. 1994) (explaining that the doctrine applies "*only* when the client tenders an issue involving *the substance or content* of a protected communication" (second emphasis added)). Courts have held that "advice of counsel is placed [at] issue where the client asserts a claim or defense, and attempts to prove that claim or defense by *disclosing* or *describing* an attorney client communication." *Rhone-Poulenc Rorer Inc. v. Home Indem. Co.*, 32 F.3d 851, 863 (3d Cir. 1994) (emphases added); *but see Roehrs v. Minn. Life Ins. Co.*, 228 F.R.D. 642, 646 (D. Ariz. 2005) (deciding that the attorney-client privilege was waived when claims adjusters testified in deposition that they "considered and relied upon, among other things, the legal opinions or legal investigation" in decision-making). However, "[a] denial of bad faith or an assertion of good faith alone is not an implied waiver of the privilege." *Bertelsen v. Allstate Ins. Co.*, 796 N.W. 2d 685, 703 (S.D. 2011). "[A] client only waives the [attorney-client] privilege by expressly or impliedly injecting his attorney's advice into the case." *Id*.

If the substance of one privileged document is disclosed, the privilege is considered waived as to all documents relating to that subject matter. *See Texaco Puerto Rico, Inc. v. Dep't of Consumer Affairs*, 60 F.3d 867, 883-84 (1st Cir. 1995); *Wardleigh*, 111 Nev. at 354-55, 891 P.2d at 1186. However, testimony that the communications occurred, without disclosing the subject matter, does not render the privilege waived. *See Lisle v. State*, 113 Nev. 679, 701, 941 P.2d 459, 474 (1997), *overruled on other grounds by Middleton v. State*, 114 Nev. 1089, 1117 n.9, 968 P.2d 296, 315 n.9 (1998); *see also United States v. O'Malley*, 786 F.2d 786, 794 (7th Cir. 1986) ("[A] client does not waive his attorney-client privilege 'merely by disclosing a subject which he had discussed with his attorney'"; rather, "[i]n order to waive the privilege, the client must disclose the communication with the attorney itself.").

Wynn Resorts argues that the documents created during the Freeh Group's investigation that the Board never saw are irrelevant to the issues to be adjudicated because it is only utilizing the Freeh Report to successfully overcome a potential challenge of the Board's decision under the business judgment rule, and their reliance on the Freeh Report is for the limited purpose of establishing what the directors knew and what they considered.

The Okada Parties counter that when Wynn Resorts chose to share the Freeh Report, but not the underlying documents, Wynn Resorts was seeking to use the privilege as both a sword and a shield. The Okada Parties cite several persuasive cases for their proposition that "[i]n the particular context of internal investigations, . . . disclosure of the results of an investigation results in a subject matter waiver of all related evidence." *See, e.g.*, *In re Martin Marietta Corp.*, 856 F.2d 619, 623-24 (4th Cir. 1988) (finding waiver of privilege and rejecting the limited waiver concept where company submitted a position paper to a government agency, and allowing discovery of the position paper and underlying details); *see also In re Kidder Peabody Sec. Litig.*, 168 F.R.D. 459, 472-73 (S.D.N.Y. 1996) (finding waiver where company submitted investigative report to the SEC, as well as in litigation, using "the substance of the documents as a sword while at the same time invoking the privilege as a shield to prevent disclosure of the very materials that it has repeatedly invited the courts to rely upon").

In an analogous case, *In re OM Securities Litigation*, 226 F.R.D. 579 (N.D. Ohio 2005), outside counsel gave a PowerPoint presentation regarding an investigative report to the company's audit committee. *Id*. at 590. The plaintiff asked for discovery of all the documents underlying the report and the investigation, and the defendants claimed attorney-client privilege. *Id.* at 584. After the defendants produced the PowerPoint presentation and two related spreadsheets, but did "not produce[ ] any of the underlying documents relating to, referred to, or relied upon, in the presentation," the plaintiffs argued

that the "[d]efendants waived any privilege over the documents containing the same subject matter as the presentation." *Id*. at 590. The defendants countered "that the privilege in documents underlying the Power Point presentation was not waived because the report merely summarized findings and conclusions and did not disclose a 'significant part' of the investigation." *Id.* The court disagreed with the defendants and gave examples of the significant disclosures, noting that

> it described the reason for the . . . [investigation], directly quoted concerns and observations . . . set forth in e-mails by identified individuals, summarized the content of specific e-mails, identified more than ten persons interviewed in connection with the investigation, . . . and set forth investigative results.

Id. at 592. The court held that the "disclosure of the presentation would make it unfair to protect the documents underlying the presentation" because the disclosure was "substantial, intentional, and deliberate." *Id*. at 593. Because there "was a detailed formal, oral presentation relying upon specific information," the court found that

> [t]he underlying documents clearly [were] within the scope and subject matter of the . . . intentional disclosure. There [was] no reason [d]efendants, who voluntarily disclosed substantial information about an investigation that led to a public announcement . . . should now be able to withhold information that would allow [p]laintiff to review the whole picture.

