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Volume 138

AARON ROMANO, APPELLANT, *v.* TRACY ROMANO, RESPONDENT.

No. 81259

AARON ROMANO, APPELLANT, *v.* TRACY ROMANO, RESPONDENT.

No. 81439

January 13, 2022 501 P.3d 980

Consolidated appeals from district court orders denying a motion to modify child custody and child support and awarding attorney fees. Eighth Judicial District Court, Family Division, Clark County; Rebecca Burton, Judge.

Affirmed.

The Abrams & Mayo Law Firm and *Rena G. Hughes* and *Jennifer V. Abrams*, Las Vegas, for Appellant.

Kainen Law Group and *Racheal H. Mastel, Edward L. Kainen*, and *Andrew L. Kynaston*, Las Vegas, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, Cadish, J.:

In these consolidated appeals, we consider the circumstances under which a district court may modify the joint physical custody of minor children and a parent's child-support obligations. As to custody, we hold that a court may modify a joint or primary physical custody arrangement only if (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) the modification serves the best interest of the child. This two-part inquiry unifies tests previously applied by this court in determining whether a joint or primary physical custody arrangement should be modified on a parent's motion. Regarding child support, we hold that the new child-support guidelines alone do not constitute a change in circumstances necessary to support a motion to modify a child-support obligation. Applying these standards to this case, we conclude the district court did not abuse its discretion when it denied appellant's motion to modify the parties' physical custody designation and his child-support obligation. Additionally, we conclude that the district court did not abuse its discretion in awarding respondent attorney fees and costs. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Appellant Aaron Romano and respondent Tracy Romano divorced in 2019. Before the decree was entered, in March 2019, the parties agreed to resolve all issues relating to the custody, control, and care of their seven minor children in a stipulated order. This agreement created a complex timeshare regarding the physical custody of each child. Under the timeshare, the oldest 3 children are in Aaron's custody approximately 90 percent of the time, while the younger 4 children are in Tracy's custody approximately 95 percent of the time. The agreement indicates that both parties will make efforts to have the minor children spend more time with the other parent. Although the timeshare does not meet the at-least-40-percent-physical-custody standard for joint physical custody, the parties agreed to joint physical custody of the children, regardless.

In June 2019, after the parties resolved custody, they stipulated to a Marital Settlement Agreement (MSA), which provides terms regarding alimony, income, and child support. Pursuant to the MSA, Aaron owes Tracy $1,138 per month per child, the presumptive maximum for child support at the time, for the four youngest children and $569 per month for one of the older children. The MSA further provides that the prevailing party in litigation concerning the terms and conditions of the MSA or a breach of the MSA is entitled to attorney fees and costs.

Roughly eight months later, Aaron filed a "Motion to Confirm De Facto Physical Custody Arrangement of Children." In it, he requested that the court modify the custody order to reflect that he had primary physical custody of the three oldest children, while Tracy had primary physical custody of the four youngest children. He further requested the court to modify the child-support obligations because of the actual physical custody timeshare as well as an increase in Tracy's monthly income from $0 to $6,018.67. Tracy opposed, arguing that their global settlement did not warrant modification, as it reflected what the parties contemplated and stipulated to in court, such that there were no changed circumstances. As to her income, which consists of alimony and interest on a promissory note paid by Aaron, Tracy argued that there was no change in circumstances because her income was part of the parties' global settlement agreement, which Aaron knew of at the time they agreed on child support.

The district court denied Aaron's motion, concluding that there was no change in circumstances that warranted modifying custody, that Aaron's motion "seem[ed] to be an attempt to create a nonexistent change of circumstances to be able to apply the new child support guidelines," and that Tracy's income had not changed. On Tracy's motion, the district court awarded her attorney fees and costs pursuant to the MSA and NRS 18.010(2)(b), finding that Tracy was the prevailing party and that Aaron brought his motion without reasonable grounds. Aaron appealed from both of the district court's orders, and we consolidated his appeals for resolution.

DISCUSSION

The district court did not abuse its discretion when it denied Aaron's motion to modify custody

Aaron argues that the district court abused its discretion by denying his motion to modify physical custody because *Rivero v. Rivero*, 125 Nev. 410, 216 P.3d 213 (2009), does not require a party to show a change in circumstances before the court will determine the nature of the custody arrangement under Nevada law and modify the custody order accordingly. *Rivero*'s framework, however, relies on the premise that two distinct tests apply for evaluating motions to modify a physical custody arrangement depending on whether the arrangement is joint or primary. While our caselaw in this area has been inconsistent, we now clarify that regardless of whether a movant requests to modify joint custody or primary physical custody, the test to evaluate such a motion is one and the same—the movant must show that "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification." *Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007).

We first suggested that the test to modify joint physical custody may be different from the test to modify primary physical custody in *Truax v. Truax*, 110 Nev. 437, 874 P.2d 10 (1994). There, we stated that the test from *Murphy v. Murphy*[1]—the controlling custody-modification test at that time—applied only to primary physical custody arrangements because the Legislature had enacted NRS 125.510(2) after we decided *Murphy*. *Truax*, 110 Nev. at 438-39, 874 P.2d at 11. Because NRS 125.510(2) then provided that a court may modify a joint physical custody arrangement when the movant shows it is in the child's best interest to do so, we concluded that a party need not show a change in circumstances to modify a joint physical custody arrangement. *Id.* (citing 1981 Nev. Stat., ch. 148, at 283-84); *see also Hopper v. Hopper*, 113 Nev. 1138, 1142 n.2, 946 P.2d 171, 174 n.2 (1997) (recognizing that *Truax* "explained that the *Murphy* change of circumstances criterion would not apply to the modification of *joint physical custody* orders"), *overruled in part on other grounds by Castle v. Simmons*, 120 Nev. 98, 105, 86 P.3d 1042, 1047 (2004).

Even when *Truax* was decided, however, the child's best interest was the sole factor for a court to consider in determining physical custody regardless of whether a party sought joint or primary custody. NRS 125.480, *repealed by* 2015 Nev. Stat., ch. 445, § 19, at 2591, *and reenacted in substance in NRS 125C.0035 by* 2015 Nev. Stat., ch. 445, § 8, at 2583-85. And as we subsequently explained, *Truax*'s statement that a joint physical custody arrangement may be modified if the movant shows that it is in the child's best interest "did not mean that we abandoned the doctrine of res adjudicata in child custody matters and that persons dissatisfied with custody decrees can file immediate, repetitive, serial motions until the right circumstances or the right judge allows them to achieve a different result, based on essentially the same facts." *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1114 (1997) (emphasis omitted), *overruled in part by Castle*, 120 Nev. at 105 n.20, 86 P.3d at 1047 n.20. In that regard, we observed that "[i]t is rather obvious that when a judge makes a decision on child custody, such a decision should not be subject to modification if substantially the same set of circumstances that were present at the time the decision was made remains in effect." *Id.* at 58, 930 P.2d at 1115.

Consistent with that observation, we later explained in the context of reviewing an order granting a motion to modify primary physical custody that requiring the movant to show a substantial change in circumstances affecting the welfare of the child "serves the important purpose of guaranteeing stability unless circumstances have changed to such an extent that a modification is appropriate." *Ellis*, 123 Nev. at 151, 161 P.3d at 243. Because custodial stability is

[1]*Murphy v. Murphy*, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968), *overruled by Ellis*, 123 Nev. at 150, 161 P.3d at 242.

important for children regardless of the custodial designation, and res judicata principles are equally applicable in all child custody matters, we perceive no basis, statutory or otherwise, to maintain separate tests for evaluating a motion to modify a child-custody arrangement. Accordingly, consistent with *Ellis*, we hold that a court may modify a joint or primary physical custody arrangement only when "(1) there has been a substantial change in circumstances affecting the welfare of the child, and (2) the child's best interest is served by the modification."[2] *Id.* at 150, 161 P.3d at 242.

Applying that analysis here, we discern no abuse of discretion in the district court's conclusion that there was no change in circumstances that warranted modifying the child-custody arrangement, as Aaron did not allege, much less show, a substantial change in circumstances affecting the welfare of the children in the short time since the arrangement was agreed upon. *See Rivero*, 125 Nev. at 428, 216 P.3d at 226 (reviewing a district court's custody determinations for an abuse of discretion). As the district court stated after reviewing the timeshare schedule and the parties' evidence and arguments, "nothing was different from what it was when [the parties] put that [physical custody] schedule together." The record supports that conclusion.[3] *See id.* at 429, 216 P.3d at 226 (observing that a district

[2]This two-part analysis is consistent with other jurisdictions' approaches regarding motions to modify a joint physical custody arrangement. *See, e.g.*, *E.F.B. v. L.S.T.*, 157 So. 3d 917, 921 (Ala. Civ. App. 2014) ("Our supreme court has held that joint-physical-custody arrangements may be modified based on a material change of circumstances showing that modification would serve the best interests of the children."); *Mahan v. McRae*, 522 S.E.2d 772, 773 (Ga. Ct. App. 1999) (holding that "[o]nce a permanent child custody award has been entered, the test for use by the trial court in change of custody suits is whether there has been a change of conditions affecting the welfare of the child"); *Mimms v. Brown*, 856 So. 2d 36, 43 (La. Ct. App. 2003) (applying the changed circumstances and best interest of the child test to a motion to modify a stipulated joint custody order); *see also Family Law and Practice* § 32.10[1] (Arnold H. Rutkin ed. 2020) ("The legal principles governing modification of child custody are well settled. First, the party seeking modification must show a material change in circumstances, occurring after the entry of the previous custody order and affecting the best interests of the child. Next, the party seeking modification must prove that changing the child's custody is in the child's best interests.").

[3]As stated in *Rivero*, "parties are free to agree to child custody arrangements and those agreements are enforceable if they are not unconscionable, illegal, or in violation of public policy." 125 Nev. at 428-29, 216 P.3d at 226-27. Further, the parties may designate their agreement as either joint or primary physical custody even if the actual timeshare would not be considered joint or physical custody under Nevada law, and that designation will control unless the custody arrangement is modified. *See id.* However, a party cannot agree to a custody timeshare and designation and then move to modify the designation without also seeking to modify the timeshare itself in accordance with the test we confirm today. *Cf. Citicorp Servs., Inc. v. Lee*, 99 Nev. 511, 513, 665 P.2d 265, 266 (1983) (explaining that parties are bound by their stipulation unless they can show it "was entered into through mistake, fraud, collusion, accident or some ground of like nature").

court abuses its discretion in making a custody determination when it fails to make findings of fact supported by substantial evidence).

However, Aaron argues that *Rivero* requires the district court to determine whether the actual custody arrangement qualified as joint custody as provided in the stipulated custody order before it may reject a motion to modify based on lack of changed circumstances.[4] This argument, however, is premised on the continued existence of two separate tests for evaluating a motion to modify physical custody and, therefore, is foreclosed by our holding that the same two-part test applies to motions to modify any physical custody arrangement. Thus, we overrule *Rivero* to the extent it indicates that a district court must first determine what type of physical custody arrangement exists before considering whether to modify that arrangement.[5] Accordingly, the district court did not abuse its discretion when it denied Aaron's motion based on his failure to demonstrate a substantial change in circumstances without first determining whether the parties were exercising a joint or primary physical custody arrangement.[6]

The district court did not abuse its discretion when it denied Aaron's motion to modify his child-support obligation

Aaron argues that the district court abused its discretion in denying his motion to modify his child-support obligation.[7] We disagree.

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[4]Although *Rivero* indicated that two separate tests may apply depending on what type of physical custody arrangement exists, 125 Nev. at 422 n.4, 216 P.3d at 222 n.4, the custody issue in *Rivero* turned on the district court's abuse of discretion in (1) summarily determining that the parties had a joint physical custody arrangement without making any supporting findings of fact, and (2) modifying custody without supported factual findings that doing so was in the child's best interest, *id.* at 430, 216 P.3d at 227. Thus, the test that applies in determining a motion to modify a physical custody arrangement was not the basis for the disposition reversing and remanding.

[5]Nothing in this opinion overrules the dispositive aspects of *Rivero*, which define joint and primary physical custody and require the district court to make express findings of fact as to whether the moving party met the criteria for modifying physical custody. 125 Nev. at 420-28, 216 P.3d at 221-26.

[6]Our holding does not change the rule announced in *Nance v. Ferraro* that the doctrine of res judicata does not "bar district courts from reviewing the facts and evidence underpinning their prior rulings in deciding whether the modification of a prior custody order is in the child's best interest." 134 Nev. 152, 163, 418 P.3d 679, 688 (Ct. App. 2018); *see also Castle*, 120 Nev. at 105, 86 P.3d at 1047 ("Although the doctrine of res judicata, as applied through the changed circumstances doctrine, promotes finality and therefore stability in child custody cases, it should not be used to preclude parties from introducing evidence of domestic violence that was unknown to a party or to the court when the prior custody determination was made.").

[7]In light of our holding that the district court properly concluded there was no change of circumstances relating to the physical custody arrangement, we need not address Aaron's argument that a change in the custody arrangement

We review decisions regarding child support for an abuse of discretion. *Rivero*, 125 Nev. at 438, 216 P.3d at 232. A district court may modify a child-support order if there has been a change in circumstances and the modification is in the child's best interest. *Id.* at 431, 216 P.3d at 228.

Although Aaron first argues that Tracy's income increased from $0 to $6,018.67 following the MSA, such that the district court should have reviewed the child-support order based on changed circumstances, Tracy's income and Aaron's child-support obligation were both resolved in the MSA. Thus, Tracy's income at the time the parties resolved child support was $6,018.67, and her income has not changed since then. Accordingly, the district court did not abuse its discretion when it concluded Tracy's income did not constitute a change in circumstances to support modifying Aaron's support obligation.[8]

Aaron next argues that NAC Chapter 425, which became effective on February 1, 2020, and promulgated a new formula to determine a parent's child-support obligations, constitutes a change in circumstances that requires the district court to review the parties' child-support obligations. He further claims that NAC 425.170(3), which provides that the enactment of the new guidelines alone is not a change in circumstances sufficient to modify an existing child-support order, conflicts with our holdings in *Rivero*, 125 Nev. at 432, 216 P.3d at 228, and *Burton v. Burton*, 99 Nev. 698, 669 P.2d 703 (1983). According to Aaron, those cases show that a change in the law made after entry of a support obligation amounts to a changed circumstance, warranting modification of that obligation. We disagree.

