KEITH BOMAN, Appellant, *v.* MICHAEL ELKANICH, M.D., an Individual; and BONE & JOINT SPECIALISTS, Respondents.

No. 86005-COA

April 25, 2024 548 P.3d 1232

Appeal from a district court order granting a motion to dismiss in a professional negligence action. Eighth Judicial District Court, Clark County; Veronica Barisich, Judge.

Reversed and remanded.

Hymanson & Hymanson and *Ariana Caruso*, *Henry J. Hymanson*, and *Philip M. Hymanson*, Las Vegas, for Appellant.

McBride Hall and *Heather S. Hall* and *Robert C. McBride*, Las Vegas, for Respondents.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Bulla, J.:

In this opinion, we address whether irrefutable evidence existed to support the district court's determination of the accrual date in a professional negligence action, thereby warranting dismissal of the case pursuant to the applicable one-year statute of limitation.[1] Because we conclude that factual disputes remain regarding the relevant accrual date, the district court erred in dismissing the complaint as untimely as a matter of law under NRCP 12(b)(5). In reaching our decision, we apply the reasoning of *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983), a summary judgment case, in the context of a motion to dismiss, to conclude that a patient is "fully entitled to rely on the physician's professional skill and judgment" while under the physician's care, which, in this case, precluded the district court from finding—as a matter of law—that irrefutable evidence existed to support its determined accrual date. Therefore, we reverse the judgment of the district court.

[1]We note that recent amendments to NRS 41A.097 extend the statute of limitations for professional negligence claims to two years after the plaintiff discovers or should have discovered the injury, but only for claims arising on or after October 1, 2023. *See* Secretary of State, Statewide Ballot Question No. 3, § 8 (Nev., effective Nov. 23, 2004); NRS 41A.097(2)-(3); 2023 Nev. Stat., ch. 493, § 3, at 3023-24. As the claims in this case arose before October 1, 2023, these amendments do not affect this court's analysis.

FACTS AND PROCEDURAL HISTORY

In 2019, appellant Keith Boman, a board-certified cardiologist, experienced pain radiating from his spine. Boman initially saw Gary Flangas, M.D., who referred him to a pain management specialist for epidural injections. When his condition did not improve with the injections, Boman presented to respondents, Dr. Elkanich with Bone & Joint Specialists, in September 2020. Following a review of Boman's x-rays and MRI scans, Dr. Elkanich diagnosed Boman with severe lumbar spinal stenosis.[2] Dr. Elkanich provided Boman with two treatment options: continue with epidural injections or undergo a laminectomy surgery from L2-S1.[3] Boman opted for surgery.

Approximately one month later, on October 19, 2020, Dr. Elkanich performed the laminectomy at MountainView Hospital. When Boman awoke from surgery, he had no feeling or movement in his left leg. Dr. Elkanich then informed Boman that his spinal cord dura was apparently "nicked," and then repaired, during surgery.[4] Dr. Elkanich also told Boman that the issues he was experiencing with "his left leg can occur and should improve over time."

After 24 hours of bed rest, Boman felt severe lower back pain at the site of his incision and had not regained feeling or movement in his left leg, except for slight movement in his toes. After three days, Boman was transferred to the rehabilitation facility at MountainView Hospital where he continued experiencing pain. At Boman's request, Dr. Elkanich ordered an MRI on October 24, which showed a "6 [by] 5.1-centimeter-deep hematoma that was crowding the nerve roots" around his lumbar and sacral region, called the cauda equina. Two days later, Dr. Elkanich performed surgery to remove the hematoma at MountainView Hospital. Following surgery, Boman's lower back pain lessened, but the feeling in his left leg did not return.

Boman returned to the rehabilitation facility, where he stayed for approximately two weeks. When he was discharged on November 13, Boman "was still experiencing significant leg weakness, numbness,

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[2]"Spinal stenosis is the narrowing of one or more spaces within [the] spinal canal. [The] spinal canal is the tunnel that runs through each of the vertebrae in [the] spine." *Spinal Stenosis: What It Is, Causes, Symptoms & Treatment*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/17499-spinal-stenosis (last reviewed by a Cleveland Clinic medical professional on June 30, 2023).

[3]According to Boman's complaint, "[a] laminectomy is a procedure where all or part of the vertebral bone (lamina) is removed to help ease pressure on the spinal cord and offer relief from pain and neurological conditions."

[4]According to Boman's complaint, "[t]he spinal cord dura is a thick membrane of dense irregular connective tissue that surrounds the brain and spinal cord and protects the central nervous system."

and paralysis of his left foot." Thereafter, Boman began physical therapy three times a week for five months. He also continued to be treated by Dr. Elkanich. According to Boman, at his appointment on January 5, 2021, "Dr. Elkanich downplayed the continued post-surgery complications . . . Boman was experiencing by telling [him] that 'it's only been three months since surgery with your symptoms.'" On April 23, Dr. Elkanich referred Boman to Dr. Flangas for a second opinion. At his June 1, 2021, referral appointment, Dr. Flangas purportedly told Boman, for the first time, that his "symptoms were consistent with cauda equina syndrome with exacerbation from the post-operative hematoma."[5] Boman claims it was at this appointment that he was placed on inquiry notice as to Dr. Elkanich's potential professional negligence.

Within one year after his appointment with Dr. Flangas, on June 1, 2022, Boman filed a complaint against Dr. Elkanich and Bone & Joint Specialists, alleging six claims for relief, including professional negligence; negligent hiring, training, supervision, and/or credentialling/privileging; and corporate negligence/vicarious liability.[6] Dr. Elkanich and Bone & Joint Specialists moved to dismiss the complaint, arguing that Boman's complaint was untimely because he filed it after the one-year statute of limitations under NRS 41A.097 (2004) had expired.[7] In support of their position, respondents assert that the statute of limitations accrued no later than the date Boman was discharged from the hospital in 2020 because, at that time, Boman was placed on inquiry notice of his potential claims against Dr. Elkanich, as he had learned of the nicked dura and hematoma and experienced neurological symptoms.