Id. Therefore, the plaintiff was granted discovery for "all documents in existence at the time of the . . . presentation" that related to, or were underlying, the presentation by counsel. *Id*.

Wynn Resorts disclosed the Freeh Report by voluntarily and intentionally placing protected information into the litigation. Wynn Resorts voluntarily filed its complaint, seeking to have the court affirm its business decision and, in doing so, attached a copy of the Freeh Report. Like the disclosed presentation in *In re OM*, the disclosed Freeh Report describes the reason for the investigation, directly quotes concerns and observations, summarizes the content of emails from identified individuals, identifies persons interviewed, and sets forth investigative results. Further, not only did Wynn Resorts provide this specific information to the court and regulatory agency, but, like in *In re OM*, the disclosure led to a public announcement when Wynn Resorts allegedly disclosed the Freeh Report to the press.

Therefore, we conclude that the district court did not err in finding that Wynn Resorts waived the attorney-client privilege in regard to the Freeh Report and the documentation compiled in the preparation of the Report. However, disclosure of some of the underlying Freeh Report documents may be protected by the work-product privilege.

Freeh Report documents and work-product protection (Docket No. 70452)

The work-product doctrine protects more than just communications between a client and attorney, and is thus broader than the attorney-client privilege. *Hickman v. Taylor*, 329 U.S. 495, 508 (1947). "At its core, the work-product doctrine shelters the mental processes of the attorney, providing a privileged area within which he can analyze and prepare his client's case." *United States v. Nobles*, 422 U.S. 225, 238 (1975). Thus, an attorney's work product, which includes "mental impressions, conclusions, opinions, and legal theories of counsel . . . , are not discoverable under any circumstances." *Wardleigh*, 111 Nev. at 359, 891 P.2d at 1189; NRCP 26(b)(3).

Both the attorney and client have the power to invoke the work-product privilege. Restatement (Third) of the Law Governing Lawyers § 90 (2000). Nevada's work-product privilege is found at NRCP 26(b)(3), which provides, in relevant part:

> [A] party may obtain discovery of documents and tangible things . . . prepared in anticipation of litigation . . . by or for another party or by or for that other party's representative . . . only upon a showing that the party seeking discovery has substantial need of the materials . . . and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, *the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.*

(Emphasis added.) Therefore, like its federal counterpart, FRCP 26(b)(3), NRCP 26(b)(3) protects documents with "two characteristics: (1) they must be prepared in anticipation of litigation or for trial, and (2) they must be prepared by or for another party or by or for that other party's representative." *In re Grand Jury Subpoena (Mark Torf/Torf Envtl. Mgmt.)* (*Torf*), 357 F.3d 900, 907 (9th Cir. 2004) (internal quotation marks omitted).

In determining whether materials were prepared in anticipation of litigation, courts generally use one of two tests: (1) the "primary purpose" test[6] or (2) the "because of" test. We take this opportuni-

---

[6]*See Navigant Consulting, Inc. v. Wilkinson*, 220 F.R.D. 467, 477 (N.D. Tex. 2004) ("[A] document is entitled to work product protection if the primary motivating purpose behind the creation of the document was to aid in possible future litigation."); *Blockbuster Entm't Corp. v. McComb Video, Inc.*, 145 F.R.D. 402, 404 (M.D. La. 1992) ("[T]he general rule is that litigation need not necessarily be imminent as long as the primary motivating purpose behind the creation of the document was to aid in possible future litigation."); *Ex parte Cryer*, 814 So. 2d 239, 247 (Ala. 2001) ("[T]he primary motivating

ty to join a majority of courts and adopt the "because of" test for determining whether work was done "in anticipation of litigation." NRCP 26(b)(3). *See, e.g.*, *Torf*, 357 F.3d at 907-08; *Maine v. U.S. Dep't of the Interior*, 298 F.3d 60, 68 (1st Cir. 2002); *United States v. Adlman*, 134 F.3d 1194, 1195 (2d Cir. 1998); *Simon v. G.D. Searle & Co*., 816 F.2d 397, 401 (8th Cir. 1987); *Senate of P.R. v. U.S. Dep't of Justice*, 823 F.2d 574, 586 n.42 (D.C. Cir. 1987); *Binks Mfg. Co. v. Nat'l Presto Indus., Inc*., 709 F.2d 1109, 1118-19 (7th Cir. 1983); *In re Grand Jury Proceedings*, 604 F.2d 798, 803 (3d Cir. 1979).

Under the "because of" test, documents are prepared in anticipation of litigation when "in light of the nature of the document and the factual situation in the particular case, the document can fairly be said to have been prepared or obtained *because of* the prospect of litigation." Restatement (Third) of the Law Governing Lawyers § 87 cmt. i (2000) (quoting 8 Charles A. Wright et al., Federal Practice & Procedure § 2024, at 343 (2d ed. 1994) (emphasis added)). The Restatement approach is consistent with Nevada caselaw examining work product and protecting records prepared by or at the request of an attorney, but not records prepared in the normal course of business since those are not prepared because of the prospect of litigation. *See, e.g.*, *Columbia/HCA Healthcare Corp. v. Eighth Judicial Dist. Court*, 113 Nev. 521, 527-28, 936 P.2d 844, 848 (1997) (concluding that hospital's "occurrence reports" were not protected work product because they were prepared in the normal course of business).