NRS 425.620 directs the Administrator of the Division of Welfare and Support Services (the agency) to establish the guidelines for child support and authorizes the agency to promulgate regulations such as NAC 425.170(3). NRS 425.450(1) also commands the agency to establish a formula for the adjustment of child support and "[t]he times at which such an adjustment is appropriate." Because the Legislature specifically directed the agency "to ensure the maintenance of effective, efficient and appropriate guidelines that best serve the interests of the children of this State," *see* NRS 425.620(3), and expressly delegated the ability to determine when modification of child support fulfills those legislative goals, NAC 425.170(3) did not exceed the scope of the agency's power. Thus, while *Rivero* and

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constitutes a change of circumstances that warrants revisiting his child-support obligations.

[8]To the extent Aaron argues that the district court was required to review his child-support obligation because Tracy is an obligor and her income increased more than 20 percent, we disagree. As discussed above, Tracy's income did not increase at all after his support obligation was established, much less by 20 percent.

Burton provide that a district court typically may modify a support order when there is a legal change in circumstances, here the duly promulgated regulation carves out a minor exception to that general rule.[9] "A properly adopted substantive rule establishes a standard of conduct which has the force of law." *State ex rel. Nev. Tax Comm'n v. Saveway Super Serv. Stations, Inc.*, 99 Nev. 626, 630, 668 P.2d 291, 294 (1983). While we "will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious," *Felton v. Douglas County*, 134 Nev. 34, 38, 410 P.3d 991, 995 (2018) (quoting *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003)), none of those circumstances apply here. Accordingly, the district court did not abuse its discretion when it concluded that there was no change in circumstances warranting modification of Aaron's child-support obligations.[10]

The district court did not abuse its discretion by awarding Tracy attorney fees and costs

As noted, the district court awarded attorney fees and costs to Tracy under the MSA and NRS 18.010(2)(b). Aaron does not challenge the reasonableness of the district court's award or the applicability of NRS 18.010 and the MSA. Because we conclude that the district court properly denied Aaron's motion, making Tracy the prevailing party, the district court likewise did not abuse its discretion by awarding Tracy attorney fees and costs. *See Kantor v. Kantor*, 116 Nev. 886, 896, 8 P.3d 825, 831 (2000) (applying an abuse of discretion standard of review to an order awarding attorney fees and costs); *see also* NRS 18.010(1) (providing that a district court

[9]We note that neither *Rivero* nor *Burton*, which both predate NAC 425.170(3), involved a similar regulation stating that the change in the statutory scheme did not constitute a change in circumstances. *See Rivero*, 125 Nev. at 432, 216 P.3d at 228-29 (explaining the proper standard for when a court may modify a child-support obligation); *Burton*, 99 Nev. at 699-700, 669 P.2d at 704 (noting that the Legislature passed a law specifically allowing former military spouses to "request a modification in the district court of the adjudication of property rights in the decree of divorce").

[10]Aaron further argues that NAC 425.170(3) violates the Equal Protection Clause. However, Aaron waived this argument by failing to raise it before the district court. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding that a party waives an argument by failing to raise it in the district court). Moreover, while "issues of a constitutional nature may be addressed when raised for the first time on appeal," *Levingston v. Washoe County*, 112 Nev. 479, 482, 916 P.2d 163, 166 (1996), we decline to do so here, as Aaron failed to provide any authority supporting his equal protection challenge, *see Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court will not consider claims that are unsupported by cogent argument and relevant authority).

may award attorney fees as provided for in an agreement between the parties or as authorized by a statute).

CONCLUSION

A district court may modify a joint physical custody arrangement, like a primary physical custody arrangement, only when (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) the modification would serve the child's best interest. On the record before us, the district court did not abuse its discretion when it concluded that no substantial change in circumstances affecting the welfare of the children occurred. Additionally, the district court did not abuse its discretion when it denied Aaron's motion to modify his child-support obligation. Finally, the district court properly awarded Tracy attorney fees and costs. Accordingly, we order the judgments of the district court affirmed.

Parraguirre, C.J., and Hardesty, Stiglich, Silver, Pickering, and Herndon, JJ., concur.

SEAN MAURICE DEAN, Appellant, *v.* AITOR NARVAIZA, ELKO COUNTY SHERIFF, Respondent.

No. 81209

January 13, 2022 502 P.3d 177

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Fourth Judicial District Court, Elko County; Alvin R. Kacin, Judge.

Reversed and remanded.

[Rehearing denied February 14, 2022]

[En banc reconsideration denied March 7, 2022]

Lockie & Macfarlan, Ltd., and *David B. Lockie*, Elko, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Tyler J. Ingram*, District Attorney, and *Mark S. Mills*, Deputy District Attorney, Elko County, for Respondent.

Before the Supreme Court, Hardesty and Stiglich, JJ., and Gibbons, Sr. J.[1]

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider whether a defense attorney's overt interjection of racial stereotypes into a criminal trial constituted ineffective assistance of counsel. In conducting voir dire, counsel discussed several offensive racial stereotypes. Because counsel carelessly introduced racial animus into this criminal trial, we conclude that the district court erred in denying appellant Sean Dean's postconviction petition for a writ of habeas corpus, as counsel's performance fell below an objective standard of reasonableness and resulted in prejudice. We therefore reverse the district court's order denying Dean's petition and remand for further proceedings.

FACTS AND PROCEDURAL HISTORY

Dean faced charges of attempted murder with the use of a deadly weapon and other related offenses. During jury selection, Dean's counsel asked the prospective jurors if they had any preconceived ideas about African Americans having "certain attributes." None of the prospective jurors answered that they did. Counsel responded "You don't?" Counsel followed this with a discussion involving

[1]The Honorable Mark Gibbons, Senior Justice, participated in the decision of this matter under a general order of assignment.

several offensive racial stereotypes. Counsel insisted that the prospective jurors must have heard that all African Americans "like watermelon" or "have an attribute of violence, that they are sneaky." Again, no one on the venire responded.

Eventually, one outspoken prospective juror rejected counsel's suggestions and asserted that "we're all equal" and that it was "unfair" to make assumptions based on race. Despite this clear disavowal of racial bias, counsel further interrogated this prospective juror with more questions about offensive racial stereotypes, including the following: "[Dean] has a propensity for violence because he is black. You have heard that?" Despite receiving no affirmative response, counsel asked if any of the prospective jurors could not evaluate Dean "as just another guy, not a black guy?"

The jury found Dean guilty of attempted murder with the use of a deadly weapon, battery with the use of a deadly weapon, and battery with the use of a deadly weapon resulting in substantial bodily harm. The district court sentenced Dean to an aggregate prison term of 144 to 372 months. Dean appealed, and the court of appeals affirmed his conviction. *Dean v. State*, No. 74602-COA, 2019 WL 398002 (Nev. Ct. App. Jan. 25, 2019) (Order of Affirmance). Dean filed a timely postconviction petition for a writ of habeas corpus, alleging, among other claims, that counsel was ineffective for introducing racial issues into the trial. After an evidentiary hearing, the district court denied the petition. Dean appealed.

DISCUSSION

Dean argues that counsel's method of broaching the subject of race during voir dire by asking the venire about offensive racial stereotypes constitutes ineffective assistance of counsel. We agree.

To prove ineffective assistance of counsel, a petitioner must demonstrate that counsel's performance was deficient in that it fell below an objective standard of reasonableness and resulted in prejudice such that, but for counsel's errors, there is a reasonable probability of a different outcome in the proceedings. *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984); *Warden v. Lyons*, 100 Nev. 430, 432-33, 683 P.2d 504, 505 (1984) (adopting the test in *Strickland*). "With respect to the prejudice prong, '[a] reasonable probability is a probability sufficient to undermine confidence in the outcome.'" *Johnson v. State*, 133 Nev. 571, 576, 402 P.3d 1266, 1273 (2017) (quoting *Strickland*, 466 U.S. at 694). A petitioner must show both deficient performance and prejudice to warrant postconviction relief. *Strickland*, 466 U.S. at 697. We give deference to the district court's factual findings if supported by substantial evidence and not clearly erroneous but review the court's application of the law to those facts de novo. *Lader v. Warden*, 121 Nev. 682, 686, 120 P.3d 1164, 1166 (2005).

A criminal defendant has a constitutional right to be tried by a fair and impartial jury. *See Turner v. Murray*, 476 U.S. 28, 36 & n.9 (1986). "Jury selection is the primary means by which a court may enforce a defendant's right to be tried by a jury free from ethnic, racial, or political prejudice or predisposition about the defendant's culpability." *Gomez v. United States*, 490 U.S. 858, 873 (1989) (internal citations omitted). In some cases, after weighing the risks and benefits, trial counsel may decide to raise the issue of race and racial prejudice during voir dire. *See Mahdi v. Bagley*, 522 F.3d 631, 638 (6th Cir. 2008) (explaining that "counsel had to weigh the potential harm that could flow from a *voir dire* on racial and religious bias against its arguable benefit"); *see also Commonwealth v. Henry*, 706 A.2d 313, 323 (Pa. 1997) ("[R]aising the issue of racial bias may have the adverse effect of emphasizing racial stereotypes by focusing the jurors' attentions on skin color instead of the guilt or innocence of the accused."). And under some circumstances, counsel may be compelled to broach the issue of race. For example, counsel may be ineffective for not asking any individual questions of an empaneled juror "who expressly admitted her racially biased view that black people—including [the defendant]—are inherently more violent than other people." *State v. Bates*, 149 N.E.3d 475, 484 (Ohio 2020). But when probing for racial bias, counsel must discuss the subject in a careful and responsible manner. *See Middleton v. State*, 64 N.E.3d 895, 901 (Ind. Ct. App. 2016) (explaining that counsel referring to his client as a "negro" while exploring potential racial bias during voir dire "was wholly unacceptable and amounted to deficient performance").

In this case, counsel chose to delve into possible racial bias among the prospective jurors but did so in a flawed and inappropriate manner. Among the numerous problematic comments, counsel suggested that all African Americans, and Dean himself, had an "attribute" of being sneaky and violent. Given that Dean faced charges involving violence, we conclude that counsel's conduct went beyond an objectively reasonable inquiry into potential racial bias. We, like the Florida Supreme Court, are concerned that "[t]he manner in which counsel approached the subject [of race] unnecessarily tended either to alienate jurors who did not share his animus against African Americans 'just because they're black,' or to legitimize racial prejudice without accomplishing counsel's stated objective of bringing latent bias out into the open." *State v. Davis*, 872 So. 2d 250, 256 (Fla. 2004). At the evidentiary hearing on Dean's postconviction petition, counsel testified that he sought to bring out the unconscious racial biases present "in all of us." However, counsel's stated goal does not make his method of addressing possible racial bias reasonable. Indeed, at the evidentiary hearing, the State described the outspoken prospective juror

as "offended" and counsel testified that the prospective juror was "very angry" about the implication that race would factor into his deliberation, which further demonstrates the impropriety of counsel's conduct. *See Mazzan v. State*, 100 Nev. 74, 79-80, 675 P.2d 409, 412-13 (1984) (finding counsel ineffective for, in part, antagonizing the jury). Whether counsel himself believed any of the offensive stereotypes is immaterial because bringing such racial invective into the courtroom cannot be justified. *See Davis*, 872 So. 2d at 253 ("Whether or not counsel is in fact a racist, his expressions of prejudice against African-Americans cannot be tolerated."). In particular, we are troubled by counsel's comment that "[Dean] has a propensity for violence because he is black." This comment came after the outspoken prospective juror rejected the idea of making any assumptions based on race. Rather than ending this line of inquiry, counsel chose to ask more problematic racial questions and undercut his stated purpose of challenging the prospective jurors' unconscious feelings about race. Based on the foregoing, we conclude that counsel's conduct constituted deficient performance, as we discern no reasonable basis for his method of exploring possible racial bias among the prospective jurors.

We next consider whether that deficient performance prejudiced Dean. Under the facts in this case, we conclude that counsel's offensive discussion about race resulted in prejudice. First, of particular note, counsel's repeated suggestion that African Americans are inherently violent severely compromised Dean's defense that he did not wield a knife during the altercation and the victims stabbed each other. *See Strickland*, 466 U.S. at 686 ("The benchmark for judging any claim of ineffectiveness must be whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."). Next, counsel's suggestion that African Americans are "sneaky" potentially undermined his own client's credibility, particularly in this case where Dean testified at trial. Lastly, counsel created an unacceptable risk of infecting the jury's deliberations because his statements "appealed to a powerful racial stereotype—that of black men as violence prone," *Buck v. Davis*, 580 U.S. 100, 121 (2017) (internal quotation marks omitted). Because counsel suggested that Dean "has a propensity for violence" based on his race, we do not believe that counsel's concluding remarks about not evaluating Dean by his race cured the prejudicial effect of counsel's earlier statements about African Americans. Based on counsel's poorly designed introduction of offensive racial stereotypes into the jury-selection process, we do not have confidence in the outcome at trial, as counsel's conduct created a reasonable probability of an unreliable conviction. *See Strickland*, 466 U.S. at 694 ("A reasonable probability is a probability sufficient to undermine

confidence in the outcome."); *Davis*, 872 So. 2d at 255 (finding that counsel's conduct in discussing racial prejudice "created a reasonable probability of unreliable convictions"). Because Dean's counsel performed deficiently and that performance resulted in prejudice, we conclude that Dean received ineffective assistance of counsel at trial.