Following a hearing, the district court found that Boman was on inquiry notice of his legal injury on October 19, 2020, when Dr. Elkanich stated that he nicked the dura, or on October 24, 2020, at the latest, when Boman underwent an MRI at his request that showed the presence of a hematoma requiring surgery. Therefore, the district court determined that Boman filed his June 1, 2022, complaint well beyond the applicable one-year statute of limitations

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[5]Cauda equina syndrome is the compression of the cauda equina nerve roots. *Cauda Equina Syndrome: Symptoms, Treatment & Causes*, Cleveland Clinic, https://my.clevelandclinic.org/health/diseases/22132-cauda-equina-syndrome (last reviewed by a Cleveland Clinic medical professional on Nov. 22, 2021). "Compressed cauda equina nerves can cause pain, weakness, incontinence and other symptoms." *Id*.

[6]Boman also sued MountainView Hospital, Sunrise Health System, and HCA Healthcare, Inc. But those parties and the claims against them were dismissed below and are not before this court on appeal.

[7]The initial motion to dismiss we are considering on appeal was filed by MountainView Hospital, Sunrise Health System, and HCA Healthcare, Inc., and later joined by Dr. Elkanich and Bone & Joint Specialists.

from the date of accrual in October 2020 and accordingly dismissed it.[8] Boman timely appealed.

ANALYSIS

On appeal, Boman argues that the district court erred in its interpretation of the terms "injury" and "discovers" set forth in NRS 41A.097. Boman contends that if the court had properly interpreted "injury" to mean a legal injury and interpreted "discovers" to mean having inquiry notice of a negligence cause of action, then the court could not have determined that Boman had discovered his legal injury on October 24, 2020, at the latest. Boman specifically argues that he was not placed on inquiry notice of his potential professional negligence claims against respondents until June 1, 2021, when he presented to Dr. Flangas for a second opinion. Therefore, Boman claims that he timely filed his complaint within one year after the accrual date.

In turn, respondents argue that the district court properly found that Boman was first placed on inquiry notice of a professional negligence claim against Dr. Elkanich in October 2020 when he became aware of his surgical injuries and experienced symptoms, rather than at his June 1, 2021, visit with Dr. Flangas. Therefore, respondents argue that, because Boman was on inquiry notice as of October 2020, the district court correctly dismissed his complaint because the one-year statute of limitations had expired when Boman filed his complaint on June 1, 2022.

"A district court's order granting a motion to dismiss under NRCP 12(b)(5) is reviewed de novo." *Nelson v. Burr*, 138 Nev. 847, 850, 521 P.3d 1207, 1210 (2022). 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." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). This rigorous standard requires this court to recognize all factual allegations in the plaintiff's complaint as true and draw all inferences in favor of the moving party. *Id.* at 227-28, 181 P.3d at 672; *see also Nelson*, 138 Nev. at 850, 521 P.3d at 1210. "[A] court can dismiss a complaint under NRCP 12(b)(5) 'if the action is barred by the statute of limitations.'" *Engelson v. Dignity Health*, 139 Nev. 578, 582, 542 P.3d 430, 436 (Ct. App. 2023) (quoting *Bemis v. Est. of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998)).

NRS 41A.097(2) provides that "an action for injury . . . against a provider of health care may not be commenced more than 3 years after the date of injury or 1 year after the plaintiff discovers or

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[8]The district court denied a different motion to dismiss filed by respondents, but that issue is not before us in this appeal.

through the use of reasonable diligence should have discovered the injury, whichever occurs first." "'[I]njury' as used in NRS 41A.097[ ] means legal injury." *Massey*, 99 Nev. at 726, 669 P.2d at 251. A legal injury includes "*both* the 'physical damage' *and* the '[professional] negligence causing the damage.'" *Engelson*, 139 Nev. at 584, 542 P.3d at 437 (alteration in original). "[A] plaintiff discovers his injury when he knows or, through the use of reasonable diligence, should have known of facts that would put a reasonable person on *inquiry notice* of his cause of action." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012) (internal quotation marks omitted). "[A] person is put on 'inquiry notice' when he or she should have known of facts that 'would lead an ordinarily prudent person to investigate the matter further.'" *Id*. (quoting *Inquiry Notice*, *Black's Law Dictionary* (9th ed. 2009)). "[T]hese facts need not pertain to precise legal theories the plaintiff may ultimately pursue, but merely to the plaintiff's general belief that someone's negligence may have caused his or her injury." *Id*. at 252-53, 277 P.3d at 462. "The discovery may be either actual or presumptive, but must be of both the fact of damage suffered and the realization that the cause was the health care provider's negligence." *Massey*, 99 Nev. at 727, 669 P.2d at 251. The accrual date is generally a question of fact to be decided by the jury; however, the district court may determine the accrual date as a matter of law when the evidence is irrefutable. *Winn*, 128 Nev. at 251, 277 P.3d at 462.

In *Massey*, following hip replacement surgery, the plaintiff experienced a loss of sensation in her left leg and foot. 99 Nev. at 724, 669 P.2d at 249. The plaintiff's treating physician "told [her] that it was not unusual or permanent and that physical therapy would result in an improvement." *Id*. The plaintiff continued under the treating physician's care for many months, and during this time, the physician maintained that the condition would improve. *Id*. However, six months after the surgery, the physician changed course "when he expressed his inability to explain [plaintiff's] condition." *Id*.

The plaintiff subsequently sued the physician, who moved to dismiss her complaint on the ground that it was untimely, asserting that the statute of limitations started running on the date that the plaintiff discovered her symptoms. *Id*. at 725, 669 P.2d at 250. The Nevada Supreme Court disagreed, noting that the patient-plaintiff "commended herself to [the physician's] care and continuing treatment" and that a "patient is fully entitled to rely upon the physician's professional skill and judgment while under his care, and has little choice but to do so." *Id*. at 728, 669 P.2d at 252 (quoting *Sanchez v. S. Hoover Hosp.*, 553 P.2d 1129, 1135 (Cal. 1976)). The supreme court stated that "during the continuance of this professional relationship, which is fiduciary in nature, the degree of diligence required of a patient in ferreting out and learning of the negligent causes of his condition is diminished." *Id.* (quoting *Sanchez*, 553 P.2d at 1135). Thus, the supreme court held that "it [was] not clear" when the plaintiff was, or should have been, aware of her cause of action during the time she remained under the physician's care. *Id.* On that basis, and upon treating the order granting the motion to dismiss as one for summary judgment because the district court considered matters outside the pleadings, the supreme court concluded that summary judgment was inappropriate. *Id.* at 724 n.1, 728, 669 P.2d at 249 n.1, 252.