The anticipation of litigation must be the *sine qua non* for the creation of the document—"but for the prospect of that litigation," the document would not exist. *Torf*, 357 F.3d 900, at 908 (quoting *Adlman*, 134 F.3d at 1195). However, "a document . . . does not lose protection under this formulation merely because it is created in order to assist with a business decision." *Adlman*, 134 F.3d at 1202. "Conversely . . . [this rule] withholds protection from documents that are prepared in the ordinary course of business or that would have been created in essentially similar form irrespective of the litigation." *Id*.

In determining whether the "because of" test is met, we join other jurisdictions in adopting a "totality of the circumstances" standard. *See, e.g.*, *Torf*, 357 F.3d at 908; *In re CV Therapeutics, Inc. Sec. Litig.*, No. C-03-3709 SI(EMC), 2006 WL 1699536, at *4 (N.D.

---

purpose behind the creation of a document or investigative report must be to aid in possible future litigation."); *Squealer Feeds & Liberty Mut. Ins. Co. v. Pickering*, 530 N.W.2d 678, 687 (Iowa 1995) ("[I]f the 'primary motivating purpose' in preparing the documents is to 'aid in possible future litigation,' the documents are prepared in anticipation of litigation." (quoting *Ashmead v. Harris*, 336 N.W.2d 197, 201 (Iowa 1983)), *abrogated by Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38 (2004).

Cal. June 16, 2006). In *Torf*, the Ninth Circuit Court of Appeals stated that

> [t]he "because of" standard does not consider whether litigation was a primary or secondary motive behind the creation of a document. Rather, it considers the totality of the circumstances and affords protection when it can fairly be said that the "document was created because of anticipated litigation, and would not have been created in substantially similar form but for the prospect of that litigation[.]"

357 F.3d at 908 (second alteration in original) (quoting *Adlman*, 134 F.3d at 1195).

In evaluating the totality of the circumstances, the court should "look[ ] to the context of the communication and content of the document to determine whether a request for legal advice is *in fact* fairly implied, taking into account the facts surrounding the creation of the document and the nature of the document." *In re CV Therapeutics*, 2006 WL 1699536, at *4. Lastly, the court should consider "whether a communication explicitly sought advice and comment." *Id*.

It is unclear in the case before us whether the district court utilized the "because of" test for determining if the Freeh Report was prepared in anticipation of litigation. Therefore, we direct the district court to consider whether the Freeh Report was created "in anticipation of litigation" under the "because of" test, applying a "totality of the circumstances" analysis.[7]

Waiver of the work-product privilege

Unlike the attorney-client privilege, selective disclosure of work product to some, but not to others, is permitted. *See* 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 530 (3d ed. 2010); *see also In re Sealed Case*, 676 F.2d 793, 809 (D.C. Cir 1982) ("[B]ecause [the work-product doctrine] looks to the vitality of the adversary system rather than simply seeking to preserve confidentiality, the work product privilege is not automatically waived by any disclosure to a third party."); *United States ex rel. Purcell v. MWI Corp.*, 209 F.R.D. 21, 25 (D.D.C. 2002) ("[A] party does not automatically waive the work-product privilege by disclosure to a third party."); *Medinol, Ltd. v. Bos. Scientific Corp.*, 214 F.R.D. 113, 114 (S.D.N.Y. 2002) ("Unlike the attorney-client privilege, . . . work product protection

[7]The district court order required production of documents compiled in the preparation of the Freeh Report. However, this ruling was made after a review of 25 percent of the documents submitted to the court *in camera*. If the district court concludes that the Freeh Report was created in anticipation of litigation, it must undertake a complete examination of the underlying documents to determine whether those documents are separately protected under the work-product privilege.

is not necessarily waived by disclosures to third persons."). Waiver of the protection is, however, usually found when the material is disclosed to an adversary. *See, e.g.*, *Meoli v. Am. Med. Serv. of San Diego*, 287 B.R. 808, 817 (S.D. Cal. 2003) ("Voluntary disclosure of attorney work product to an adversary in the litigation defeats the policy underlying the privilege."); 8 Charles A. Wright, Arthur R. Miller & Richard L. Marcus, *Federal Practice and Procedure* § 2024, at 532 (3d ed. 2010) (stating that disclosure to third parties does not waive work-product protection except when "it has substantially increased the opportunities for potential adversaries to obtain the information").