We must also note that, under the facts of this case, the trial court's inaction heightens our lack of confidence in the outcome of the trial. In this case, counsel's conduct of discussing harmful racial stereotypes warranted intervention by the trial judge. Instead, the venire may have seen the judge's silence as normalizing, or even tacitly approving, counsel's offensive questioning. *See Azucena v. State*, 135 Nev. 269, 272, 448 P.3d 534, 538 (2019) ("[J]udges [must] be mindful of the influence they wield over jurors, as a trial judge's words and conduct are likely to mold the opinion of the members of the jury to the extent that one or the other side of the controversy may be prejudiced." (internal quotation marks omitted)). The United States Supreme Court has recognized "that if the right to counsel guaranteed by the Constitution is to serve its purpose, defendants cannot be left to the mercies of incompetent counsel, and that judges should strive to maintain proper standards of performance by attorneys who are representing defendants in criminal cases in their courts." *McMann v. Richardson*, 397 U.S. 759, 771 (1970). Here, the trial court neither cautioned counsel nor canvassed any of the prospective jurors to assess whether the inappropriate comments had any adverse effect. Such actions were needed because "[t]he trial judge has a duty to restrict attorney-conducted voir dire to its permissible scope: obtaining an impartial jury." *Whitlock v. Salmon*, 104 Nev. 24, 28, 752 P.2d 210, 213 (1988). When counsel treads into improper or antagonistic lines of inquiry, it is incumbent on judges to exercise their discretion and reign in such behavior. *See id*. (acknowledging "the absolute right of a trial judge to reasonably control and limit an attorney's participation in voir dire"); *see also* Nev. Code of Judicial Conduct Canon 2, Rule 2.8. Exercising reasonable control over the conduct of counsel safeguards not only the integrity of an individual trial proceeding but also the decorum and public confidence in the justice system as a whole. The district court's duty is particularly critical when it comes to sensitive issues like racial prejudice because vigilance is required from trial courts to combat the corrosive effects of such prejudice in the justice system. As the United States Supreme Court has explained, "[b]ecause of the risk that the factor of race may enter the criminal justice process, we have engaged in 'unceasing efforts' to eradicate racial prejudice from our criminal justice system." *McCleskey v. Kemp*, 481 U.S. 279, 309 (1987) (quoting *Batson v. Kentucky*, 476 U.S. 79, 85 (1986)). Accordingly, counsel's offensive questioning of

the venire warranted intervention by the trial court.[2] Thus, we take this opportunity to urge trial judges to exercise reasonable control when counsel exceeds the appropriate bounds of voir dire. *See* NRS 175.031 (providing that the district court shall allow supplemental examination of potential jurors "as the court deems proper").

CONCLUSION

We conclude that counsel's statements impermissibly tainted the jury pool by introducing racial invective into the proceedings. Counsel's performance fell below an objective standard of reasonableness and prejudiced the defense. Accordingly, we reverse the district court's order denying Dean's postconviction habeas petition and remand this matter for further proceedings.

Hardesty, J., and Gibbons, Sr. J., concur.

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[2]We do not suggest that the court needed to reprimand counsel in front of the venire; rather, the court could have excused the venire or conducted a bench conference to admonish counsel.

U.S. BANK, N.A., AS TRUSTEE FOR THE SPECIALTY UNDERWRITING AND RESIDENTIAL FINANCE TRUST MORTGAGE LOAN ASSET-BACKED CERTIFICATES SERIES 2006-BC4, APPELLANT, *v.* THUNDER PROPERTIES, INC.; AND WESTLAND REAL ESTATE DEVELOPMENT AND INVESTMENTS, RESPONDENTS.

No. 81129

February 3, 2022 503 P.3d 299

Certified questions under NRAP 5 concerning statutory limitations periods for declaratory judgment and quiet title actions. United States Court of Appeals for the Ninth Circuit; Ronald M. Gould, Carlos T. Bea, and Michelle T. Friedland, Circuit Judges.

Questions answered.

[Rehearing denied May 18, 2022]

PICKERING, J., with whom CADISH and SILVER, JJ., agreed, dissented in part.

Akerman LLP and *Melanie D. Morgan, Ariel E. Stern*, and *Lilith V. Xara*, Las Vegas, for Appellant.

Kim Gilbert Ebron and *Jacqueline A. Gilbert*, Las Vegas; *Roger P. Croteau & Associates, Ltd.*, and *Roger P. Croteau* and *Timothy E. Rhoda*, Las Vegas, for Respondent Thunder Properties, Inc.

Kim Gilbert Ebron and *Diana S. Ebron* and *Jacqueline A. Gilbert*, Las Vegas, for Amicus Curiae SFR Investments Pool 1, LLC.

Before the Supreme Court, EN BANC.

OPINION

By the Court, STIGLICH, J.:

The United States Court of Appeals for the Ninth Circuit certified questions to this court concerning the statute of limitations in a declaratory relief and quiet title matter arising out of an HOA foreclosure sale. The Ninth Circuit asks two questions:

> (1) When a lienholder whose lien arises from a mortgage for the purchase of a property brings a claim seeking a declaratory judgment that the lien was not extinguished by a subsequent foreclosure sale of the property, is that claim exempt from statute[s] of limitations under *City of Fernley v.* [*State,*] *Department of Taxation*, 132 Nev. 32, 366 P.3d 699 (2016)?

(2) If the claim described in (1) is subject to a statute of limitations:

(a) Which limitations period applies?

(b) What causes the limitations period to begin to run?

We respond to the Ninth Circuit that declaratory relief actions are not categorically exempt from statutes of limitations under *City of Fernley v. State, Department of Taxation*, 132 Nev. 32, 366 P.3d 699 (2016). We next determine that the four-year catch-all statute of limitations, NRS 11.220, applies to an action (like this one) to determine the validity of a lien under NRS 40.010. And finally, the statute of limitations does not begin to run until the titleholder affirmatively repudiates the lien, which does not necessarily happen at the foreclosure sale.

FACTS

Because this is a certified question, the court takes the facts as stated in the Ninth Circuit's order certifying the questions, *U.S. Bank, N.A. v. Thunder Properties, Inc.*, 958 F.3d 794 (9th Cir. 2020).

Briefly, appellant U.S. Bank, N.A., holds a first deed of trust on the subject residential real property. Based on unpaid HOA assessments, the HOA foreclosed on the property in 2011, and the bank made no effort to challenge the foreclosure sale at that time. The property was subsequently transferred to respondent Thunder Properties, Inc. In 2016, five years after the sale, U.S. Bank sued for a declaration to quiet title. It stated that this claim was made pursuant to the state and federal declaratory judgments acts, as well as Nevada's quiet title statute. It also asserted other claims that are not at issue here. The bank argued that it is entitled to a declaration that its deed of trust was not extinguished by the sale and remains a present interest in the property. Thunder Properties argued that the statute of limitations began to run when the property was sold and has since expired, such that the bank's suit must be dismissed. The federal district court dismissed the bank's claim as time-barred. The bank appealed, and the Ninth Circuit Court of Appeals certified the above-stated questions of law to this court.

DISCUSSION

City of Fernley *does not hold that declaratory relief actions are categorically exempt from statutes of limitations*

As to the Ninth Circuit's first certified question, we respond that our holding in *City of Fernley* does not necessarily allow declaratory relief in an action that is otherwise time-barred, because framing an action as seeking declaratory relief does not provide a categorical exception to the statute of limitations.

In *City of Fernley v. State, Department of Taxation*, the city challenged the constitutionality of a 1997 tax statute (the C-Tax) that provided a new system for distributing tax revenues among cities. 132 Nev. 32, 36-37, 366 P.3d 699, 702-03 (2016). After Fernley incorporated as a city in 2001, it did not meet criteria to receive increased C-Tax distributions. *Id.* at 39, 366 P.3d at 704. Thus, the city received less tax revenue than other cities with comparable populations. *Id.* at 39, 366 P.3d at 705. Eleven years later, Fernley filed suit, seeking retrospective money damages, a declaration that the C-Tax was unconstitutional, and an injunction barring its future enforcement. *Id.* at 40 & n.4, 366 P.3d at 705 & n.4. The district court granted summary judgment, however, after concluding that the complaint was time-barred under NRS 11.220's four-year catch-all limitations period. *Id.* at 41, 366 P.3d at 705-06.

In resolving Fernley's subsequent appeal, this court observed that the "[t]he statute of limitations applies differently depending on the type of relief sought," noting "two types of relief: retrospective relief, such as money damages, and prospective relief, such as injunctive or declaratory relief." *Id.* at 42, 366 P.3d at 706. Relying on the principle that statutes must accord with constitutions, we recognized that permitting a statute of limitations to bar challenge to an allegedly unconstitutional statutory provision would undermine the constitutional supremacy doctrine. *Id.* at 42-44, 366 P.3d at 706-07. In *City of Fernley*, we thus concluded that "the failure to file a claim within the statute of limitations period does not render all relief time-barred because claimants retain the right to prevent *future violations* of their constitutional rights." *Id.* at 44, 366 P.3d at 708 (emphasis added). And therefore, "the statute of limitations does not bar Fernley's claims for injunctive and declaratory relief from an allegedly unconstitutional statute." *Id.* at 44, 366 P.3d at 707. Accordingly, *City of Fernley* held that declaratory or injunctive relief to prevent future constitutional violations is not subject to statutes of limitations based on when the violation first began. It does not provide that declaratory relief is categorically exempt from statutes of limitation.

Consistent with *City of Fernley*, a claim for declaratory relief cannot be used to circumvent the statute of limitations absent an alleged ongoing violation of a party's constitutional rights. If a statute of limitations would bar a legal remedy based on the same substantive claim as underlies a request for declaratory relief, the limitations period will apply "[t]o prevent plaintiffs from making a mockery of the statute of limitations." *Levald, Inc. v. City of Palm Desert*, 998 F.2d 680, 688 (9th Cir. 1993) (quoting *Gilbert v. City of Cambridge*, 932 F.2d 51, 57 (1st Cir. 1991)); *see also Taxpayers Allied for Constitutional Taxation v. Wayne County*, 537 N.W.2d 596, 601 (Mich. 1995) ("Declaratory relief may not be used to avoid the statute of limitations for substantive relief."). In sum,

declaratory relief does not exempt a time-barred claim from the statute of limitations where there is not an ongoing violation of a party's constitutional rights.[1]

This is a quiet title action under NRS 40.010

Before reaching the Ninth Circuit's next question, we must determine the nature of the relief sought to determine what limitations period should apply. The bank's complaint asserted a claim for "Quiet Title/Declaratory Judgment." It claimed an entitlement to a declaration under 28 U.S.C. § 2201 (the federal Declaratory Judgments Act), NRS 30.040 (the state-law Uniform Declaratory Judgments Act), and NRS 40.010 (the quiet title statute).[2] The nature of the claim, however, is that the bank retained a valid first priority interest on the property via its deed of trust because the HOA foreclosure sale, through which Thunder Properties' predecessor-in-interest acquired its interest, did not extinguish the deed of trust.

Whether characterized as seeking declaratory relief or quiet title, this court examines the nature of the substantive claim, as "[t]he nature of the claim, not its label, determines what statute of limitations applies." *Perry v. Terrible Herbst, Inc.*, 132 Nev. 767, 770, 383 P.3d 257, 260 (2016). NRS 40.010 permits an action by a party that claims an interest in real property against another party claiming an interest in that property to resolve the competing claims. Rather than any particular elements, parties must prove their interests in the property at issue and demonstrate superiority of title. *Chapman v. Deutsche Bank Nat'l Tr. Co.*, 129 Nev. 314, 318, 302 P.3d 1103, 1106 (2013). The parties here agree that Thunder Properties' title is not in dispute and that they only dispute the validity of a lien on that title. We have recognized that actions to resolve competing claims to title and clouds on title are quiet title actions brought under NRS 40.010. *Shadow Wood Homeowners Ass'n v. N.Y. Cmty. Bancorp, Inc.*, 132 Nev. 49, 58, 366 P.3d 1105, 1111 (2016). That the claim has been framed as seeking declaratory relief does not change the applicable statute of limitations; instead, courts generally apply the limitations period for the substantive "claim on which the relief is based," because "[l]imitations statutes do not apply to declaratory judgments as such." *Luckenbach S.S. Co. v. United States*, 312 F.2d 545,

[1]The bank argues that *City of Fernley* applies with equal force to prospective statutory claims, relying on *City of Fernley*'s citation to *Taxpayers Allied*. The bank is mistaken. *City of Fernley* pertinently noted that permitting the statute of limitations to bar suit to enjoin future unconstitutional taxes would be improper because it "would truncate the constitutional right." 132 Nev. at 43, 366 P.3d at 707 (quoting *Taxpayers Allied*, 537 N.W.2d at 600). *City of Fernley* is silent as to declaratory relief for a hypothetical statutory claim relating to an ongoing violation that is otherwise time-barred.

[2]To the extent the bank argues it asserts a defense to which statutes of limitations do not apply, it exceeds the scope of the certified questions and thus the scope of this opinion.

548 (2d Cir. 1963); *see also Int'l Ass'n of Machinists & Aerospace Workers v. Tenn. Valley Auth.*, 108 F.3d 658, 668 (6th Cir. 1997) ("A request for declaratory relief is barred to the same extent that the claim for substantive relief on which it is based would be barred."). In this context, a declaration to quiet title resolving the status of the bank's interest in the property is the substantive relief sought.

The four-year catch-all statute of limitations applies

Having determined that the bank seeks to quiet title and determine that its lien was not extinguished, we answer the Ninth Circuit that the catch-all limitations period set forth in NRS 11.220 applies.

"When a right of action does not have an express limitations period, we apply the most closely analogous limitations period," if one exists.[3] *Perry*, 132 Nev. at 774, 383 P.3d at 262. Such an analogous period does not always exist. *Perry* illustrates an analogous claim that may supply a limitations period: a constitutional minimum-wage-amendment claim is analogous to a statutory claim for failure to pay an employee the minimum wage, and thus the limitations period for the statutory claim may be applied. *Id.* at 768, 383 P.3d at 258. "NRS 11.220 provides a catch-all limitations period for any right of action not otherwise provided for by law." *Id.* at 770, 383 P.3d at 260. When a statutory category of claim is broad enough to encompass many kinds of claims, such that it is "impossible to analogize them to any other type of claim consistently," it is appropriate to apply the catch-all provision. *Id.* at 773, 383 P.3d at 261-62.