Massey was resolved on a summary judgment basis, and therefore the district court considered evidence regarding whether the plaintiff had discovered his legal injury more than two years (the statute of limitations at the time) before filing the complaint. *Id.* at 728, 669 P.2d at 252; *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005) (setting forth the summary judgment standard and providing that a court is to consider "the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court" when ruling on a summary judgment motion); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) (providing that, when the party that bears the burden of persuasion at trial is the nonmoving party in a request for summary judgment, they "must transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine issue of material fact" to avoid summary judgment). Although the summary judgment standard does not apply here, as this case was resolved on a motion to dismiss, and the district court did not consider evidence in making its decision, *Massey* is still instructive. Its legal holdings concerning a patient's ability to rely on a treating physician's advice during the time of treatment and the diminished diligence required of a patient to discover their legal injury during this time apply equally when considering whether to grant a dismissal or summary judgment. *See Massey*, 99 Nev. at 728, 669 P.2d at 252.

Here, in considering whether the district court erred in granting a dismissal, we take Boman's allegations as true and draw every inference in Boman's favor. *See Buzz Stew*, 124 Nev. at 227-28, 181 P.3d at 672. Applying the rules promulgated in *Massey*, we conclude that the district court erred in finding that, as a matter of law, Boman was on inquiry notice of his legal injury by October 24, 2020, at the latest. Although Dr. Elkanich informed Boman that the dura was nicked during surgery and repaired, and surgically addressed the hematoma, Dr. Elkanich also advised Boman that the issues he experienced in his leg could occur following surgery and should improve over time. Additionally, three months after the surgery, Dr. Elkanich purportedly downplayed Boman's neurological complications involving his left leg, again suggesting that he would improve. Because Boman was under Dr. Elkanich's continued care, he was fully entitled to rely upon Dr. Elkanich's skill and judgment, and the degree of diligence required of him to learn of any alleged negligence was diminished.[9] *See Massey*, 99 Nev. at 728, 669 P.2d at 252; *see also Engelson*, 139 Nev. at 587, 542 P.3d at 439 (determining there was not irrefutable evidence that the plaintiff had inquiry notice because the record did not state that the patient or plaintiff "were actually informed by the hospital staff that her condition had in fact worsened and, more specifically, was the result of professional negligence").

Therefore, at this stage of the proceedings, irrefutable evidence does not exist to support that Boman was on inquiry notice of his legal injury either on October 19, 2020, when he learned about the nicked dura and his leg paralysis, or on October 24, 2020, when he learned about the hematoma because of his ongoing physician-patient relationship with Dr. Elkanich. *See Winn*, 128 Nev. at 251, 277 P.3d at 462. Taking the allegations in the complaint as true and all inferences in Boman's favor, as we must, Boman was unaware of the possibility of his continuing health issues being related to Dr. Elkanich's alleged negligence until he sought a second opinion from Dr. Flangas on June 1, 2021, at which time he learned of his diagnosis of cauda equina syndrome and the effect the post-operative hematoma had on his outcome. Thus, at this stage of the proceedings, there is no irrefutable evidence that the statute of limitations had expired when Boman filed his complaint, and factual disputes remain regarding the accrual date of the statute of limitations on Boman's claims.

CONCLUSION

Taking all factual inferences in favor of Boman in considering whether dismissal of his complaint was appropriate under NRCP 12(b)(5) and applying the reasoning set forth in *Massey*, we conclude that irrefutable evidence does not support that as of October 24, 2020, at the latest, Boman was placed on inquiry notice of his claims against Dr. Elkanich. Indeed, Boman's degree of diligence was diminished while he remained under Dr. Elkanich's care during this

[9]Respondents further argue that this court should consider Boman's experience as a cardiologist as irrefutable evidence that he knew or should have known about his injury as of October 24, 2020, at the latest. However, respondents cite no authority to support their position that, because Boman is a doctor, as a patient he was not entitled to rely on the information Dr. Elkanich provided him regarding his treatment and diagnosis. *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 need not consider an argument that is not cogently argued or lacks the support of relevant authority).

period, particularly when Boman alleges that Dr. Elkanich continually reassured him that his post-operative condition would improve. Because factual disputes remain regarding the relevant accrual date, the district court erred in dismissing Boman's complaint as being untimely as a matter of law under NRCP 12(b)(5). And we note that if genuine disputes regarding inquiry notice remain following discovery, then the determination of the accrual date is a question of fact for the jury or trier of fact to resolve. *Winn*, 128 Nev. at 251, 277 P.3d at 462.[10] Accordingly, we reverse and remand this matter to the district court for further proceedings consistent with this opinion.

Gibbons, C.J., and Westbrook, J., concur.

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[10]Insofar as the parties have raised arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for further relief or need not be reached given the disposition of this appeal.

B.Y. and A.F., Petitioners, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE STACY MICHELLE ROCHELEAU, District Judge, Respondents, and ATHENA BURDISS; LaTOYA BURDISS; SHERICE INEZ F.; IHAB Y.; and ALAN-MICHAEL F., SR., Real Parties in Interest.

No. 88027

April 25, 2024 547 P.3d 666

Emergency original petition for a writ of mandamus challenging a district court ruling denying a petition for temporary guardianship over minor children.

Petition granted in part.

Legal Aid Center of Southern Nevada, Inc., and *Marina Dalia-Hunt*, Las Vegas, for Petitioners.

Athena Burdiss, Las Vegas, Pro Se.

LaToya Burdiss, Las Vegas, Pro Se.

Sherice Inez F., Las Vegas, Pro Se.

Ihab Y., San Diego, California, Pro Se.

Alan-Michael F., Sr., Tuscaloosa, Alabama, Pro Se.

Before the Supreme Court, Stiglich, Pickering, and Parraguirre, JJ.