The Okada Parties argue that any work-product protection of the Freeh Report documents has been waived. However, the district court order compelling disclosure of the Freeh Report documents was not based on a waiver theory; rather, it was based on a finding that the investigation was not done in anticipation of litigation. We do not consider the Okada Parties' waiver argument at this time because it would require this court to engage in fact-finding, a task more appropriately reserved for the district courts. *See Ryan's Express Transp. Servs., Inc. v. Amador Stage Lines, Inc.*, 128 Nev. 289, 299, 279 P.3d 166, 172 (2012) ("An appellate court is not particularly well-suited to make factual determinations in the first instance." (citing *Zugel v. Miller*, 99 Nev. 100, 101, 659 P.2d 296, 297 (1983))).

CONCLUSION

In Docket No. 70050, we conclude that the district court erred when it compelled Wynn Resorts to produce certain attorney-client privileged documents from its attorneys with the law firm Brownstein Hyatt on the basis that Wynn Resorts invoked the business judgment rule. Therefore, we grant Wynn Resorts' petition for writ relief in Docket No. 70050 and direct the clerk of this court to issue a writ of prohibition precluding the district court from compelling the production of the attorney-client privileged Brownstein Hyatt documents.

In Docket No. 70452, we conclude that the district court correctly determined that Wynn Resorts waived the attorney-client privilege by placing the Freeh Report at issue in the initial litigation. However, because the work-product privilege may apply to some of the documents compiled in the preparation of the Freeh Report, we grant the petition in part and direct the clerk of this court to issue a writ of prohibition directing the district court to consider, consistent with this opinion, whether the work-product privilege applies.

CHERRY, C.J., and DOUGLAS, GIBBONS, and STIGLICH, JJ., concur.

RURAL TELEPHONE COMPANY, APPELLANT, *v.* PUBLIC UTILITIES COMMISSION OF NEVADA, AN ADMINISTRATIVE AGENCY OF THE STATE OF NEVADA, RESPONDENT.

No. 69612

August 3, 2017 398 P.3d 909

Appeal from a district court order dismissing a petition for judicial review of a public utilities commission decision. First Judicial District Court, Carson City; James E. Wilson, Judge.

Affirmed.

Allison MacKenzie, Ltd., and *Karen A. Peterson* and *Justin M. Townsend*, Carson City, for Appellant.

Public Utilities Commission of Nevada and *Garrett C. Weir* and *Hayley A. Williamson*, Carson City, for Respondent.

Before CHERRY, C.J., HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

In this appeal, we consider whether, under NRS 703.373(6) or any inherent authority, the district court may extend the deadline for filing the opening brief in a petition for judicial review of a public utilities commission decision. We conclude that the district court lacks such authority.

Because the district court did not have authority to grant appellant Rural Telephone Company's request for an extension of time to file its opening memorandum of points and authorities, through statute or its inherent authority, we conclude that the district court acted within its discretion in dismissing the petition. Thus, we affirm.

FACTS AND PROCEDURAL HISTORY

Rural Telephone filed an application with respondent Public Utilities Commission of Nevada (PUCN) concerning, among other things, a change in its telephone service rates and charges. After an adverse ruling from the PUCN, Rural Telephone timely filed a petition for judicial review of the PUCN decision in the district court.

NRS 703.373(1) provides that "[a]ny party of record to a proceeding before the [PUCN] is entitled to judicial review of the final decision upon the exhaustion of all administrative remedies by the party of record seeking judicial review." Pursuant to NRS 703.373(6), "[a] petitioner who is seeking judicial review must serve and file a memorandum of points and authorities within 30 days after the

[PUCN] gives written notice to the parties that the record of the proceeding under review has been filed with the court."

The deadline to file its opening memorandum of points and authorities was October 19, 2015, but on October 15, Rural Telephone asked the PUCN to stipulate to a 30-day extension. When the PUCN would only agree to a 10-day extension, Rural Telephone moved the court for a 30-day extension on October 16. The PUCN opposed the motion and sought dismissal of Rural Telephone's petition for failing to file its opening memorandum of points and authorities within the statutory time limit. After further briefing, a request for submission was filed on November 13. Before the court ruled on the motions, Rural Telephone filed its opening memorandum of points and authorities on November 18, within the requested extended deadline. Nevertheless, on December 8, 2015, the district court entered an order denying the motion for an extension, striking the November 18 memorandum of points and authorities, and dismissing the petition. Rural Telephone appeals.

DISCUSSION

Rural Telephone argues that because a district court has inherent authority to manage its own cases, the district court erred in determining it was statutorily prohibited from granting an extension of time for Rural Telephone to submit its opening memorandum of points and authorities. The PUCN argues that because the statutory language in NRS 703.373(6) creates a mandatory timeline intended by the Legislature to streamline and fast-track judicial review of the PUCN's decisions, the district court correctly held that it did not have the authority to extend the deadline for Rural Telephone to submit its opening memorandum of points and authorities.

The district court lacked the authority to grant Rural Telephone an extension of time to file its opening memorandum of points and authorities

Rural Telephone argues that the district court read the statutory language and legislative history of NRS 703.373 too narrowly and thereby erroneously deprived it of the right to judicial review. Rural Telephone further argues that the court's decision violates both the policy that actions should be adjudicated on the merits, and the separation of powers doctrine by upholding a legislative encroachment on the courts' power to administer justice.