As a threshold matter, we address the bank's claim that the statute of limitations may depend on the plaintiff's theory of the case and Thunder Properties' argument that relies on the bank's fact-specific assertion that the HOA's foreclosure sale did not comply with NRS Chapter 116. Both parties thus urge that courts look beyond the cause of action and the relief sought and engage with specific arguments made to support that cause of action. We decline to do so, as we have observed that "it is the object of the action, rather than the theory upon which recovery is sought, that is controlling" in determining the statute of limitations. *State Farm Mut. Auto. Ins. Co. v. Wharton*, 88 Nev. 183, 186, 495 P.2d 359, 361 (1972) (alteration and quotation marks omitted); *see also Szymborski v. Spring Mountain Treatment Ctr.*, 133 Nev. 638, 643, 403 P.3d 1280, 1285 (2017) (recognizing that "the gravamen of the claims rather than the gravamen of the complaint determines statute of limitations issues"). Even if "[t]he statute of limitations applies differently depending on the type of relief sought," *City of Fernley*, 132 Nev. at 42, 366 P.3d at 706, the

[3]We recognize that the doctrine of "analogous limitations" has recently been superseded by statute. 2021 Nev. Stat., ch. 161, § 2, at 723-24 (amending NRS 11.220). The amendment applies only prospectively, however, *id.* § 3, at 724, and thus does not directly govern here. Though the amendment is not retroactive, we have considered it in seeking to establish a consistent rule.

applicable statute of limitations should *not* depend on highly case-specific facts or arguments, *see Owens v. Okure*, 488 U.S 235, 240 (1989) (observing that seeking analogous applications on a case-by-case basis may lead to confusion and inconsistent results in determining the appropriate statute of limitations). Focusing on the nature of the claim, rather than specific case-by-case facts, serves "a primary goal of statutes of limitations"—"[p]redictability." *Id.*

The bank argues that there is no clearly applicable statute of limitations, while Thunder Properties and amicus curiae SFR Investments Pool 1, LLC, argue that the bank is suing upon a "liability created by statute" and is thus subject to NRS 11.190(3)(a). The bank's action has not sought to hold Thunder Properties liable, but rather to determine the viability of the bank's interest. We agree with the bank and conclude that no statute of limitations specifically addresses a quiet title action involving a nonpossessory lien.

Considering the statutes proffered by the parties in turn, we conclude that none are suitably analogous. Rather, we conclude that this is exactly the type of situation for which NRS 11.220's catch-all period was built. The bank first argues that NRS 106.240 should apply. NRS 106.240 extinguishes a lien ten years after the debt secured by the deed of trust becomes "wholly due." This statute does not address an analogous claim involving whether a foreclosure extinguished a deed of trustholder's lien; rather, it "creates a conclusive presumption that a lien on real property is extinguished ten years after the debt becomes due." *Pro-Max Corp. v. Feenstra*, 117 Nev. 90, 94, 16 P.3d 1074, 1077 (2001). The bank next argues that NRS 40.090's 15-year limitations period should apply because the claim is analogous to adverse possession. There is, however, no uncertainty regarding title or ownership here. *See Brundy v. Bramlet*, 101 Nev. 3, 5, 692 P.2d 493, 495 (1985) ("Adverse possession allows peaceful resolution of disputes over the ownership of real property and frees the alienation of that property by removing uncertainties regarding title."). The bank next argues that NRS 104.3118(1), setting a six-year term for an action to enforce an obligation to pay a note, is analogous. This argument is unpersuasive as well; the bank seeks to determine whether its interest persists, not to recover a debt due. Lastly, the bank argues that the quiet title actions addressed in NRS 11.070 or NRS 11.080 are analogous. These provisions apply, however, to claims where the plaintiff actually "was seized or possessed of the premises in question," NRS 11.070; NRS 11.080, which is not comparable to the bank's claims here. Amicus argues that the 30- and 90-day periods in NRS 107.080 to challenge a foreclosure sale are analogous; however, the bank here does not seek to unwind that transaction but rather to determine that its deed of trust persists notwithstanding the sale. Amicus alternatively argues that the 60-day redemption period in NRS 116.31166(3) is analogous, but the statutory right of redemption seeks to restore

an interest that has been extinguished, while the bank distinguishably argues that its interest remains intact. *See generally Saticoy Bay LLC Series 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 444 P.3d 428 (2019) (interpreting NRS 116.31166(3)). Finally, amicus argues that the action is analogous to a suit to recover property sold for taxes, *see* NRS 361.600, but again, the bank at no point possessed and does not seek to recover the premises at issue here. Accordingly, we conclude that the parties have not shown that the nature of the claim here is analogous to that of a claim provided for by another statute of limitations.

A claim to determine the validity of a lien may be analogous to various other actions, depending on the facts of the case. But that does not mean the court should engage in a fact-intensive inquiry to determine the statute of limitations on a case-by-case basis. Rather, precisely because it is "impossible to analogize [these claims] to any other type of claim consistently," it is appropriate to apply the catch-all provision. *See Perry*, 132 Nev. at 773, 383 P.3d at 261-62.

The four-year limitations period is not triggered until the titleholder repudiates the lien

Finally, we consider the Ninth Circuit's question regarding when the limitations period begins to run. We respond that the limitations period does not begin to run until the lienholder receives notice of some affirmative action by the titleholder to repudiate the lien or that is otherwise inconsistent with the lien's continued existence.

Our recent decision in *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 460 P.3d 440 (2020), is instructive on this point. In *Berberich*, the plaintiff purchased the property at an HOA foreclosure sale and, six years later, sought to quiet title in himself by a judicial determination that the foreclosure sale extinguished the lender's original deed of trust. *Id.* at 94, 460 P.3d at 441. We held that in such a case, "the limitations period is triggered when the plaintiff is ejected from the property or has had the validity or legality of his or her ownership or possession of the property called into question." *Id.* at 97, 460 P.3d at 443. "[M]ere notice of an adverse claim is not enough." *Id.* (quoting *Salazar v. Thomas*, 186 Cal. Rptr. 3d 689, 696 (Ct. App. 2015) (alteration in original)). Rather, the period is triggered when "someone presses an adverse claim." *Id.* Pressing an adverse claim may consist of explicitly calling the owner's right to possession into question or indirectly challenging the owner's interest by asserting that another party has a senior interest. *Id.*

Berberich does not directly control this case, as the bank here has not asserted a right to possess the property. However, it is straightforward to extend *Berberich*'s discussion of when the limitations period begins to run to this case. *Berberich* held that the statute of limitations does not run against a property owner until he or she

"has notice of disturbed possession." *Id.* It takes more than mere notice of an adverse claim to trigger the limitations period; some affirmative action is required. *Id.* Applying the same principle, the statute of limitations should not run against a lienholder until it has something closely analogous to "notice of disturbed possession," such as repudiation of the lien.

The HOA foreclosure sale, standing alone, is not sufficient to trigger the period. As the bank has at least constructive notice—and likely actual notice—of the foreclosure sale, it knows that there is a possibility the purchaser will raise an adverse claim that the lien has been extinguished. But the foreclosure sale is not itself that claim because the foreclosure sale does not necessarily extinguish the lien. Of course, an HOA foreclosure *can* extinguish a bank's deed of trust. *SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 758, 334 P.3d 408, 419 (2014). But it is also possible that a foreclosure *does not* do so—for example, if the bank properly tendered the superpriority amount, *see Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 612, 427 P.3d 113, 121 (2018), or if tender was excused, *7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 63, 458 P.3d 348, 349 (2020). Thus, an HOA foreclosure sale—standing alone—does not sufficiently call the bank's deed of trust into question to trigger the statute of limitations. It is more akin to "notice of an adverse claim" than "notice of disturbed possession" or "someone press[ing] an adverse claim." To rise to the level that would trigger the limitations period, something more is required.[4]

CONCLUSION

Here, we consider another facet of the effect of HOA foreclosures on lender deeds of trust, as posed by the United States Court of Appeals for the Ninth Circuit in questions certified to this court. In response, we conclude that *City of Fernley* does not establish that declaratory judgments are categorically exempt from statutes of

[4]We disagree with our dissenting colleagues that this opinion is advisory. Rather, whether a triggering action was present is beyond the scope of our inquiry. That we do not decide whether such action was present does not mean that this conclusion is not determinative. It simply involves factual determinations beyond the certified facts and thus beyond the scope of this review. Further, the dissent finds a "one-size-fits-all approach" in our analysis that is not present, as we looked to the substance of the claims raised, looking beyond whether the claimant labeled them as seeking quiet title or declaratory relief. We agree that such actions can be mechanisms to seek relief for a wide variety of claims. We also agree that the bank need not take further action in cases of "tender or tender futility." However, because the certified questions focus specifically on a claim arising from the foreclosure sale, the analysis here thus focuses on whether the bank's interest persisted as a consequence of the sale. The certified questions do not present the matter of an action to quiet title based on a bank's claimed property rights in general or any other particular basis. Accordingly, this discussion concerns a claim on the specific basis of the consequence of a foreclosure sale.

limitations. Rather, that decision established only that suits seeking a declaration to prevent future, ongoing violations of constitutional rights are not time-barred. We further conclude that a claim seeking to quiet title by declaring the validity of a lien is subject to a four-year statute of limitations. And, consistent with *Berberich*, which held that the statute of limitations does not begin to run on a titleholder's suit until the plaintiff had notice of disturbed possession—rather than mere notice of an adverse claim—the statute of limitations does not begin to run on a lienholder's suit until a comparable act occurs, such as the titleholder's repudiation of the lien. Because an HOA foreclosure sale may or may not extinguish a lien, such a sale does not, without more, trigger the limitations period.

Parraguirre, C.J., and Hardesty and Herndon, JJ., concur.

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

This case comes to us under NRAP 5. This rule permits us to answer certified questions about Nevada law when the answers "may be determinative of the cause then pending in the certifying court." NRAP 5(a). But "[t]his court lacks the constitutional power to render advisory opinions." *Echeverria v. State*, 137 Nev. 486, 489, 495 P.3d 471, 475 (2021). So, to proceed under NRAP 5, it must appear to the court that "its answers may 'be determinative' of part of the federal case, there is no controlling [Nevada] precedent, and the answer will help settle important questions of law." *Volvo Cars of N. Am., Inc. v. Ricci*, 122 Nev. 746, 751, 137 P.3d 1161, 1164 (2006) (quoting *Ventura Grp. v. Ventura Port Dist.*, 16 P.3d 717, 719 (Cal. 2001)).

The answers the majority gives to the Ninth Circuit's questions do not meet these criteria. In the first place, the majority's opinion is impermissibly advisory—it opines that all of the Bank's claims are subject to the four-year catch-all statute of limitations in NRS 11.220 but then holds that the HOA foreclosure sale did not start the clock running on any of them. For a statute of limitations to matter, the cause of action must first accrue. *See* NRS 11.010 ("Civil actions can only be commenced within the periods prescribed in this chapter, *after the cause of action shall have accrued*.") (emphasis added). If the cause of action has not accrued, which statute of limitations applies is academic. Declaratory judgment is available to parties in this position, provided their disagreement is ripe and will "terminate the uncertainty or controversy," NRS 30.080, but the action is not time-barred, whether under a three-, four-, or five-year limitations period.

Second, and more fundamentally, the majority errs by adopting a one-size-fits-all approach to the statute of limitations questions posed. Quiet title and declaratory judgment actions can serve as

the vehicle for a variety of claims. Such actions do not carry a single statute of limitations that operates the same way for all types of claims. On the contrary, the statute of limitations that applies and its trigger depend on the theory that underlies the claim. *Salazar v. Thomas*, 186 Cal. Rptr. 3d 689, 694-95 (Ct. App. 2015) (holding that, in the quiet title context, "courts refer to the underlying theory of relief to determine the applicable period of limitations"); *see also Las Vegas Dev. Grp., LLC v. Blaha*, 134 Nev. 252, 257, 416 P.3d 233, 237 (2018) (applying the five-year statute of limitations in NRS 11.080 instead of the shorter limitation periods in NRS 107.080(5)-(6) to a quiet title action where the theory was the HOA foreclosure sale extinguished the first deed of trust, such that the trustee lacked authority thereafter to conduct a deed-of-trust foreclosure sale); 74 C.J.S. *Quieting Title* § 58 (2013) (discussing how the theory underlying the quiet title claim determines the statute of limitations, if any, that applies); 65 Am. Jur. 2d *Quieting Title and Determination of Adverse Claims* § 46 (2021) (similar). The majority recognizes as much—acknowledging that the five-year statute of limitations that *Berberich v. Bank of America, N.A.*, 136 Nev. 93, 95, 460 P.3d 440, 442 (2020), holds governs an HOA-foreclosure-sale buyer's quiet title action against the deed-of-trust holder does not apply when the roles are reversed, and the deed-of-trust holder sues the foreclosure-sale buyer to quiet title.

Instead of answering the Ninth Circuit's statute of limitations questions in the abstract, I would tie the answers to the claims alleged in the Bank's complaint. *See In re Fontainebleau Las Vegas Holdings*, 128 Nev. 556, 570, 289 P.3d 1199, 1207 (2012) (consulting the facts stated by the certifying court and alleged in the federal court complaint in answering questions certified under NRAP 5). In its complaint, the Bank alleges that its deed of trust is superior to Thunder's title on two different theories. First, it maintains that the HOA lien foreclosure sale was unfair and produced a grossly inadequate price, such that equity should invalidate it under *Shadow Wood Homeowners Ass'n v. New York Community Bancorp, Inc.*, 132 Nev. 49, 57, 366 P.3d 1105, 1110 (2016), and its progeny. *See Nationstar Mortg., LLC v. Saticoy Bay LLC Series 2227 Shadow Canyon*, 133 Nev. 740, 749, 405 P.3d 641, 648 (2017) (discussing *Shadow Wood* and noting that, while "mere inadequacy of price is not in itself sufficient to set aside the foreclosure sale . . . it should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness, or oppression" and should be set aside on the basis of equity). Second, the Bank alleges that tender of the superpriority portion of the lien was futile and therefore excused, such that the HOA lien foreclosure sale failed to extinguish its deed of trust by operation of law. *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 610, 427 P.3d 113, 120 (2018) (*Diamond Spur*) (holding that

"under the split-lien scheme, tender of the superpriority portion of an HOA lien satisfies that portion of the lien by operation of law," so the HOA lien foreclosure sale does not extinguish the first deed of trust); *see also 7510 Perla Del Mar Ave Tr. v. Bank of Am., N.A.*, 136 Nev. 62, 67, 458 P.3d 348, 351-52 (2020) (extending *Diamond Spur* to hold that, where the tendering party knew tender "would have been rejected," tender is excused, and the deed of trust survives as if tender had occurred).