OPINION[1]

Per Curiam:

NRS 159A.053 allows the district court to appoint temporary guardians over minor children upon a showing of good cause. After a significant delay in hearing a general guardianship petition in this case, two of the proposed protected minors asked the court to impose a temporary guardianship pending a decision on the petition for general guardianship, but the district court denied the request

[1]This matter was resolved on March 8, 2024, by an unpublished Order Granting in Part Petition for Writ of Mandamus. On March 22, petitioners filed a motion to reissue the order as an opinion. We grant the motion and enter this opinion in place of our prior order. NRAP 36(f). As the writ of mandamus issued on March 8 in accordance with the prior order and was returned by the district court on March 18, no new writ need issue with the filing of this opinion.

without a hearing. The minors then sought emergency relief from this court. We conclude that the district court manifestly abused its discretion in failing to give the request for temporary guardianship proper consideration under NRS Chapter 159A and grant the petition in part.

FACTS AND PROCEDURAL HISTORY

On October 4, 2023, real parties in interest Athena Burdiss and LaToya Burdiss filed a pro se petition for general guardianship over their four grandchildren, explaining generally that a guardianship was sought because the children had been exposed to unsafe conditions while living with their mother, real party in interest Sherice F. According to the guardianship petition, Sherice was currently living with a new partner with whom the children felt unsafe and had not obtained independent housing or daycare, and Sherice refused to renew voluntary guardianship papers. Attached to the guardianship petition was a June 2023 letter signed by Athena and Sherice stating that Sherice allowed the children to live with Athena from March 2023 until further notice, as well as notarized six-month voluntary guardianship forms for each of the children dated April 19, 2023. The guardianship petition listed the children's parents' addresses as unknown. A citation to appear on January 18, 2024, was entered the same day, but one week before the hearing, the guardianship petition was denied without prejudice for failure to provide proof that the petition and citation were properly served or consents and waivers of service.[2] The court allowed the Burdisses to request that a new citation to appear issue in the same case and to serve it along with the original petition. Five days later, the Burdisses caused to issue a new citation to appear, noticing a hearing for the next available date, April 18, 2024. Sherice filed an objection to the proposed guardianship the next day, disputing some of the allegations therein, including that she did not have a place for the children to reside.

On January 24, the two oldest children, petitioners B.Y. and A.F., acting through appointed counsel, filed an ex parte petition for appointment of the Burdisses as temporary guardians.[3] In the temporary guardianship petition, petitioners explained that they were uncomfortable with their mother's new partner given the domestic

[2]It appears that the district court prematurely denied the petition for failure to timely provide proof of service because NRS 159A.034(6) allows such proof to be filed "[o]n or before the date set for the hearing." While that provision applies to "notices" of hearings, a citation by definition provides notice of a hearing, NRS 159A.0145; NRS 159A.047(1), and a copy of the petition must be served with a citation, NRS 159A.047(2). Although we cannot fault the district court for applying NRCP 5 and employing modes of efficiency in view of the statutes' obliqueness, we think the more specific statute, NRS 159A.034(6), must be read to apply here.

[3]Petitioners also sought appointment of an investigator, which was granted.

violence they had historically witnessed with other partners, also noting the new partner's criminal background; asserted risk of physical and emotional harm should they return to their mother at this time; and pointed out that they had been or were likely to be unenrolled from their school, such that a temporary guardianship with their grandmothers, with whom they had resided since March 2023, was necessary for their well-being. The petition pointed to presumptions under NRS 159A.053(4) and NRS 159A.061(4), which arise when a parent has not had care, custody, and control of their child for the preceding six months. Petitioners indicated that the parents had been notified by phone, and both Sherice and A.F.'s father objected to the proposed temporary guardianship, while B.Y.'s father was in favor of it. The petition was accompanied by a declaration from Athena.

Two days later, on January 26, the district court entered minutes denying the petition for temporary guardianship, recognizing that petitioners had resided with Athena for more than six months but indicating that no emergency was demonstrated as a basis for a temporary guardianship. The court also noted that Athena's declaration was not signed, which apparently resulted from a technical glitch and was corrected on January 26, after the minutes were entered. To date, this court has not been provided with any written order denying the petition for temporary guardianship.

B.Y. and A.F. subsequently filed this emergency petition for a writ of mandamus seeking to compel the district court to grant the Burdisses temporary guardianship. In it, they assert that the district court erred in refusing to grant temporary guardianship, as it is presumptively in their best interests under NRS 159A.053(4), Sherice is presumptively unsuitable under NRS 159A.061(4), and an active emergency exists. Sherice and respondent District Judge Stacy Michelle Rocheleau have timely filed answers, as directed, and petitioners have filed a reply. Because no adequate legal remedy exists to challenge the denial of temporary guardianship, we consider the petition. NRS 34.170.

DISCUSSION

As noted, temporary guardianships governed by NRS 159A.053 may issue upon a finding of good cause, so long as the petitioner attempted to provide prefiling notice or was excused from so doing. NRS 159A.053(2). Here, petitioners provided notice in accordance with subsection (2)(a). While the statute does not otherwise define good cause, NRS 159A.053(4) provides that "[i]f no parent of the proposed protected minor has had the care, custody and control of the minor for the 6 months immediately preceding the petition, temporary guardianship of the person of the minor is presumed to be in the best interest of the minor." Similarly, NRS 159A.061(4)(c) presumes a parent is unsuitable to care for their children if the children have been out of the parent's care, custody, and control for the six months preceding the filing of a petition for guardianship. Here, petitioners have been out of the care, custody, and control of their parents since March 2023, well over the six-month period after which the presumption applies. Thus, good cause for the temporary guardianship must be presumed.

In her answer, Judge Rocheleau asserts that, since the NRS 159A.053(4) presumption is rebuttable, logic dictates that it cannot apply to a temporary guardianship issued ex parte before a hearing is held because the parents must have a chance to rebut it. While nothing in the statute indicates that the presumption is not rebuttable, *see* NRS 47.240 (noting that conclusive presumptions include only certain enumerated presumptions and a "presumption which, by statute, is expressly made conclusive," and no others); *Presumption*, *Black's Law Dictionary* (11th ed. 2019) (noting that, generally, "[a] presumption shifts the burden of production or persuasion to the opposing party, who can then attempt to overcome the presumption"), we do not read the statute as limiting the presumption's application to extension decisions after a hearing. Rather, the presumption applies any time temporary guardianship is sought; the fact that it may not be rebutted until a hearing, at most ten days after an ex parte appointment, NRS 159A.053(8), does not render it inapplicable at the ex parte stage. *See generally In re Amberley D.*, 775 A.2d 1158, 1163 (Me. 2001) (concluding that the risk of erroneous deprivation of parental rights due to appointment of an emergency guardian without notice to parents is lessened when the guardianship is limited in duration and the parent can obtain a hearing on the matter thereafter, at which the guardian bears the burden to show continuation of the guardianship is in the child's best interest).