The district court concluded that the term "must" in NRS 703.373(6), coupled with the legislative history and the Legislature's apparent intentional omission of any language authorizing a court to extend the time for filing briefs, meant that the court did not have authority to extend the deadline for filing an opening memo-

randum of points and authorities in an action seeking judicial review of a PUCN decision. We agree.

Statutory interpretation is a question of law that this court reviews de novo. *Gallagher v. City of Las Vegas*, 114 Nev. 595, 599, 959 P.2d 519, 521 (1998). "[W]hen the language of a statute is plain and unambiguous," the courts are not permitted to look beyond the statute itself when determining its meaning. *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 225, 19 P.3d 245, 247 (2001). "Whether statutory terms are plain or ambiguous depends both on the language used and on the context in which that language is used." *Simmons v. Briones*, 133 Nev. 59, 62, 390 P.3d 641, 644 (2017); *see also Banegas*, 117 Nev. at 229, 19 P.3d at 250 ("[W]ords within a statute must not be read in isolation, and statutes must be construed to give meaning to all of their parts and language within the context of the purpose of the legislation."). Finally, we must "not render any part of the statute meaningless," or read it in a way that "produce[s] absurd or unreasonable results." *Orion Portfolio Servs. 2, LLC v. Cty. of Clark ex rel. Univ. Med. Ctr. of S. Nev.*, 126 Nev. 397, 403, 245 P.3d 527, 531 (2010).

NRS 703.373 establishes the procedures for judicial review of a final PUCN decision, including specific deadlines for each stage of the judicial review process. The "[p]roceedings for review may be instituted by filing a petition for judicial review in the [d]istrict [c]ourt." NRS 703.373(2). "Copies of the petition for judicial review must be served upon the [PUCN] and all other parties of record." NRS 703.373(3). Within 30 days of this service, the PUCN must "transmit to the reviewing court a certified copy of the entire record of the proceeding under review." NRS 703.373(5). "[W]ithin 30 days after the [PUCN] gives written notice to the parties that the record of the proceeding under review has been filed with the court," the "petitioner who is seeking judicial review must serve and file a memorandum of points and authorities." NRS 703.373(6).

This court follows the principle of statutory construction that "the mention of one thing implies the exclusion of another." *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) (quoting *State v. Wyatt*, 84 Nev. 731, 734, 448 P.2d 827, 829 (1968) (Batjer, J., dissenting)); *see also Ex parte Arascada*, 44 Nev. 30, 35, 189 P. 619, 620 (1920) ("[I]t is fair to assume that, when the [L]egislature enumerates certain instances in which an act or thing may be done, or when certain privileges may be enjoyed, it names all that it contemplates; otherwise what is the necessity of specifying any?"). In addition, "[s]tatutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory." *Clark Cty. v. S. Nev. Health Dist.*, 128 Nev. 651, 656, 289 P.3d 212, 215 (2012).

When read as a whole, it is clear that the various subsections of NRS 703.373 provide for both mandatory and discretionary action. Whereas NRS 703.373(3), (6), and (7) contain mandatory language for filing timelines, NRS 703.373(5) explicitly gives the district court power to vary the timeline for certain filings. *Compare* NRS 703.373(3) ("A petition for judicial review *must* be filed within 30 days after the final action by the [PUCN] . . . ." (emphasis added)), NRS 703.373(6) ("A petitioner who is seeking judicial review *must* serve and file a memorandum of points and authorities within 30 days after the [PUCN] gives written notice . . . ." (emphasis added)), *and* NRS 703.373(7) ("The [PUCN] and any other respondents *shall* serve and file a reply memorandum of points and authorities within 30 days after service of the memorandum of points and authorities . . . ." (emphasis added)), *with* NRS 703.373(5) ("Within 30 days after the service of the petition for judicial review *or such time as is allowed by the court*," PUCN must provide a record of the proceeding (emphasis added)). Thus, it is fair to say that by using the mandatory language in NRS 703.373(6) and omitting any language allowing the district court discretion, a purpose of that statute is to preclude an extension of time for a petitioner to file its opening memorandum of points and authorities. *See, e.g.*, Hearing on A.B. 17 Before the Assembly Government Affairs Comm., 76th Leg. (Nev., February 9, 2011) (elaborating on the reasons behind the fast-track review of PUCN decisions).

The legislative purpose of NRS 703.373(6)'s mandatory language is further evident when compared with statutory language found in NRS Chapter 233B, Nevada's Administrative Procedure Act (APA). NRS 233B.133 provides the "[f]orm and deadlines for serving and filing memorandum of points and authorities" for judicial review of an administrative decision. In particular, "[a] petitioner . . . who is seeking judicial review *must* serve and file a memorandum of points and authorities within 40 days after the agency gives written notice . . . ." NRS 233B.133(1) (emphasis added). This mandatory language is nearly identical to NRS 703.373(6). But, unlike NRS 703.373, NRS 233B.133(6) provides that "[t]he court, for good cause, may extend the times allowed in this section for filing memoranda." No such authority to adjust timelines for filing a memorandum of points and authorities exists in NRS 703.373. And, under NRS 233B.039(5)(d), the provisions of the APA expressly do not apply to "[t]he judicial review of decisions of the [PUCN]."