As to the Bank's first theory—its *Shadow Wood*-based claim for equitable relief from the HOA lien foreclosure sale—I agree that the catch-all four-year statute of limitations in NRS 11.220 applies. This claim is not an "action upon a liability created by statute," so NRS 11.190(3)(a)'s three-year statute of limitations does not apply. *See U.S. Bank Nat'l Ass'n v. SFR Invs. Pool 1, LLC*, 376 F. Supp. 3d 1085, 1091 (D. Nev. 2019). And the Bank does not possess or assert a right to possess the property, so NRS 11.070 and NRS 11.080 and their five-year limitations periods do not apply either. *See id.* Last, a *Shadow Wood*-type claim seeks to set aside an HOA superpriority lien foreclosure sale deed that, if not set aside, extinguished the first deed of trust. Nevada's ancient mortgage statute, NRS 106.240, providing for the expiration of a deed of trust ten years after the note it secures became fully due, sets an outside expiration date. It does not revive an already-extinguished deed of trust.

The majority and I part company, though, on what triggers the statute of limitations on a first deed-of-trust holder's *Shadow Wood*-based claim for equitable relief from an HOA foreclosure sale. Applying the same rule to all such challenges, whether equitable or tender-based, the majority firmly holds that "an HOA foreclosure sale—standing alone—does not sufficiently call the bank's deed of trust into question to trigger the statute of limitations"; "something more is required." Majority op. at 23. But this conflicts fundamentally with a *Shadow Wood*-based claim, which seeks to *set aside*, on equitable grounds, an HOA superpriority lien foreclosure sale that allegedly extinguished the first deed of trust. If a superpriority lien foreclosure sale does not call the deed of trust sufficiently into question to trigger the statute of limitations, it is hard to imagine what would. At least in the context of a *Shadow Wood*-based claim for equitable relief from an HOA superpriority lien foreclosure sale, I would hold, as several federal courts have held, that the HOA superpriority lien foreclosure sale triggers the four-year statute of limitations in NRS 11.220. *U.S. Bank Nat'l Ass'n*, 376 F. Supp. 3d at 1091; *Bank of N.Y. Mellon v. 4655 Gracemont Ave. Tr.*, No. 2:17-cv-00063-JAD-PAL, 2019 WL 1598745, at *4 (D. Nev. Apr. 12, 2019); *Bank of Am., N.A. v. Giavanna Homeowners Ass'n*, No. 2:18-cv-00288-RFB-VCF, 2019 WL 1407411, at *2-3 (D. Nev. Mar. 28, 2019).

The Bank's second theory—that tender or tender futility preserved its deed of trust by operation of law—stands on a different footing. Under *Diamond Spur*, tender or tender futility extinguishes the superpriority portion of the HOA lien, invalidating the foreclosure sale as to the first deed of trust. 134 Nev. at 612, 427 P.3d at 121 (stating that "after a valid tender of the superpriority portion of an HOA lien, a foreclosure sale on the entire lien is void as to the superpriority portion, because it cannot extinguish the first deed of trust on the property"); *see also 7510 Perla Del Mar Ave Tr.*, 136 Nev. at 67, 458 P.3d at 352 (extending *Diamond Spur* to tender futility). Under this theory, the Bank's deed of trust and the HOA buyer's deed do not conflict. The deed of trust survives the HOA lien foreclosure sale, such that the HOA buyer takes title subject to the Bank's deed of trust. The Bank is under no obligation to take further action to protect its deed of trust against the lien foreclosure sale buyer. *See Newport v. Hatton*, 231 P. 987, 991 (Cal. 1924) (noting that in the quiet title context "[a] party holding the paramount claim to a legal title is not called upon to take action against a hostile claim which is not of a nature to ripen into a valid adverse title"); 74 C.J.S. *Quieting Title*, *supra*, § 58 ("An equitable suit to quiet title in relation to a void deed is not subject to a statute of limitations that applies if a deed is voidable.") (footnote omitted). And the deed of trust remains enforceable until it expires under the statutes applicable thereto. *See* NRS 104.3118(1) (the statute of limitations for judicial foreclosure is six years after the debt's maturity date). *Compare* NRS 106.240 (providing that a deed of trust is canceled ten years after the obligation it secures becomes fully due), *with Facklam v. HSBC Bank USA*, 133 Nev. 497, 497, 401 P.3d 1068, 1069 (2017) (holding that "because statutes of limitations only apply to judicial actions, and a nonjudicial foreclosure by its very nature is not a judicial action," a lender may pursue nonjudicial foreclosure of a deed of trust despite the contract-based statute of limitations having run on the note secured by the deed of trust). The four-year catch-all statute of limitations thus does not apply to the Bank's tender/tender futility claim.

Last, this case differs from *City of Fernley v. State, Department of Taxation*, 132 Nev. 32, 366 P.3d 699 (2016).[1] The plaintiff in *City of Fernley* challenged the constitutionality of a tax distribution scheme. *Id.* at 36, 366 P.3d at 702. Although it let the statute of limitations run on its accrued damages claim, the scheme was ongoing,

[1]Like the majority, I note the Bank's argument that statutes of limitations do not apply to defenses, *Dredge Corp. v. Wells Cargo, Inc.*, 80 Nev. 99, 102, 389 P.2d 394, 396 (1964); *see Ferrell St. Tr. v. Bank of Am., N.A.*, No. 78691, 2021 WL 911893, at *1 (Nev. Mar. 9, 2021) (citing *Dredge* and noting that "[w]e have also held that statutes of limitation do not run against defenses such as tender"), but leave that issue for another day, since the Bank does not adequately develop it and neither Thunder nor amicus curiae addresses it.

with annual distributions projected into the future. *Id.* at 44, 366 P.3d at 707-08. The statute of limitations had not run as to the future distributions, so the City was entitled to pursue declaratory and injunctive relief as to future distributions on a continuing claim theory. *Id.* at 43-44, 366 P.3d at 707-08.

In sum, I concur in the majority's decision to apply a four-year statute of limitations to the Bank's equitable claim to set aside the HOA foreclosure sale. Otherwise, I respectfully dissent.

LARRY PORCHIA, Appellant, *v.* CITY OF LAS VEGAS; STEPHEN MASSA; NICHOLAS PAVELKA; WILLIAM HEADLEE; MARINA CLARK; JASON W. DRIGGERS; and LVFR RISK MANAGEMENT, Respondents.

No. 78954

February 17, 2022 504 P.3d 515

Appeal from a district court order granting a motion to dismiss a tort action. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed in part, reversed in part, and remanded.

Olson, Cannon, Gormley & Stoberski and *Stephanie M. Zinna*, Las Vegas, for Appellant.

Bradford R. Jerbic, City Attorney, and *Jeffry M. Dorocak* and *Rebecca L. Wolfson*, Deputy City Attorneys, Las Vegas, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Herndon, J.:

Appellant Larry Porchia alleges EMTs denied him medical treatment and transportation to the hospital after negligently misdiagnosing him and/or because he was homeless and uninsured. The district court dismissed Porchia's complaint after concluding that Porchia's claims were barred by the public duty doctrine and the Good Samaritan statute. However, accepting Porchia's allegations as true, a failure to render medical assistance or to transport a patient to the hospital based solely on their socioeconomic status may qualify as an affirmative act exempted from the public duty doctrine and as gross negligence, which would render the Good Samaritan statute inapplicable. Thus, we conclude the district court erred in dismissing Porchia's complaint in its entirety at such an early stage in the proceedings.

FACTS AND PROCEDURAL HISTORY

On August 26, 2015, at 3:45 a.m., Porchia's friend called emergency services on his behalf because he was suffering from severe stomach pain, vomiting, and hot flashes. Las Vegas Fire and Rescue (LVFR), which employs respondents Firefighter-Paramedic Stephen Massa and Firefighter-Advanced Emergency Medical Technician Nicholas Pavelka, was dispatched to Porchia's location. Massa and

Pavelka placed Porchia on a stretcher, took his vitals, and asked him questions about his condition. Porchia requested they transport him to the hospital. According to Porchia's amended complaint, once he informed them that he was homeless and did not have insurance, Massa and Pavelka diagnosed Porchia with gas pain, removed him from the stretcher, and concluded he did not need to be transported to the hospital.

At 11 a.m., another of Porchia's friends called emergency services again on his behalf because he was still experiencing severe stomach pain. LVFR was again dispatched, and different EMTs immediately transported Porchia to the hospital, where he underwent emergency surgery for a bowel obstruction. Porchia asserts that both the doctor and the nurse at the hospital informed him that if he had received medical treatment earlier, he would not have required emergency surgery.

Porchia filed, pro se, an amended complaint alleging negligence against respondents. The district court granted respondents' motion to dismiss, concluding that, as a matter of law, respondents could not be held liable for damages based on the public duty doctrine, NRS 41.0336, and the Good Samaritan statute, NRS 41.500(5). Porchia appealed, and the Court of Appeals affirmed the district court's order. *Porchia v. City of Las Vegas*, No. 78954-COA, 2020 WL 7396925 (Nev. Ct. App. Dec. 16, 2020) (Order of Affirmance). Porchia filed a petition for review with this court, which we granted.

DISCUSSION

We review de novo a district court order dismissing a complaint pursuant to NRCP 12(b)(5). *Dezzani v. Kern & Assocs., Ltd.*, 134 Nev. 61, 64, 412 P.3d 56, 59 (2018). Under our "rigorous standard of review" of such orders, we must consider all factual allegations in the complaint as true and draw all inferences in the plaintiff's favor. *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). A "complaint should be dismissed only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id.* at 228, 181 P.3d at 672.

The public duty doctrine

This court first recognized the public duty doctrine in 1979 when it concluded that a police department could not be held liable for injuries sustained as the result of another's unlawful actions, even when the injured party claimed the police department failed to provide adequate security and medical care at a public event. *Bruttomesso v. Las Vegas Metro. Police Dep't*, 95 Nev. 151, 153, 591 P.2d 254, 255 (1979). In that matter, this court emphasized that "[t]he duty of the government . . . runs to all citizens and is

to protect the safety and well-being of the public at large." *Id.* The rationale behind the public duty doctrine permits public entities to carry out their duty to the public without fear of financial loss or reprisal. *See generally Scott v. Dep't of Commerce*, 104 Nev. 580, 585-86, 763 P.2d 341, 344 (1988) ("[T]he public interest is better served by a government which can aggressively seek to identify and meet the current needs of the citizenry, uninhibited by the threat of financial loss should its good faith efforts provide less than optimal—or even desirable—results." (quoting *Commonwealth, Dep't of Banking & Sec. v. Brown*, 605 S.W.2d 497, 499 (Ky. 1980)). Thus, the public duty doctrine shields public entities, like fire departments or public ambulance services, from liability on the basis that such entities should not be inhibited by their good faith efforts to serve the public, even when the outcome of their emergency treatment is less than desirable.

The public duty doctrine was codified in NRS 41.0336, which provides that public officers called to assist in an emergency are not liable for their negligent acts or omissions unless one of two exceptions is applicable: (1) the public officer made a specific promise or representation to the person and the person relied on that promise or representation to his or her detriment, resulting in the officer assuming a special duty to the individual person; or (2) the conduct of the public officer "affirmatively caused the harm." Additionally, the public duty doctrine does not "abrogate the principal of common law that the duty of governmental entities to provide services is a duty owed to the public, not to individual persons." NRS 41.0336.

The special duty exception

Porchia argued in his amended complaint that the first exception to the public duty doctrine applied because Massa and Pavelka breached a special duty they owed to him, as an individual, to transport him to the hospital. Nevada recognizes two ways in which a special duty may be established: (1) if a statute or ordinance sets forth "mandatory acts clearly for the protection" of an individual "rather than the public as a whole," *Coty v. Washoe County*, 108 Nev. 757, 761 n.6, 839 P.2d 97, 99 n.6 (1992) (internal quotations omitted); or (2) if a public officer, "acting within the scope of official conduct, assumes a special duty by creating specific reliance on the part of certain individuals," *id.* at 760, 839 P.2d at 99. *See also Charlie Brown Constr. Co. v. City of Boulder City*, 106 Nev. 497, 505-06, 797 P.2d 946, 951 (1990) (explaining that a special duty sufficient to pierce the public duty doctrine was established by a city ordinance that imposed a duty to act for the benefit of specific entities), *abrogated on other grounds by Calloway v. City of Reno*, 116 Nev. 250, 993 P.2d 1259 (2000).

Porchia failed to point to any Nevada or local law that required Massa or Pavelka to transport him to the hospital under the asserted

circumstances. The Legislature has recognized that "prompt and efficient emergency medical care and transportation is necessary for the health and safety of the people of Nevada," NRS 450B.015, but that statute does not require EMTs to transport every member of the public who seeks emergency medical care. If an EMT has exercised his or her duty of care in examining a patient and determined that no further medical intervention is necessary, the EMT does not have a duty to transport the patient to the hospital. *See, e.g.*, *Watts v. City of Chicago*, 758 N.E.2d 337, 340 (Ill. App. Ct. 2001) (explaining that a paramedic has a duty to transport a person to the hospital only if there is a medical necessity); *Wright v. Hamilton*, 750 N.E.2d 1190, 1194 (Ohio Ct. App. 2001) (providing that if a paramedic utilizes a reasonable exercise of professional judgment in determining that the patient does not require additional medical attention, the paramedic need not transport the patient to the hospital). Accordingly, an EMT's duty is owed to the public, not to the individual person, and there is no law establishing a special duty to transport all patients to the hospital.

Porchia further failed to demonstrate a special duty created by a promise from Massa or Pavelka that he relied upon to his detriment. *See Hines v. District of Columbia*, 580 A.2d 133, 136 (D.C. 1990) (stating that "the mere fact that an individual has emerged from the general public and become[s] an object of the special attention of public employees does not create a relationship which imposes a special legal duty"). He does not assert that Massa or Pavelka promised to transport him to the hospital. Because Porchia cannot point to a special duty Massa or Pavelka had to transport him to the hospital, his asserted claims failed to demonstrate the first exception to the public duty doctrine.