Judge Rocheleau also points to substantial concerns with the ex parte nature of the request itself, ultimately concluding that no emergency necessitating an ex parte temporary guardianship existed. For instance, based on the original general guardianship petition, the answer explains that the judge found Athena's credibility questionable; noted that she had been allowing the children to spend time with their mother, including overnights, despite the allegations; and pointed out that there did not appear to be any current issues with domestic violence or housing. Based on her review of the record, the judge determined that no emergency was shown, especially as Athena had not sought temporary guardianship over the two youngest children.

When temporary guardianship is requested ex parte, an affidavit explaining the emergency requiring appointment before a hearing must be provided. NRS 159A.053(3). While the district court appears to have thoroughly reviewed the record and we generally do not disturb the district court's fact-based and discretionary conclusions, here it appears that, at least in part, the district court's conclusions incorporated a misunderstanding as to who was seeking the temporary guardianship. As it was B.Y. and A.F. who filed the petition, not the Burdisses, the failure to seek temporary guardianship over all four children cannot form a basis for the conclusion that no emergency existed. Moreover, petitioners have been living with the Burdisses for several months with no valid guardianship in place, fear to return to their mother and her new partner (a fear that might not be completely unfounded, given their backgrounds), and allegedly are not enrolled in school, all with the hearing on general guardianship months out at the time the petition was filed. If no emergency warranted an immediate ex parte guardianship, nothing prevented the district court from requiring petitioners to provide notice and holding an expedited hearing before ruling on the petition for temporary guardianship. An expedited hearing on the petition or, if an ex parte petition is granted without a hearing, a hearing on whether the temporary guardianship should be extended would also afford Sherice (and any other interested party) an opportunity to address the disputed allegations made in the petition for temporary guardianship.

CONCLUSION

The district court manifestly abused its discretion in failing to give the petition for temporary guardianship proper consideration under NRS Chapter 159A, and we thus conclude that writ relief is warranted in part. *See Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981). Accordingly, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to reconsider the petition for temporary guardianship on an expedited basis in accordance with this opinion.

JESSE CALVIN GILBERT, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 85564

May 9, 2024 548 P.3d 1

Appeal from a judgment of conviction, pursuant to a no-contest plea, of ex-felon in possession of a firearm. Tenth Judicial District Court, Churchill County; Thomas L. Stockard, Judge.

Affirmed.

Evenson Law Office and *Steve E. Evenson*, Fallon, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Arthur E. Mallory*, District Attorney, and *Chelsea D. Sanford*, Senior Deputy District Attorney, Churchill County, for Respondent.

Before the Supreme Court, Cadish, C.J., and Pickering and Bell, JJ.

OPINION

By the Court, Cadish, C.J.:

The inventory search is a well-established exception to the warrant requirement of the Fourth Amendment. Generally, if an inventory search complies with standardized procedures, it is reasonable and therefore constitutional. We have previously recognized that even when an inventory search does not comply with standardized procedures, it may still be constitutional if it is reasonable under the totality of the circumstances. We are called on today to address how courts should conduct this reasonableness analysis. First, we clarify that while an inventory search cannot be a ruse for general rummaging, an investigatory motive does not necessarily invalidate an inventory search so long as the search that occurred is the same as the inventory-based search that would have happened absent any such motivation and the circumstances leading to the search were not created as a ruse to establish a basis for that search. Instead, a court deciding a suppression motion must determine the search's reasonableness under the totality of the circumstances by evaluating (1) the extent to which law enforcement departed from the standardized procedures, (2) whether the scope of the search was as expected in light of the underlying justifications for inventory searches, and (3) whether the inventory produced served the purposes of an inventory search.

Here, a law enforcement deputy pulled over appellant Jesse Calvin Gilbert because the car Gilbert was driving did not have an operating license plate light. As Gilbert had an active warrant, the deputy arrested him. During the subsequent warrantless search of the vehicle, the deputy made several statements that indicated the deputy hoped to locate incriminating evidence in the vehicle. While searching, the deputy found a handgun under the driver's seat. Gilbert was charged with ex-felon in possession of a firearm and moved to suppress the evidence on the basis that the search was not a true inventory search, but rather a ruse to conduct an investigatory search. Finding that the deputy appropriately impounded the vehicle and the inventory search was reasonable, the district court denied the motion. Gilbert appeals from his subsequent conviction based on the search and resulting unsuppressed evidence.

Perceiving no error in the district court's decision denying the motion to suppress, we affirm. The investigatory motive here does not invalidate the inventory search because the search that occurred was precisely the same as the search that would have occurred absent the impure motivation. Because the deputy properly stopped Gilbert for the nonfunctioning license plate light and arrested Gilbert on the outstanding warrant, the deputy was required under police policy to tow the car Gilbert was driving. Therefore, the search that uncovered the gun would have occurred pursuant to the inventory search policy even absent the deputy's investigatory motives. Additionally, we conclude that while the inventory search here did not comply with standardized policies, it passes constitutional muster because it was reasonable under the totality of the circumstances, as the district court concluded.

FACTS AND PROCEDURAL HISTORY

In the early morning hours, Deputy Nollan of the Churchill County Sheriff's Office observed two vehicles enter a parking lot, meet up, and leave the parking lot a short time later. Deputy Nollan followed one of the vehicles and initiated a traffic stop because it did not have an operating license plate light. Appellant Jesse Calvin Gilbert, who was driving the vehicle, pulled over and stopped in a private residential driveway.