This court has recognized that, in the case of review of agency decisions, the operative statute vests the court with authority to adjust otherwise mandatory timelines. *Fitzpatrick v. State ex rel., Dep't of Commerce, Ins. Div.*, 107 Nev. 486, 488, 813 P.2d 1004, 1005 (1991) ("[I]f the petition for judicial review is timely filed, *NRS 233B.133 allows the district court* to accept a tardy memorandum of

points and authorities in support of the petition." (emphasis added)); *see also Ex parte Ala. State Pers. Bd.*, 86 So. 3d 993, 995 (Ala. Civ. App. 2011) ("Appeals from [administrative-agency] decisions are purely statutory and the time periods provided by the statute must be strictly observed." (internal quotation marks omitted)).

Based on the foregoing, we conclude that NRS 703.373(6) precluded the district court from granting Rural Telephone's request for an extension of time to file its opening memorandum of points and authorities. To conclude otherwise would render other provisions of NRS 703.373 and the Legislature's intent to provide an expedited timeline for judicial review nugatory. *See S. Nev. Health Dist.*, 128 Nev. at 656, 289 P.3d at 215.

We further conclude that, although NRS Chapter 703 does not provide for the consequences for failure to timely file an opening brief under NRS 703.373(6), the district court acted within its discretion in striking Rural Telephone's memorandum of points and authorities and dismissing the petition. *See Beggs v. Bd. of Educ. of Murphysboro Cmty. Unit Sch. Dist. No. 186*, 72 N.E.3d 288, 302 (Ill. 2016) ("[W]hether dismissal of plaintiff's complaint was proper depends on whether plaintiff strictly complied with the [statutory] requirements." (internal quotation marks omitted)); *Warren Vill., Inc. v. Bd. of Assessment Appeals*, 619 P.2d 60, 64 (Colo. 1980) ("It is within the discretion of the district court to dismiss an appeal from a state administrative agency action if the appellant has not complied with the statutory time limitations for filing briefs.")

We thus affirm the district court's order dismissing Rural Telephone's petition for judicial review.

CHERRY, C.J., and PARRAGUIRRE, J., concur.

PETER GARDNER; AND CHRISTIAN GARDNER, ON BEHALF OF MINOR CHILD, L.G., APPELLANTS, *v.* HENDERSON WATER PARK, LLC, DBA COWABUNGA BAY WATER PARK, A NEVADA LIMITED LIABILITY COMPANY; WEST COAST WATER PARKS, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND DOUBLE OTT WATER HOLDINGS, LLC, A UTAH LIMITED LIABILITY COMPANY, RESPONDENTS.

No. 71652

August 3, 2017 399 P.3d 350

Appeal from a district court order granting summary judgment, certified as final under NRCP 54(b), in a tort action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Affirmed.

Campbell & Williams and *Donald J. Campbell, Philip R. Erwin*, and *Samuel R. Mirkovich*, Las Vegas, for Appellants.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger and *Paul F. Eisinger* and *Alexandra B. McLeod*, Las Vegas, for Respondents.

Before DOUGLAS, GIBBONS and PICKERING, JJ.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we are asked to consider to what extent a member of a limited liability company (LLC) is protected in a negligence-based tort action against the LLC. In doing so, we conclude that, pursuant to NRS 86.371 and NRS 86.381, a member cannot be personally responsible for the LLC's liabilities solely by virtue of being a member. Based on the facts of this case, we further conclude that the district court properly dismissed the members as defendants and, therefore, we affirm the district court's order granting summary judgment.

FACTS AND PROCEDURAL HISTORY

After their son, L.G., suffered severe injuries in a near-drowning in the wave pool at Cowabunga Bay, appellants Peter and Christian Gardner brought suit against Henderson Water Park, LLC, which does business as Cowabunga Bay Water Park (the Water Park), and its two managing members, West Coast Water Parks, LLC, and Double Ott Water Holdings, LLC (the member-LLCs). Among other allegations, the Gardners alleged that the negligence of the Water Park and member-LLCs contributed to L.G.'s injuries because of the Water Park's inadequate staffing of lifeguards.

The member-LLCs eventually moved for summary judgment, which the district court granted. Specifically, the district court dismissed the member-LLCs as improper parties pursuant to NRS 86.381. The district court certified its order as final under NRCP 54(b), and the Gardners appealed.

DISCUSSION

The Gardners challenge the district court's grant of summary judgment, which we review de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (holding that summary judgment should be granted "when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as

a matter of law" (alteration in original) (internal quotation marks omitted)). Specifically, the Gardners argue the district court erred in concluding that NRS 86.371 and NRS 86.381 shield the member-LLCs from suit because the Gardners seek to pursue a direct claim against the member-LLCs for the member-LLCs' own tortious conduct in negligently operating the Water Park. We disagree and conclude that summary judgment was appropriate.