The affirmative harm exception

Porchia also argued in his amended complaint that he was refused treatment and transport by Massa and Pavelka because of his socioeconomic status and that the delay in receiving treatment was what caused his need for surgery. Consequently, he argued, the second exception to the public duty doctrine applies because, accepting the factual assertions as true, Massa and Pavelka affirmatively caused him harm. He alleged that they took affirmative steps by removing him from the stretcher when they learned he was homeless and uninsured.

In *Coty v. Washoe County*, 108 Nev. 757, 760-61, 839 P.2d 97, 99 (1992), we recognized that NRS 41.0336 did not define the phrase "affirmatively caused the harm," and we defined the phrase as meaning "that a public officer must actively create a situation which leads directly to the damaging result." Accordingly, to have invoked the affirmative harm exception to the public duty doctrine, Porchia must

have alleged facts that, when taken as true, demonstrate that Massa and Pavelka created a situation that led directly to Porchia's alleged harm and that their actions "actively and continuously" operated to bring about his harm. *See id.* at 760, 839 P.2d at 99 (explaining that in negligence actions, "legal cause is determined when the actor's negligent conduct *actively and continuously* operates to bring about the harm to another" (internal quotations omitted)).

The Court of Appeals of Utah has further described when affirmative acts by a public officer establish liability under the affirmative act exception to the public duty doctrine. *Faucheaux v. Provo City*, 343 P.3d 288, 293 (Utah Ct. App. 2015).

> [T]he public duty doctrine applies only to the omissions of a governmental actor. Thus, where the affirmative acts of a public employee actually causes the harm . . . the public duty doctrine does not apply. Affirmative acts include active misconduct working positive injury to others, while omissions are defined as passive inaction, i.e., a failure to take positive steps to benefit others, or to protect them from harm. A negligent affirmative act leaves the plaintiff positively worse off as a result of the wrongful act, whereas in cases of negligent omissions, the plaintiff's situation is unchanged; she is merely deprived of a protection which, had it been afforded her, would have benefitted her.

Id. (internal quotation marks and citations omitted). We find this analysis persuasive.

This court has considered the affirmative harm exception only in one case, in which a police officer pulled over an intoxicated driver, cited him for speeding, directed him to park his car on the side of the road, and arranged for the driver to be transported home, but left before the driver's transportation arrived. *Coty*, 108 Nev. at 758-59, 839 P.2d at 98. The driver then resumed driving and collided with another vehicle, killing himself and the passenger in the other vehicle. *Id.* at 759, 839 P.2d at 98. In the wrongful death action that was subsequently filed against the officer, this court concluded that because the driver ignored the police officer's order to park his car on the side of the road, the police officer was not the active and direct cause of the harm. *Id.* at 762, 839 P.2d at 100. Thus, the public duty doctrine precluded the wrongful death action. *Id.* While *Coty* clearly established the appropriate test, the facts of that case are not directly analogous to the present case, so we look to other jurisdictions for persuasive authority on this matter.

In *Woods v. District of Columbia*, 63 A.3d 551, 552 (D.C. 2013), EMTs refused to transport the appellant after misdiagnosing her symptoms of slurred speech, loss of balance, and vomiting as a side effect of recently quitting smoking. The next day, appellant was transported to the hospital by different EMTs, where it was

determined she had suffered a stroke. *Id.* The District of Columbia Court of Appeals held that detrimental reliance on "a negligent judgment call, discretionary determination, or incorrect statement of fact by a [public] employee providing on-the-scene emergency services does not constitute the kind of actual and direct worsening of the plaintiff's condition that will permit imposition of negligence liability despite the public-duty doctrine." *Id.* at 557 (internal quotations omitted).

In *Johnson v. District of Columbia*, 580 A.2d 140, 141 (D.C. 1990), the decedent suffered a heart attack and, after three 911 calls and a 30-minute delay, firefighters arrived on the scene but lacked equipment to examine or treat the decedent other than to administer cardiopulmonary resuscitation. Sometime later, EMTs arrived, began to treat the decedent, and immediately transported her to the hospital, where she died. *Id.* A doctor at the hospital stated that if she had arrived earlier, he could have saved her. *Id.* There was no evidence that some act by the firefighters made the decedent's condition worse than it would have been if the firefighters had failed to arrive at all or not done anything after their arrival. *Id.* at 142. Because the firefighters' active conduct did not actually and directly worsen the decedent's condition, the District of Columbia Court of Appeals concluded the public duty doctrine barred firefighter liability. *Id.* at 142-43.

In *Faucheaux v. Provo City*, a husband and wife fought earlier in the day, resulting in police intervention; later, the wife texted the husband goodbye and took prescription pills. 343 P.3d at 291. The husband called 911 and told police officers his wife was suicidal and abusing prescription drugs and asked them to call EMTs. *Id.* The police spoke to the wife, concluded she just needed to "sleep it off," tucked her into bed, and told the husband to leave her alone. *Id.* When the husband checked on her hours later, she was dead. *Id.* The Court of Appeals of Utah concluded that by tucking the wife into bed and admonishing the husband to leave the wife alone, the police officers undertook affirmative actions, rather than omissions, which left the wife worse off. *Id.* at 293-94. Because the police officers did not merely fail to help but instead hindered the situation, the court concluded that the police officers had taken affirmative actions and the public duty doctrine did not protect the police officers from liability. *Id.* at 294.

Because the present case was resolved at an initial stage of the proceedings, the facts have not been as fully developed as some of the cases discussed above. Therefore, to the extent Porchia contends that Massa and Pavelka misdiagnosed him, which led them to not transport him to the hospital for further medical attention, he fails to demonstrate facts supporting an affirmative action by Massa or Pavelka causing him harm. A diagnosis made by EMTs based on their medical expertise, which later is determined to be incorrect,

is more akin to an omission by EMTs than to an affirmative action causing harm. Therefore, Porchia's allegations that Massa and Pavelka misdiagnosed him do not qualify for the affirmative action exception to the public duty doctrine.

Nevertheless, because we must accept all of Porchia's factual assertions in his amended complaint as true, we must accept as true his allegation that Massa and Pavelka removed him from the stretcher upon learning that he was homeless and uninsured and refused to transport him based on his socioeconomic status, not a misdiagnosis. If these facts are supported by evidence, they would establish an affirmative action by Massa and Pavelka, not a mere omission/misdiagnosis. It would be more than a passive action that left Porchia in the same situation he was in earlier. Instead, this would be an affirmative action that hindered Porchia, causing a delay in his medical treatment, which according to the facts asserted in his amended complaint was the only reason he required emergency surgery. Therefore, the facts alleged by Porchia met the affirmative harm exception to the public duty doctrine. Accordingly, we conclude the district court erred in dismissing the amended complaint in its entirety under the public duty doctrine.

The Good Samaritan statute

Next, Porchia claims the district court also erred in dismissing his action under the Good Samaritan statute, NRS 41.500(5), because the facts alleged in his amended complaint, taken as true, demonstrated Massa's and Pavelka's failure to render medical assistance based on Porchia's socioeconomic status and would establish gross negligence. NRS 41.500(5) provides that any person employed by a public fire-fighting agency and authorized to render emergency medical care

> is not liable for any civil damages as a result of any act or omission, not amounting to gross negligence, by that person in rendering that care or as a result of any act or failure to act, not amounting to gross negligence, to provide or arrange for further medical treatment for the injured or ill person.

NRS 41.500(5) does not define gross negligence, but we have previously defined it as "an act or omission respecting legal duty of an aggravated character as distinguished from a mere failure to exercise ordinary care." *Cornella v. Justice Court*, 132 Nev. 587, 594, 377 P.3d 97, 102 (2016) (quoting *Hart v. Kline*, 61 Nev. 96, 100, 116 P.2d 672, 674 (1941)). Gross negligence is a "very great negligence, or the absence of slight diligence, or the want of even scant care" that "amounts to indifference to present legal duty, and to utter forgetfulness of legal obligations so far as other persons may be affected" but "falls short of being such reckless disregard of

probable consequences as is equivalent to a willful and intentional wrong." *Hart*, 61 Nev. at 100-01, 116 P.2d at 674 (quoting *Shaw v. Moore*, 162 A. 373, 374 (Vt. 1932)).

As discussed above, because we must accept Porchia's allegations as true, an EMT's decision to not render medical assistance or assist a patient with obtaining further medical attention based purely on the patient's socioeconomic status might rise to the level of gross negligence. Such a decision could amount to an aggravated act, absent of even slight diligence and also indifferent to legal obligations owed to the patient. Thus, we conclude Porchia's factual claims may be sufficient to assert Massa's and Pavelka's actions amounted to gross negligence, rendering the application of Good Samaritan protection under NRS 41.500(5) improper. Accordingly, we conclude the district court erred in dismissing Porchia's amended complaint in its entirety under the Good Samaritan statute.

CONCLUSION

The district court properly concluded that the specific duty exception to the public duty doctrine did not apply because paramedics do not have a duty to transport patients who in their medical opinion do not require further medical attention, and because Massa and Pavelka did not make a specific promise to Porchia to transport him on which he relied to his detriment. Additionally, to the extent Porchia's claim for negligence was based on Massa's and Pavelka's misdiagnosis, the district court also properly concluded that the affirmative action exception to the public duty doctrine did not apply. Nevertheless, because we have to accept Porchia's claims in his amended complaint as true, and because he alleged that Massa and Pavelka refused to transport him to the hospital on the basis that he was homeless and uninsured, the district court erred in concluding the affirmative action exception to the public duty doctrine could not apply and that the Good Samaritan statute necessarily precluded Porchia's requested relief. Accordingly, we affirm the district court's order to the extent it dismissed Porchia's claims based on misdiagnosis, reverse it to the extent it dismissed claims based on socioeconomic discrimination, and remand for further proceedings on the surviving claims.

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

SOUTHWEST GAS CORPORATION, Appellant, *v.* PUBLIC UTILITIES COMMISSION OF NEVADA; and STATE OF NEVADA, BUREAU OF CONSUMER PROTECTION, Respondents.

No. 80911

February 17, 2022 504 P.3d 503

Appeal from a district court order denying a petition for judicial review in a public utilities general rate case. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg, Joel D. Henriod*, and *Abraham G. Smith*, Las Vegas, for Appellant Southwest Gas Corporation.

Aaron D. Ford, Attorney General, and *Whitney F. Digesti, Ernest D. Figueroa, Mark J. Krueger*, and *Michelle C. Newman*, Deputy Attorneys General, Carson City, for Respondent State of Nevada, Bureau of Consumer Protection.

Public Utilities Commission of Nevada and *Matthew S. Fox* and *Garrett C. Weir*, Carson City, for Respondent Public Utilities Commission of Nevada.

Holland & Hart LLP and *Laura K. Granier* and *Erica K. Nannini*, Reno, for Amicus Curiae Nevada Resort Association.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

Private entities operate Nevada's public utilities, but a public commission sets the maximum rates they can charge for their retail services, subject to judicial review. Here, a utility provider attempted to recover its expenses and sought an increased rate of return on equity (ROE), but the commission questioned several seemingly inappropriate charges for which the utility requested compensation. The commission determined that the utility did not justify the expenses it sought to recover, and as a result, the commission denied the utility's request for reimbursement and set a return on equity lower than what the utility had requested. The utility challenges the commission's determination and rate setting, contending that it enjoys a presumption of prudence with the

expenses it submits to the commission and that the commission's rate setting did not adhere to due process requirements.

In this appeal, we hold that utilities do not enjoy a presumption of prudence with respect to the expenses they incur; rather, the utility must show that the expenses were prudently incurred. Next, we decline to adopt the constitutional-fact doctrine, which would require this court to review agency decisions de novo when a regulated party's constitutional rights are implicated. Thereafter, we determine that the commission's rate-setting procedures met due process requirements and that the ROE the PUC selected was not a confiscatory taking. Finally, we conclude that the commission's decision to disallow the utility to recover certain project expenses and additional pension expenses is supported by substantial evidence in the record. Since we hold that the commission's decision was neither clearly erroneous nor constitutionally infirm, we affirm the district court order denying judicial review.

BACKGROUND

Southwest Gas Corporation (SWG) provides natural gas to customers in Nevada. It is regulated by the Public Utilities Commission of Nevada (PUC). In May 2018, SWG filed a general rate application with the PUC, seeking to increase the service rates it charges to customers. In its application, SWG sought a rate that would allow it to recover, among other things, the costs of five software upgrade projects, adjusted pension expenses, and a 10.30% ROE.

With respect to the projects, the PUC Regulatory Operations Staff found numerous issues. Staff determined SWG's documentation demonstrated a lack of proper financial oversight. Among the many questionable expenses SWG submitted were items and services including: tens of thousands of dollars in consultant costs, airfare, lodging, car rentals, non-travel meals and entertainment, seminar fees, vouchers for biweekly massages, bartender costs, Apple Mac computers and multiple Apple iPads, a golf course membership, a home theater system, a digital piano, headphones, dozens of polo shirts, and a gas grill—all of which Staff determined were not adequately explained by SWG. Staff asserted that the audit led them to "question the reasonableness of all of the costs" associated with the projects, and as a result, Staff recommended that the PUC disallow 50% of the total project costs.

SWG filed the direct testimony of SWG Regulatory Professional Randi Cunningham in support of these projects, which included an exhibit that provided a brief summary of each work order and its total cost, but did not break down the costs within each work order. SWG also presented rebuttal testimony of SWG Vice President of Information Services Ngoni Murandu. He testified that, while Staff accurately identified a small number of costs that should not have been included in the application, those errors did not rise to the level

of an "extreme lack of oversight" that would justify disallowing half the costs of the projects. Mr. Murandu noted that the improper expenditures were removed and that SWG was no longer seeking recovery for them. He testified that the overall budget was reasonable based on independent estimates from PricewaterhouseCoopers (SWG's external accountant), a survey of industry peers, and responses to the company's Request for Proposals. Mr. Murandu contended that Staff's goal of "send[ing] a clear directive to SWG senior management" by recommending that the PUC disallow 50% of the project costs was inappropriately punitive.