Deputy Nollan approached the vehicle and recognized Gilbert from prior law enforcement contact. Gilbert indicated to Deputy Nollan that he was driving on a suspended license. Deputy Nollan confirmed this information with dispatch and was informed that Gilbert had an active arrest warrant. Deputy Nollan arrested Gilbert, after which other officers, including Deputy Nollan's supervisor, arrived on the scene. Deputy Nollan told his supervisor that he wanted to search the car and that he intended to tow it.

Before Gilbert was transported to jail, he made a phone call to an unidentified woman. Either Gilbert or the unidentified woman asked Deputy Nollan if the woman could take the car, which Deputy

Nollan refused because the vehicle was being illegally operated on a roadway, such that the vehicle had to be towed. Shortly after, a woman approached the officers and identified herself as Lauren Sealock. She asked the officers if she could take the vehicle, stating that she was a friend of the residents of the house in front of which the car was parked, to which Deputy Nollan said no. A different officer transported Gilbert to jail, and Deputy Nollan searched Gilbert's vehicle.

Among other items, Deputy Nollan found a handgun under the driver's seat approximately one minute into the search. The entire search, which was captured on Deputy Nollan's body-camera video, lasted roughly 15 minutes, during which Deputy Nollan searched the car door pockets, the floor, under the seats, and in the trunk of the car. During the search, another deputy asked Deputy Nollan if he found anything, to which Deputy Nollan responded "not yet" and then "not yet anyway." Deputy Nollan did not apply for or obtain a search warrant.

During the search, the officers interacted with two more people: another unidentified woman and the owner of the residence where Gilbert had pulled over. The woman allegedly co-owned the car Gilbert was driving and requested to take the vehicle. Deputy Nollan denied this request. The owner of the residence asked the officers what was happening and indicated he needed to leave. Later, at the hearing on the motion to suppress, the owner testified that he never gave Gilbert permission to park in his driveway.

After the search, Deputy Nollan completed a Churchill County Sheriff's Office Vehicle Inventory/Impound Sheet. On that sheet, Deputy Nollan listed the following items as "property, tools, or other items in the vehicle": set of golf clubs, two earrings white metal/white stone, black metal ring, two air rifles, and miscellaneous trash. Deputy Nollan failed to include on the inventory sheet several other items that were in the car, including a glass pipe, a substance he suspected to be methamphetamine, and the handgun.

Gilbert was formally charged by information with one count of ex-felon in possession of a firearm. Gilbert filed a motion to suppress evidence of the gun, arguing that the inventory search was a "ruse for the purposeful and general means of discovering evidence of a crime." (Internal quotation marks omitted.) Respondent State of Nevada opposed, arguing the vehicle was appropriately impounded and the inventory of the vehicle was not unlawfully excessive.

At the hearing on the motion, Deputy Nollan testified that he stated he was going to tow the vehicle because "[he] was arresting the driver who was also parked in a private driveway." After reviewing his body-camera footage, he admitted that during the stop, he planned to tow the vehicle because it was being operated illegally on the roadway, i.e., dispatch confirmed that Gilbert had a suspended driver's license. On cross-examination, he stated that he noticed the license plate light was out on Gilbert's car when it left the parking lot. When asked about his comment that he wanted to go through the car, Deputy Nollan testified that "[i]t was my vehicle stop. It was my arrest. It was my scene. I told my supervisor I wanted to—that I wanted to go through the vehicle because that's why. It was my arrest . . . I wanted to be responsible for it." *Id.* at 74-75. Deputy Nollan acknowledged that he does not always conduct a vehicle inventory following an arrest, but he wanted to do so in this case because "[he] was relatively new on the—on patrol. [He] wanted the experience. [He] wanted to be responsible for it."

Deputy Nollan also testified that the two vehicles meeting in the parking lot "played a part" in his stopping Gilbert and towing the vehicle because he believed the meeting was suspicious, he believed he would find drugs in the car and that was a substantial reason why he decided to search and tow the vehicle. He also testified that he suggested his supervisor search Gilbert's wallet because he thought it might have dope in it. Deputy Nollan acknowledged that he located a handgun, a glass pipe, and what he presumed to be methamphetamine but did not list them in his inventory. Deputy Nollan, however, listed the gun and possible drugs in his report and turned all three items over to the task force officer. Deputy Nollan admitted that he "made mistakes as far as what items [he] did not list on the form" and lacked proper diligence and documentation for all the items in the car.

Relying on *State v. Nye*, 136 Nev. 421, 468 P.3d 369 (2020), the district court denied Gilbert's motion, finding that the inventory search of Gilbert's vehicle was reasonable based on the totality of the circumstances, including that (1) law enforcement had an unquestionable right to tow the vehicle because Gilbert was arrested, the car was inoperable due to a nonfunctioning license plate light, and it was dark; (2) the inventory search did not exceed the scope of a proper inventory; (3) the search was recorded on a body-worn camera; and (4) Deputy Nollan produced a nearly completed inventory sheet. The district court found, however, that Deputy Nollan's failure to produce a complete inventory sheet and clear motivation to search the car because he believed he would find drugs weighed against reasonableness.[1]

Gilbert entered a conditional no-contest plea to ex-felon in possession of a firearm, wherein he preserved his right to appeal on the basis that the district court erred in denying his motion to suppress.

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[1]The district court also found the inevitable discovery doctrine was inapplicable. We agree because the search conducted by Deputy Nollan was the only inventory search that was conducted or would have been conducted on the vehicle. The State does not argue on appeal that the inevitable discovery doctrine applies.

The district court entered a judgment of conviction on the no-contest plea. Gilbert now appeals.

DISCUSSION

"A motion to suppress presents mixed questions of law and fact." *State v. Lloyd*, 129 Nev. 739, 743, 312 P.3d 467, 469 (2013). "A district court's legal conclusion regarding the constitutionality of a challenged search receives de novo review." *Id.* at 743, 312 P.3d at 469. Because Gilbert does not challenge the district court's factual findings and instead challenges only its legal conclusions that the search was valid and reasonable, we apply a de novo standard of review. *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013) (reviewing de novo the issue of reasonableness in the Fourth Amendment context).