Members of an LLC enjoy the benefit of limited liability, which refers to the fact that a member is not personally responsible for the LLC's liabilities solely by virtue of being a member. *See* 1 Larry E. Ribstein & Robert R. Keatinge, *Ribstein and Keatinge on Limited Liability Companies* § 1.5 (2016). With respect to a member's liability to third parties, NRS 86.371 provides that, "[u]nless otherwise provided in the articles of organization or an agreement signed by the member or manager to be charged, no member or manager of any limited-liability company formed under the laws of this State is individually liable for the debts or liabilities of the company." In addition, NRS 86.381 provides that "[a] member of a limited-liability company is not a proper party to proceedings by or against the company, except where the object is to enforce the member's right against or liability to the company." Accordingly, pursuant to NRS 86.371 and NRS 86.381, a member is not individually liable in a negligence-based tort action against the LLC solely by virtue of being a member.

While NRS 86.371 and NRS 86.381 do not shield members from liability for personal negligence, the Gardners failed to allege that the member-LLCs were personally negligent. *Cf. Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1098, 901 P.2d 684, 689 (1995) ("An officer of a corporation may be individually liable for any tort which he commits . . . ."). The Gardners argue they are seeking to assert independent claims and impose direct liability based on the member-LLCs' tortious conduct, and that the claims could be asserted against the member-LLCs even if the Water Park was not a party to the underlying action. However, the Gardners do not allege any conduct by the member-LLCs that is separate and apart from the challenged conduct of the Water Park—i.e., the Gardners do not specify how any individual act or omission by the member-LLCs contributed to L.G.'s injuries. *See Cortez v. Nacco Material Handling Grp., Inc.*, 337 P.3d 111, 119 (Or. 2014) (indicating that a member "remains responsible for his or her acts or omissions to the extent those acts or omissions would be actionable against the member . . . if that person were acting in an individual capacity"); *see also Wood*, 121 Nev. at 731, 121 P.3d at 1030-31 (noting that under NRCP 56, to withstand summary judgment, "the non-moving party may not rest upon general allegations and conclusions, but must,

by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine factual issue" (quotation marks omitted)). Indeed, the Gardners do not claim the member-LLCs breached a personal duty owed to L.G.; rather, the Gardners simply allege the member-LLCs breached certain duties that only arise based on the member-LLCs' roles as members. *See Petch v. Humble*, 939 So. 2d 499, 504 (La. Ct. App. 2006) (interpreting similar limited liability statutes, and holding that personal liability for negligence will not stand when the plaintiff fails to allege that the member's acts "are either done outside one's capacity as a member . . . or which while done in one's capacity as a member . . . also violate some personal duty owed by the individual to the injured party"). Thus, the Gardners impermissibly seek to hold the member-LLCs liable for the alleged negligence of the Water Park solely by virtue of the member-LLCs being managing members of the Water Park.

CONCLUSION

Because NRS 86.371 provides that the member-LLCs are not liable solely by virtue of being managing members, and NRS 86.381 provides that the member-LLCs are not proper parties in this action against the Water Park, we conclude that the district court did not err in dismissing the member-LLCs as improper defendants as a matter of law. Accordingly, we affirm the district court's order granting summary judgment.

DOUGLAS and PICKERING, JJ., concur.

LN MANAGEMENT LLC SERIES 5105 PORTRAITS PLACE, APPELLANT, *v.* GREEN TREE LOAN SERVICING LLC, RESPONDENT.

No. 69477

August 3, 2017 399 P.3d 359

Appeal from a district court order granting summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Douglas Smith, Judge.

Affirmed.

Kerry P. Faughnan, North Las Vegas, for Appellant.

Wolfe & Wyman LLP and *Colt B. Dodrill*, Las Vegas, for Respondent.

Before DOUGLAS, GIBBONS and PICKERING, JJ.

OPINION

By the Court, DOUGLAS, J.:

In this appeal, we consider the effect of a sale of real property situated in Nevada in violation of an automatic stay from the homeowners' bankruptcy proceedings commenced in Texas. This court was presented with a purported conflict of laws issue due to where the real property was situated and where the bankruptcy proceedings commenced, to which the United States Court of Appeals for the Ninth Circuit law would apply to the former and Fifth Circuit law would apply to the latter. However, under either circuit, the immediate effect of property sold in violation of an automatic stay is the same. Accordingly, we conclude that there is no conflict of laws issue here because under both the Ninth and Fifth Circuits, a sale conducted during an automatic stay in bankruptcy proceedings is invalid. Therefore, the district court properly granted respondent's motion for summary judgment.