As to pension expenses, SWG proposed a pension tracker to address the volatility in pension costs. A pension tracker is a ratemaking tool that tracks the gap between projected pension expenses included in rates and the expenses actually incurred by a utility provider. Christy Berger, an SWG Regulatory Professional, testified that pension costs had fluctuated substantially throughout the years based, in large part, on changes in the discount rate. The Bureau of Consumer Protection (BCP) raised concerns that a pension tracker would not incentivize SWG to control pension costs. Staff proposed a five-year normalization, or averaging of pension expenses, to address volatility.

SWG also proposed reducing the discount rate used to calculate the amount that it must now set aside to fund its future pension obligations from 4.50% to 3.75%. Between 2011 and 2017, SWG never used a discount rate lower than 4.25%. At the hearing, Ms. Berger was unable to explain how SWG justified the decreased discount rate and stated that SWG could not produce any other witnesses who had such knowledge.

Additionally, regarding the ROE, or the percentage that utilities are permitted to earn on equity investments, SWG sought 10.30%, presenting two financial analysts to provide direct testimony in support of its proposition. Staff, on the other hand, presented an economist who recommended a lower ROE of 9.40%. BCP recommended an ROE of 9.30%. Overall, SWG recommended establishing an ROE within the range of 10.00% to 10.50%, Staff recommended a range of 9.10% to 9.70%, and BCP recommended a range of 9.00% to 9.50%.

The PUC made several determinations regarding SWG's application. First, the PUC ruled that SWG does not enjoy a presumption of prudence with respect to its expenditures. The PUC explained that under NAC 703.2331, the utility bears the burden of proof in demonstrating that its proposed rate changes are just and reasonable. It further explained that "[a] rate cannot be just or reasonable if it is established for the purpose of allowing the utility to recover costs that were not prudently incurred." Ultimately, the PUC found that SWG inadequately supported the prudence of its project expenses by failing to present capable witnesses in its affirmative case-in-chief,

and thus the PUC disallowed 100% of the costs SWG submitted. The PUC stated that the only evidence supporting SWG's project expenses on direct testimony was testimony from Ms. Cunningham, who admitted that she had "no personal knowledge to support the underlying cost data."

Next, the PUC rejected SWG's proposed change in the pension discount rate, directing SWG to recalculate its pension costs consistent with the previous discount rate of 4.50%. The PUC further rejected SWG's request to establish a tracking mechanism to address volatility, instead opting for the expense normalization procedure proposed by Staff, albeit with a three-year period instead of the recommended five-year period. Lastly, the PUC adopted the Staff recommendation of a zone of reasonableness for the ROE from 9.10% to 9.70%, settling on a rate of 9.25%.

SWG sought reconsideration of the ruling on the presumption of prudence and the findings regarding the project expenses, the pension expenses, and the ROE. The PUC affirmed its decisions, rejecting SWG's claim that it did not receive due process with respect to the pension expenses, since SWG had the opportunity to provide testimony from a capable witness on the pension costs and did not do so.

SWG thereafter petitioned the district court for judicial review. Its petition presented two overarching issues: (1) whether the presumption of prudence applies to utilities in rate cases and should be used to determine its recovery of project and pension expenses, and (2) whether the PUC denied SWG procedural due process by depriving it of notice and the opportunity to present evidence in opposition to the normalization of its pension expenses, by *sua sponte* asking questions about the discount rate, and by choosing an ROE lower than Staff or the BCP requested. SWG's petition stated that the district court should apply NRS 703.373(11)'s clearly erroneous standard of review. The district court affirmed the PUC's order. This appeal followed.

DISCUSSION

Standard of review

On appeal from an order denying a petition for judicial review, this court will uphold the PUC's decision if it is supported by substantial evidence in the record and is not clearly erroneous, and we review pure legal issues de novo. NRS 703.373(11); *Nev. Power Co. v. Pub. Utils. Comm'n*, 122 Nev. 821, 834, 138 P.3d 486, 495 (2006). We do not "reweigh the evidence or substitute our judgment for that of the [PUC] on factual questions." *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495; *see also* NRS 703.373(11). When an agency's conclusions of law are "closely related to the agency's view of the facts, [they] are entitled to deference, and will not be disturbed if they are

supported by substantial evidence." *Associated Risk Mgmt., Inc. v. Ibanez*, 136 Nev. 762, 764, 478 P.3d 372, 374 (2020); *see also Father & Sons & A Daughter Too v. Transp. Servs. Auth. of Nev.*, 124 Nev. 254, 259, 182 P.3d 100, 104 (2008). "The burden of proof is on the petitioner to show that the final decision is invalid pursuant to [NRS 703.373(11)]." NRS 703.373(9).

Nevada does not recognize the constitutional-fact doctrine

To ensure that the PUC's established rate is not unconstitutionally confiscatory, SWG asks this court to apply the constitutional-fact doctrine and review the PUC's factual determinations underlying its rate decision de novo. In *Ohio Valley Water Co. v. Borough of Ben Avon*, the United States Supreme Court held that a judicial tribunal must make its determination "upon its own independent judgment as to both law and facts" when a public utility claims a potential confiscation of its property through a regulatory agency's overly low property valuation, leading to an unreasonably small return. 253 U.S. 287, 289 (1920). The Court in *Ben Avon* ruled that de novo judicial review was required to comport with the Due Process Clause of the Fourteenth Amendment in such instances. *Id.*

While the Supreme Court has not expressly overruled *Ben Avon*, *Ben Avon* deviated from the Supreme Court practice at the time. *E.g.*, *S. Pac. Co. v. Campbell*, 230 U.S. 537, 552 (1913) (providing that a reviewing court should not "substitute its judgment for that of the commission, or determine the matters which properly [fall] within the province of that body"). Similarly, since it decided *Ben Avon*, the Court has frequently deviated from the constitutional-fact doctrine and has deferred to agency determinations. *See, e.g.*, *Ala. Pub. Serv. Comm'n v. S. Ry. Co.*, 341 U.S. 341, 348 (1951) ("[I]t is now settled that a utility has no right to relitigate factual questions on the grounds that constitutional rights are involved."); *R.R. Comm'n of Tex. v. Rowan & Nichols Oil Co.*, 311 U.S. 570, 576 (1941) ("[T]he Due Process Clause does not require the feel of the expert to be supplanted by an independent view of judges on the conflicting testimony and prophecies and impressions of expert witnesses."). The Court clarified that "there is a strong presumption in favor of the conclusions reached by an experienced administrative body after a full hearing." *St. Joseph Stock Yards Co. v. United States*, 298 U.S. 38, 53 (1936) (quoting *Darnell v. Edwards*, 244 U.S. 564, 569 (1917)).[1] Indeed, the constitutional-fact doctrine has "provoked much criticism, and it has largely faded from federal administrative litigation." 33 Charles Alan Wright et al., *Federal Practice & Procedure* § 8439 (2d ed. 2018) (footnote omitted); *see*

[1]*St. Joseph Stock Yards* noted, however, that this presumption runs aground and the reviewing court may exercise independent review where the "evidence clearly establishes that the findings are wrong." 298 U.S. at 52.

also Adam Hoffman, *Corralling Constitutional Fact: De Novo Fact Review in the Federal Appellate Courts*, 50 Duke L.J. 1427, 1449 (2001) ("[J]urisdictional fact review [has] disappeared from American administrative law."). Other state courts have declined to apply *Ben Avon* to prevent their courts from being "overburdened with parallel determination of disputes already decided by agencies of tested proficiency in the administrative field." *N.Y. Tel. Co. v. Pub. Serv. Comm'n*, 320 N.Y.S.2d 280, 286 (App. Div. 1971); *accord Hayden Pines Water Co. v. Idaho Pub. Utils. Comm'n*, 834 P.2d 873, 876 (Idaho 1992); *Pub. Serv. Comm'n v. Gen. Tel. Co. of the Se.*, 555 S.W.2d 395, 402 (Tenn. 1977).

Consistent with our jurisprudence, we, too, decline to apply the constitutional-fact doctrine, as sought in this case. *See, e.g.*, *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495 (applying a deferential standard of review to factual determinations in a PUC decision); *Nev. Power Co. v. Pub. Serv. Comm'n*, 91 Nev. 816, 818, 544 P.2d 428, 430 (1975) (same); *Sw. Gas Corp. v. Pub. Serv. Comm'n*, 86 Nev. 662, 667, 474 P.2d 379, 382 (1970) (same). Indeed, we have already declined to "enlarge the scope of judicial review" to conduct de novo review of agency action where a party alleges a confiscation of its property. *Urban Renewal Agency v. Iacometti*, 79 Nev. 113, 120, 379 P.2d 466, 469 (1963) ("Involvement of the power of eminent domain does not, as respondents contend, serve to enlarge the scope of judicial review of action by a governmental body . . . .").

A deferential standard of review is particularly important in a ratemaking case. Determining rates is arguably a unique decision that does not fall neatly into traditional categories of findings of fact, conclusions of law, or even mixed questions of law and fact. Rather, within broad constitutional limits, "[t]he methods used by a regulatory body in establishing just and reasonable rates of return are generally considered to be outside the scope of judicial inquiry." *Nev. Power Co.*, 91 Nev. at 826, 544 P.2d at 435; *cf. Duquesne Light Co. v. Barasch*, 488 U.S. 299, 313 (1989) (stating that a utilities commission is "essentially an administrative arm of the legislature"). And even where a court can disentangle salient facts from the PUC's order, it is ill-equipped to handle the complex financial analysis therein. *See generally Duquesne Light*, 488 U.S. at 314 ("The economic judgments required in rate proceedings are often hopelessly complex and do not admit of a single correct result."). Put simply, the PUC has expertise to adjudicate ratemaking cases that the judiciary—both district courts and this court—lacks.

Therefore, we decline to disturb our well-settled standards governing judicial review of agency action to apply a doctrine that deviated from existing Supreme Court jurisprudence when it was promulgated, has been squarely contradicted by later cases, and has faded from use in administrative litigation. We thus move on to review SWG's merits arguments.

The PUC's order is valid as to its project and pension determinations

SWG was not entitled to a rebuttable presumption of prudence

Next, SWG argues that the PUC erred by failing to apply a rebuttable, burden-shifting "presumption of prudence" with respect to its project and pension expenses, pursuant to *Nevada Power Co.*, 122 Nev. at 834-36, 138 P.3d at 495-96, and *Public Service Commission v. Ely Light & Power Co.*, 80 Nev. 312, 393 P.2d 305 (1964).

Nevada Power Co. concerned a deferred energy accounting case, in which the PUC can adjust a utility's rates on the narrow basis of changes in the wholesale prices the utility pays. *See id.* at 824-25, 138 P.3d at 488. In 1999, Nevada Power entered into negotiations to purchase wholesale electricity at prices well below market rates, but the negotiations failed due to a disagreement in price terms. *Id.* at 827, 138 P.3d at 490-91. Nevada Power's subsequent energy purchases from a different provider left it with excess off-peak power. *Id.* at 829, 138 P.3d at 491. Instead of promptly selling the excess power, Nevada Power held onto it for almost a year, at which point the resale value had greatly decreased. *Id.* It later sought to recover these costs from consumers. *Id.* at 826, 138 P.3d at 490. The PUC found that Nevada Power's aforementioned decisions were imprudent and disallowed recovery of $437 million in expenses. *Id.* at 826-27, 138 P.3d at 490.

This court reversed the PUC's order, holding that "a utility requesting a customer rate increase enjoys a presumption that the expenses reflected in its deferred energy application were prudently incurred and taken in good faith." *Id.* at 834-35, 138 P.3d at 495. It explained that the party challenging an expenditure must overcome the presumption of prudence with evidence showing "a serious doubt" regarding the prudence of the utility's expense. *Id.* at 835, 138 P.3d at 495-96. After the presumption has been overcome, the utility must present evidence showing that the expenditure was prudent. *Id.* at 835, 138 P.3d at 496. This court drew this framework from *Re Nevada Power Co.*, 74 P.U.R.4th 703 (Nev. P.S.C. 1986), an earlier PUC opinion that adopted the presumption of prudence utilized by the Federal Energy Regulatory Commission (FERC). *Id.* at 834-35, 138 P.3d at 495-96; *see also Re Midwestern Gas Transmission Co.*, 64 P.U.R.4th 508, 510 (F.E.R.C. 1985); *Re Minn. Power & Light Co.*, 11 FERC ¶ 61312, 61645 (F.E.R.C. 1980).

We determine that SWG's contention that *Nevada Power Co.* provides that it enjoys a presumption of prudence in this context fails. *Nevada Power Co.* applied the presumption of prudence to a deferred energy accounting case, as distinguished from the general rate case at issue here.[2] *Nev. Power Co.*, 122 Nev. at 834-35, 138

[2]In a deferred energy accounting case, the PUC can adjust a utility's rates on the narrow basis of changes in the wholesale prices the utility pays, without the detail and expense of a general rate case covering other types of expenditures. NRS 704.185; *Nev. Power Co.*, 122 Nev. at 824-25, 138 P.3d at 489.

P.3d at 495-96. Further, the Nevada Legislature subsequently and promptly abrogated *Nevada Power Co.*'s holding by statute, removing the presumption of prudence in deferred energy accounting cases entirely. *See* 2007 Nev. Stat., ch. 163, § 1(3), at 551 (A.B. 7).

Nor did *Ely Light* create or recognize such a presumption. There, this court found it was improper for the PUC to substitute its judgment for that of management as to how much should be paid in pensions. *See* 80 Nev. at 323, 393 P.2d at 311 (PUC noting that "[t]he plan, as explained by the Company, is an employee retirement program which costs approximately 15% of total wages paid. . . . [T]his Commission feels that for the Company to pay such a high cost for the plan is not in the best interest of the rate payers"). While *Ely Light* observed a "presumption of the proper exercise of judgment by the utility in matters which are particularly a function of management," it did not presume that a utility's expenses were prudently incurred. *Id*. at 324, 393 P.2d at 311. Rather, because the decision to have a pension plan was within the sound judgment of the utility, *Ely Light* held that the utilities commission should review the utility's pension expenditures to determine whether the utility abused its discretion; whether inefficiency, improvidence, or a lack of good faith have been shown; and whether the costs are reasonable. *Id*. Stated differently, *Ely Light* did not establish a presumption of prudence with respect to the specific pension expenses the utility incurred, but rather prohibited the PUC from second-guessing the utility's business decision to offer a pension plan at all. *Id.* Accordingly, *Ely Light* does not show that the presumption of prudence applies in Nevada.