The Nevada Constitution and United States Constitution both prohibit unreasonable searches and seizures. U.S. Const. amend. IV; Nev. Const. art. 1, § 18. "Under these cognate provisions of our federal and state constitutions, warrantless searches are *per se* unreasonable . . . subject only to a few specifically established and well-delineated exceptions." *Lloyd*, 129 Nev. at 743, 312 P.3d at 469 (internal quotation marks omitted). Nevada recognizes inventory searches as one such exception to the warrant requirement. *Weintraub v. State*, 110 Nev. 287, 288, 871 P.2d 339, 340 (1994). The purpose of the inventory search exception is to protect an individual's property while it is in the custody of the police, to ensure against claims of damaged or missing property, and to guard the police against danger. *Colorado v. Bertine*, 479 U.S. 367, 372-73 (1987). In *Weintraub*, we held that an inventory search will pass constitutional muster if it is carried out pursuant to standardized official department procedures and administered in good faith. 110 Nev. at 288, 871 P.2d at 340. Further, "the officers conducting the search must produce 'a true inventory of' personal items found during the search." *Nye*, 136 Nev. at 423, 468 P.3d at 371 (quoting *Weintraub*, 110 Nev. at 289, 871 P.2d at 340). Indeed, without an inventory, there can be no inventory search. *State v. Greenwald*, 109 Nev. 808, 811, 858 P.2d 36, 38 (1993). However, "inventory searches need not be conducted in a totally mechanical, all or nothing fashion." *United States v. Smith*, 715 F.3d 1110, 1117 (8th Cir. 2013) (quoting *United States v. Garreau*, 658 F.3d 854, 858 (8th Cir. 2011) (internal quotation marks omitted)). In *State v. Nye*, we observed that the failure to precisely follow the department's policies does not necessarily invalidate an inventory search, as the validity of the search turns on reasonableness. 136 Nev. at 425 n.3, 468 P.3d at 372 n.3 (stating that "an inventory search need not conform to official procedure to be valid, so long as the State can otherwise prove that the search was reasonable"); *see id.* at 426-28, 468 P.3d at 373-74 (Cadish, J., concurring in part and dissenting in part) (recognizing that Fourth Amendment jurisprudence focuses on reasonableness, and a reasonableness evaluation "does not necessarily require adherence to an official procedure").

While the search did not comply with the Churchill County Sheriff's Office Policy 3.415 procedure, it was reasonable under all the circumstances

Inventory searches that comply with standardized procedures are reasonable—and thus constitutional—because the standardized procedures "ensure[ ] that an inventory search is truly designed to produce an inventory and is not just a ruse for a general rummaging . . . to discover incriminating evidence." *Jim v. State*, 137 Nev. 557, 560, 495 P.3d 478, 481 (2021) (internal quotation marks omitted); *see United States v. Taylor*, 636 F.3d 461, 464 (8th Cir. 2011) ("The reasonableness requirement is met when an inventory search is conducted according to standardized police procedures, which generally remove the inference that the police have used inventory searches as a purposeful and general means of discovering evidence." (internal quotation marks omitted) (quoting *United States v. Marshall*, 986 F.2d 1171, 1175 (8th Cir. 1993))). In *Nye*, we acknowledged that an inventory search that does not fully comply with standardized procedures may still pass constitutional muster so long as it is reasonable. 136 Nev. at 425 n.3, 468 P.3d at 372 n.3. As reasonableness is the touchstone by which courts measure the constitutionality of police searches, an inquiry into an inventory search that does not comply with such procedures must focus on whether the police conduct was reasonable under the totality of the circumstances. *See Smith*, 715 F.3d at 1117 (holding an inventory search must be reasonable under the totality of the circumstances).

Today we clarify that this reasonableness evaluation is not dependent on the motive of law enforcement under a so-called pretext theory unless the inventory search itself would not have occurred or would have been more limited absent the investigatory motive. Instead, we announce the factors a district court must consider in determining whether an inventory search is reasonable under the totality of the circumstances: (1) to what extent law enforcement departed from the standardized procedures, (2) whether the scope of the search is what one would expect in light of the underlying justifications of inventory searches, and (3) whether the inventory produced served the purpose of an inventory search. *Jim*, 137 Nev. at 561, 495 P.3d at 481 (noting law enforcement's deviation from the standardized policy was slight); *cf. United States v. Neugin*, 958 F.3d 924, 931 (10th Cir. 2020) (noting officers are entitled to some latitude in conducting their community caretaking role, but their actions must be "reasonably related in scope" to the underlying justification for the community caretaking exception to the warrant requirement (quoting *Lundstrom v. Romero*, 616 F.3d 1108, 1123 (10th Cir. 2010))); *cf. United States v. Rowland*, 341 F.3d 774, 782 (8th Cir. 2003) (concluding a search where law enforcement disregarded items without evidentiary value despite them being of possible monetary value suggested the search did not serve the purpose of an inventory search). These factors will properly focus the court on the search that actually took place and whether it is in reality an inventory search justifying an exception to the warrant requirement.

The investigatory motive to search a vehicle does not alone make the search unconstitutional

Gilbert argues that the district court erred in determining the search was reasonable despite Deputy Nollan's investigatory motive to search the car, which he expressed before ever searching the vehicle. Gilbert points to *Nye* for support that an inventory search cannot be reasonable where law enforcement does not comply with the standardized procedures for the search and the motive to conduct the search is impure.

The mere expectation that incriminating evidence may be found in a search is not impermissible pretext within the context of the Fourth Amendment. 3 Wayne R. LaFave, *Search and Seizure* 926 (6th ed. 2020). Rather, impermissible pretext within this context "arises out of the fact that the evidence is found in a search which would not have occurred at all but for the manipulation of circumstances and events by the police because of their desire to conduct a search that could not otherwise be lawfully made." *Id.* That is, an impermissible pretextual inventory search is one where law enforcement created the circumstances warranting the search to satisfy their investigatory desire. *See Jim*, 137 Nev. at 560, 495 P.3d at 481 ("While an officer's failure to complete an inventory per department policy may foreclose the inventory warrant exception, such a failure does not per se establish that an officer's motive for *beginning* an inventory was a subterfuge."); *see also Whren v. United States*, 517 U.S. 806, 816 (1996) (observing that although adherence to procedures shows lack of pretext, deviation from procedures does not prove or serve as an operational substitute for pretext). The suppression of evidence is not required when, even assuming a questionable motivation is dominant, "the Fourth Amendment activity undertaken is precisely the same as would have occurred had that intent or motivation been entirely absent from the case." 1 Wayne R. LaFave, *supra*, at 177.