FACTS AND PROCEDURAL HISTORY

The property at issue is located in Las Vegas. Homeowners encumbered the property with a note and deed of trust that were ultimately assigned to respondent Green Tree Loan Servicing LLC. When the homeowners filed for bankruptcy in Texas, they listed the property in their relevant bankruptcy schedule but failed to list the homeowners' association (HOA) as a creditor. During the bankruptcy proceedings and without seeking relief from the automatic stay, the HOA recorded a default and notice of sale and ultimately sold the property to appellant LN Management LLC. Appellant sought to quiet title in the district court, and respondent disputed the validity of the HOA sale by filing a complaint in intervention. Respondent then moved for summary judgment.[1] Ultimately, the district court granted respondent's motion for summary judgment by concluding that Ninth Circuit law controls, respondent has standing as a creditor to enforce the automatic stay in the homeowners' bankruptcy, and the HOA foreclosure sale was void due to the violation of the automatic stay. This appeal followed.

---

[1]No facts were in dispute with regard to respondent's motion for summary judgment. The only disputes between the parties concerned which circuit law applied in determining the effect of the HOA foreclosure sale and whether respondent had standing to challenge the sale. We have considered appellant's latter argument concerning standing and conclude that it lacks merit.

DISCUSSION

Standard of review

This court reviews a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all "other evidence on file demonstrate that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Id.* (alteration in original) (internal quotation marks omitted).

Acts in violation of a bankruptcy automatic stay are invalid irrespective of which circuit law applies

Appellant argues that the district court erred in granting respondent's motion for summary judgment. In particular, appellant looks to Texas, as the state where the homeowners commenced their bankruptcy proceedings, to argue that the HOA foreclosure sale is voidable pursuant to Fifth Circuit law. Conversely, respondent looks to where the property is situated to argue that the HOA foreclosure sale is void *ab initio* pursuant to Ninth Circuit law and, thus, the district court did not err in granting respondent's motion for summary judgment.[2]

"The automatic stay takes effect on the date the bankruptcy petition was filed, regardless of whether the creditor or other affected entity has knowledge of the bankruptcy and without the necessity of any formal service of process or notice to the creditors." 9B Am. Jur. 2d *Bankruptcy* § 1698 (2016) (footnotes omitted). Thus, "the automatic stay is effective against the world, regardless of notice." *Id.*

Accordingly, the HOA foreclosure sale was an act in violation of the automatic stay, despite the lack of notice of the homeowners' bankruptcy. The immediate effect of this act is the same regardless of which circuit law is applied. Thus, no conflict of laws issue arises at this point. Rather, it is the available recourse after a sale in violation of an automatic stay that distinguishes Ninth Circuit law from Fifth Circuit law.

The Ninth Circuit has held that acts in violation of the automatic stay are void *ab initio*, whereas the Fifth Circuit has held that such violations are voidable. *See In re Schwartz*, 954 F.2d 569, 571 (9th Cir. 1992); *In re Sikes v. Global Marine, Inc.*, 881 F.2d 176,

[2]We decline to address respondent's alternative arguments that the HOA foreclosure sale was commercially unreasonable and the HOA foreclosure statute is unconstitutional. In light of our disposition, we need not address these issues raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal.").

178 (5th Cir. 1989). "This [latter] position rests on the bankruptcy court's statutory power to annul the automatic stay, i.e., to lift the automatic stay retroactively and thereby validate actions which otherwise would be void." *In re Coho Res., Inc.*, 345 F.3d 338, 344 (5th Cir. 2003) (footnote and internal quotation marks omitted). In other words, the difference between a void and a voidable transaction is that the former "can never become valid," and the latter "can be made valid by subsequent judicial decision. Until that decision is rendered, however, it is not valid." *In re Pierce*, 272 B.R. 198, 207 n.21 (Bankr. S.D. Tex. 2001). Thus, under federal law in Texas, retroactive relief from the stay may be granted under some circumstances to validate the transaction; however, in general, an act in violation of the automatic stay has no effect, even if the parties did not have notice of the bankruptcy. *Id.* at 211. Accordingly, it is well recognized in the Fifth Circuit that "[a] foreclosure sale conducted in violation of the automatic stay remains invalid unless the bankruptcy court annuls the stay." *Williams v. Countrywide Home Loans, Inc.*, 504 F. Supp. 2d 176, 194 (S.D. Tex. 2007); *see also In re Jones*, 63 F.3d 411, 412 (5th Cir. 1995).

Here, the district court resolved the apparent conflict of laws issue by concluding that Ninth Circuit law controls due to the situs of the property. However, there is no conflict of laws issue because irrespective of which circuit law applies, the violation of the automatic stay invalidated the HOA foreclosure sale. If Fifth Circuit law applies, as appellant contends, then appellant must seek redress with the appropriate Texas bankruptcy court to validate the sale retroactively.[3] Until then, the sale remains invalid. Therefore, the district court did not err in determining that the HOA foreclosure sale was void, despite its reasoning.

Accordingly, we affirm the district court's order granting respondent's motion for summary judgment. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) ("This court will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

GIBBONS and PICKERING, JJ., concur.

---

[3]We note that the record is silent as to whether appellant sought recourse with the appropriate bankruptcy court and appellant's counsel conceded at oral argument before this court that such recourse was not pursued.