In the absence of statutory authority or precedent, we decline to adopt a presumption of prudence in this case. The current regime, by which the utility must demonstrate the prudence of the expenses it seeks to recover, makes sense. The PUC protects Nevada ratepayers from paying for imprudently incurred expenses. *See* Olivia Chap, Note, *Cost-of-Service Ratemaking and Labor Costs: Expanding the "Just and Reasonable" Standard to Close the Gender Pay Gap in the Energy Industry*, 11 Geo. Wash. J. Energy & Envtl. L. 67, 72 (2021) ("One way to prevent public utilities from abusing their power and charging overpriced fees has been for PUCs to oversee the rates utilities charge for [the utilities'] service[s] . . . ." (internal footnotes omitted)). Indeed, utilities are granted monopolies over their services in exchange for this oversight. *See Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 854, 839 P.2d 606, 611 (1992) ("Because utilities have a monopoly on a necessary service, they are regulated to protect the ratepayers, the public, and the parties who transact business with them."); Lina Khan, Note, *Amazon's Antitrust Paradox*, 126 Yale L.J. 710, 797 (2018) ("It was precisely because essential network industries often required scale that unregulated private control over [public utility] sectors often led to abuse of monopoly

power."). The utility has the information necessary to display the prudence of its expenses; the current framework merely requires them to submit these records. Flipping the burden to intervenors or to the PUC to raise a "serious doubt" would be impracticable. An intervenor does not know what it cannot know, and a third party may not have the documents necessary to raise such doubt about the utility's expenditures. Imposing such a burden, even when an intervenor or the PUC could possibly obtain documentation sufficient to raise a "serious doubt," would lead to an unnecessary delay in the PUC's deliberations and makes little sense when the utility could readily provide such documentation.[3] In other words, the utility is best positioned to prove the prudence of the expenses it incurs. And if the PUC rejects the utility's expenditures in an arbitrary and capricious manner that is not supported by substantial evidence in the record, the utility may petition the courts for review. NRS 703.373(11); *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495.[4] We therefore decline to adopt a presumption of prudence that would disturb the current regulatory regime.[5]

PUC's rate-setting procedures conformed to due process requirements

SWG contends that it was denied procedural due process because it was deprived of the opportunity to submit testimony or other evidence challenging the PUC's decision to normalize and reduce pension expenses. SWG also asserts that the PUC's decision to adopt a three-year normalization was arbitrarily designed to deprive it of recovery in a high-cost year. It further argues that the PUC violated due process by independently questioning SWG's proposed discount rate at the hearing, selecting a zone of reasonableness from 9.10% to 9.70%, and choosing an ROE lower than either SWG, BCP, or Staff requested. We review these constitutional claims de novo. *Eureka County v. Seventh Judicial Dist. Court*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018).

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[3]Time is of the essence in general rate cases. NRS 704.110(2) requires the PUC to adjudicate a general rate application within 210 days after the utility files its application.

[4]Placing the burden fully on the utility to demonstrate prudence is also consistent with existing regulations, which require the utility to "ensure that the material it relied upon is of such composition, scope and format that it would serve as its complete case if the matter is set for hearing." NAC 703.2231; *see also* NAC 703.2325 (providing that "adjustments [to the rate base] must be fully and clearly explained in the supporting material submitted" with the application).

[5]We decline to consider SWG's contention that a presumption of prudence is a constitutional requirement because it did not cogently argue this point or support it with salient authority. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Procedural due process "requires notice and an opportunity to be heard." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007) (quoting *Maiola v. State*, 120 Nev. 671, 675, 99 P.3d 227, 229 (2004)). Notice must be provided at the appropriate stage so that parties can provide "meaningful input in the adjudication of their rights." *Eureka County*, 134 Nev. at 280, 417 P.3d at 1125.

The record is clear that SWG had notice and the opportunity to present its case on the normalization issue. This issue was raised in the prefiled direct testimony, and yet SWG did not sufficiently address it in either direct testimony or in rebuttal at the hearing. Put differently, SWG had notice that the PUC would consider normalization and was afforded the opportunity to argue against it at the hearing, but it did not avail itself of this opportunity. Nor did the PUC deprive SWG of the opportunity to explain its reduction in the discount rate. When Ms. Berger, the SWG Regulatory Professional, was asked at the hearing how SWG determined the discount rate, she merely stated that this decision was made in conjunction with an actuary, that she could not provide any further information on the discount rate, and that SWG had no other witnesses who could do so. Therefore, these due process claims fail because SWG was provided both "notice and an opportunity to be heard" with respect to both the normalization issue and the discount rate. *See Callie*, 123 Nev. at 183, 160 P.3d at 879.

It is also clear that the PUC's decision to adopt a three-year normalization was justified and neither arbitrary nor capricious. It makes sense that the PUC would adopt a normalization procedure for the first time in response to a significant fluctuation. The nature of averaging means that SWG will be somewhat undercompensated in high-cost years but correspondingly overcompensated in low-cost years, as long as the method is consistent. To be sure, if the PUC were to switch *back* to a one-year model in a subsequent rate case when costs are lower—thus denying recovery entirely for the high-cost years—then under *Duquesne Light*, the PUC's conduct might be arbitrary and capricious. *See* 488 U.S. at 315 ("[A] State's decision to arbitrarily switch back and forth between methodologies in a way which required investors to bear the risk of bad investments at some times while denying them the benefit of good investments at others would raise serious constitutional questions."). But the record before us evinces no such conduct from the PUC that would amount to a violation of SWG's constitutional rights.

Nor did the PUC err by independently inquiring about the proposed discount rate. The PUC is not restricted to considering only the issues presented by the parties. NRS 704.440, for example, empowers the PUC to "*investigate* and ascertain the value of all property of every public utility." (Emphasis added.) As the Supreme Court of New Jersey has explained, utility commissions have a "duty to go behind the figures shown by the companies' books and

get at realities." *Petition of Pub. Serv. Coordinated Transp. v. State*, 74 A.2d 580, 591-92 (N.J. 1950). If neither Staff's recommendation nor the utility's recommendation is supported by the evidence, it would be error for the PUC to uncritically adopt either one. *See id*. Likewise, here, the PUC properly went beyond the parties' briefing and asked clarifying questions about the discount rate—a change which SWG proposed but did not support with adequate witness testimony—and when SWG was unable to support the change in the rate, the PUC denied that change.

Similarly, SWG's claims regarding the ROE fails. In selecting a zone of reasonableness between 9.10% to 9.70%, the PUC considered, *inter alia*, the parties' expert testimony and SWG's circumstances, such as its capital structure and risk profile. Far from being arbitrary, therefore, the PUC's selected zone of reasonableness is supported by substantial evidence in the record. *See* NRS 703.373(11)(e); *see also Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495 (noting that this court does not "reweigh the evidence or substitute our judgment for that of the [PUC] on factual questions"). Likewise, SWG's claim that the PUC's selection of an ROE was arbitrary and capricious falls short. The PUC was free to fix any ROE within the range of reasonableness and permissibly settled on a rate of 9.25% after balancing the interests of ratepayers and shareholders. *See Fed. Power Comm'n v. Nat. Gas Pipeline Co. of Am.*, 315 U.S. 575, 585-86 (1942) (establishing that a regulatory commission is free to fix a rate within the zone of reasonableness). We therefore conclude that SWG has not shown a procedural due process violation in this regard.[6]

The rate of return was not a confiscatory taking

We next consider SWG's contention that the PUC's selection of a 9.25% ROE amounted to an unconstitutional taking because the ROE was not "equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings that are attended by corresponding risks and uncertainties." *Cf. Bluefield Waterworks & Imp. Co. v. Pub. Serv. Comm'n*, 262 U.S. 679, 692-93 (1923).[7]

"The Constitution protects the utility from the net effect of the rate order on its property" and not from procedural errors "compensated

[6]SWG contends that the PUC's selected range of reasonableness and ROE present takings claims because the PUC's decision-making was arbitrary and capricious. Since we reject that the PUC's selections were arbitrary and capricious here, we need not consider the same allegations when presented as takings claims.

[7]To the extent that SWG contends that the PUC's denial of its project expenses was a confiscatory taking, we conclude that it did not appropriately develop this argument and therefore decline to consider it. *Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

by countervailing factors in some other aspect." *Duquesne Light*, 488 U.S. at 314; *see Nat. Gas Pipeline Co.*, 315 U.S. at 586. In considering the net effect, the inquiry is "whether 'the return to the equity owner [is] commensurate with returns on investments in other enterprises having corresponding risks,' and whether the return was 'sufficient to assure confidence in the financial integrity of the enterprise, so as to maintain its credit and to attract capital.'" *In re Permian Basin Area Rate Cases*, 390 U.S. 747, 790-91 (1968) (quoting *Fed. Power Comm'n v. Hope Nat. Gas Co.*, 320 U.S. 591, 603 (1944)); *see also Bluefield*, 262 U.S. at 692 (1923) ("A public utility is entitled to such rates . . . equal to that generally being made at the same time and in the same general part of the country on investments in other business undertakings which are attended by corresponding, risks and uncertainties.").

We determine that SWG's claim lacks merit. Consistent with the constitutional requirement that return be measured against returns on investment earned by "other enterprises having corresponding risks," the parties used an agreed-upon proxy group of other utilities to compare ROEs. *See Hope Nat. Gas*, 320 U.S. at 603; *Bluefield*, 262 U.S. at 692.[8] The PUC determined that the evidence presented—for example, that SWG's credit rating had improved since its last general rate case—did not support a finding that SWG faces higher risks than the proxy group and that an ROE of 9.25% is sufficient to ensure SWG's ability to attract capital. We conclude that the PUC's determination is supported by substantial evidence in the record and defer to its judgment. *See* NRS 703.373(11)(e); *Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495. Since the PUC's findings demonstrate that the 9.25% ROE is commensurate with other utilities with corresponding risks and maintains SWG's ability to attract capital, we conclude that the ROE was not an unconstitutional taking. *Cf. Permian Basin*, 390 U.S. at 790-91.

The PUC's decision to disallow SWG to recover its project and pension expenses is supported by substantial evidence in the record

Having declined to adopt a presumption of prudence and having established the constitutionality of the PUC's rate-setting, we next consider whether the PUC's decision to disallow SWG to recover its project and pension expenses is supported by substantial evidence in the record.

Here, Staff showed, and SWG conceded, that at least some of the expenses in the challenged work orders should not have been included. SWG submitted scant evidence substantiating the projects' work order expenses in its case-in-chief. On direct testimony,

[8]In fact, SWG selected the proxy group, which the BCP and Staff thereafter utilized in their models and analyses.

SWG presented the testimony of Ms. Cunningham, who the PUC determined possessed no "personal knowledge to support the underlying cost data of any of the itemized work order projects included in her testimony." SWG also provided the rebuttal testimony of Mr. Murandu, which the PUC gave minimal weight because he was not employed by SWG until after the projects were closed.[9] The PUC determined that SWG presented no witnesses who were directly involved in the execution of the projects or who could explain the company's basis for incurring costs. As noted above, the PUC was not bound to allow for 50% of the project expenses (Staff's recommendation) or 100% (SWG's request), and so the PUC was within its discretion to deduct all of the submitted project expenses. *See Petition of Pub. Serv. Coordinated Transp.*, 74 A.2d at 591-92.

Nor did SWG provide evidence to support its significant proposed change to the discount rate. As noted above, Ms. Berger acknowledged at the hearing that SWG had not used a discount rate lower than 4.25% between 2012 and 2017, and that SWG reduced the rate from 4.50% to 3.75% in 2018. However, she was unable to explain how SWG made the decision to significantly reduce the discount rate, and SWG did not present any other witnesses who could justify such reduction.

We will not overturn the PUC's factual conclusions unless they are clearly erroneous. *See* NRS 703.373(11)(e); *see also Nev. Power Co.*, 122 Nev. at 834, 138 P.3d at 495 ("[W]e will uphold a PUCN decision that is . . . based on substantial evidence."). SWG has not shown that the PUC's disallowance of recovery for the project expenses and its rejection of SWG's preferred discount rate are clearly erroneous or unsupported by substantial evidence. *See* NRS 703.373(9). While a utility need not solely present the testimony of employees involved in the projects for which it seeks reimbursement, it must affirmatively display the prudence of its expenses in its case-in-chief. The PUC's skepticism of SWG's expenses was warranted in light of SWG's earlier attempt to obtain reimbursement for a number of questionable expenses, including biweekly massages and a home theater system, and the utility's lack of justification for its other expenses in its case-in-chief. This court will not substitute its judgment for that of the PUC on the weight of the evidence. NRS 703.373(11). Therefore, we determine that SWG did not show that the PUC improperly denied recovery for its project expenses or the change in the discount rate.

[9]The PUC initially stated that they would disregard Mr. Murandu's testimony because of his lack of personal knowledge. However, the record reflects that the PUC ultimately considered the testimony, although it afforded it minimal weight. As discussed below, a utility is not limited to providing testimony from witnesses involved in the relevant projects because employees may obtain personal knowledge by other means. *See Wash. Cent. R.R. Co., Inc. v. Nat'l Mediation Bd.*, 830 F. Supp. 1343, 1353 (E.D. Wash. 1993) (concluding that personal knowledge can be inferred from a witness's review of files and records).

CONCLUSION

Utilities are granted monopolies to provide their services to Nevadans. In return, the PUC determines the maximum rate utilities can charge for their services, subject to judicial review. In this case, we hold that utilities do not enjoy a presumption of prudence with respect to the expenses they submit to the PUC. Additionally, we decline to adopt the constitutional-fact doctrine, and we apply the substantial evidence standard when reviewing PUC decisions.

Next, we hold that the PUC's rate-setting procedures comported with procedural due process requirements. Furthermore, we conclude that the PUC's selected ROE was not an unconstitutional taking. Lastly, we apply the substantial evidence standard and determine that SWG did not demonstrate the prudence of its pension expenses or its proposed change to the discount rate. Therefore, we affirm the district court's order denying SWG's petition for judicial review and affirming the PUC's decision.

Parraguirre, C.J., and Hardesty, Cadish, Silver, Pickering, and Herndon, JJ., concur.