Other courts have concluded this "would have . . . anyway" rationale applies in the context of inventory searches. *United States v.*

Bowhay, 992 F.2d 229, 231 (9th Cir. 1993) (quoting *United States v. Lillard*, 929 F.2d 500, 502 (9th Cir. 1991)). In *Bowhay*, the Ninth Circuit Court of Appeals explained that, in the context of inventory searches, dual motives—i.e., a motive to investigate for incriminating evidence and a motive to compile an inventory of an individual's property—do not make a search pretextual and thus do not invalidate it. 992 F.2d at 231. The court observed that unlike in pretextual cases, department inventory procedures required that the officer take an inventory of all personal property, such that the officer had no discretion in initiating a search of the defendant's satchel, in which narcotics, a gun, and cash were found. *Id.* at 230-31. Other courts have agreed, observing that "[t]he police are not precluded from conducting inventory searches when they lawfully impound the vehicle of an individual that they also happen to suspect is involved in illegal activity." *Marshall*, 986 F.2d at 1175-76; *see also United States v. Lopez*, 547 F.3d 364, 372 (2d Cir. 2008) (observing that the expectation and motivation to find criminal evidence does not constitute bad faith where good faith is a prerequisite of an inventory search). We agree that the "would have . . . anyway" rationale applies to inventory searches.

Here, we agree with the district court's conclusion that Deputy Nollan "clearly had motives to inventory the vehicle that were unrelated to the constitutionally recognized purpose of an inventory search." *See Bertine*, 479 U.S. at 372-73. Deputy Nollan's comments leading up to and during the search indicate that he was suspicious of the two vehicles meeting in the parking lot, and his belief that he would find drugs in the vehicle was a substantial reason why he decided to search and tow Gilbert's car. However, Deputy Nollan was legally permitted to initiate the traffic stop because the car did not have a functioning license plate light and was thus inoperable considering it was dark outside. *See* NRS 484D.115(4) ("Every passenger car, bus and truck under 80 inches in overall width must be equipped with a lamp so constructed and placed as to illuminate with a white light the rear registration or license plate and render it clearly legible from a distance of 50 feet to the rear."). Further, Gilbert was lawfully arrested due to an outstanding warrant, and officers removed him from the scene. This left the car parked on private property without the permission of the property owner. While two individuals approached Deputy Nollan indicating they could remove the car from the property, including the claimed co-owner of the vehicle, the car was not operable at night. NRS 484D.115(4). Under these circumstances, Deputy Nollan had an unquestionable and undisputed right to tow the car under Churchill County Sheriff's Office Policy 3.415 (governing towing and storage of vehicles) as a vehicle that was illegally parked. Further Churchill County Sheriff's Office Policy 3.410 provides vehicles will be towed when the driver is arrested. Thus, the car would have been towed and inventoried under Churchill County Sheriff's Office policies regardless of Deputy Nollan's expressed expectation or hope to find drugs in the car. In other words, Deputy Nollan had a right and obligation to perform an inventory on the car. *See Collins v. State*, 113 Nev. 1177, 1181, 946 P.2d 1055, 1058-59 (1997) (recognizing that "police have a duty to inventory the contents of an automobile" for legitimate purposes). Gilbert does not dispute the constitutionality of the stop itself, his arrest, or that Deputy Nollan's decision to tow the vehicle complied with department polices. Therefore, we conclude Deputy Nollan's investigatory motive to search Gilbert's car did not invalidate the search because the inventory search would have occurred regardless of such a motive.

Deputy Nollan's deviation from Churchill County Sheriff's Office Policy 3.415 is concerning

Turning to the factors we announce today to evaluate the reasonableness of the purported inventory search under all the circumstances, we first address the extent to which Deputy Nollan strayed from the standardized procedure. First, Deputy Nollan complied with Churchill County Sheriff's Office Policy 3.410, which provides that a vehicle will be towed in the event the driver of the vehicle is arrested. While the policy also permits a co-owner to take the vehicle if a deputy objectively determines the co-owner is capable of safely operating the vehicle, Deputy Nollan properly determined the vehicle could not be driven safely because it was dark outside and one of the license plate lights was nonoperational. Because Deputy Nollan was required to have the vehicle towed under these circumstances, he was also required to conduct an inventory search of the vehicle.

However, it is undisputed that Deputy Nollan failed to fully comply with Churchill County Sheriff's Office Policy 3.415 in that he failed to provide a detailed written description of the contents of *all* the personal property that was in the car. This policy provides:

> Any vehicle which is taken or removed from any location pursuant to the lawful authority of any Deputy, whether said vehicle is on public or private property, will be thoroughly inventoried as to its condition and contents . . . . Said inventory shall be recorded on a Vehicle Inventory Report form and will include a detailed written description of the contents and conditions of any items of personal property contained therein.

Deputy Nollan did properly identify the make and license number of the vehicle and its features and listed certain items of personal property on the inventory sheet. The district court's thorough order after a full evidentiary hearing noted Deputy Nollan acknowledged in his testimony that other items of personal property were in the car and not listed on the inventory, including "a pipe, a Halloween mask, what appeared to be two one-dollar bills, a cell phone, a basket of golf balls, a rangefinder, and a pack of cigarettes." The court also found the body camera footage showed other omitted items whose nature was not clear. While some items that were not catalogued may fall under Deputy Nollan's miscellaneous trash listing on the inventory sheet, others did not fit in that category and were of the type the inventory policy would cover, such as the cell phone and rangefinder. Thus, as the district court properly concluded, Deputy Nollan deviated from the standardized policy by failing to provide a "detailed written description" of these items. Even Deputy Nollan acknowledged that he lacked proper diligence when documenting the items in the car. However, Deputy Nollan did not altogether disregard his duty to document the items in the car, and it is not clear that any of the omitted items were of value. *Compare United States v. Garay*, 938 F.3d 1108, 1112 (9th Cir. 2019) (concluding an inventory search was valid despite the officer failing to list some of the property in the inventory list), *with Weintraub*, 110 Nev. at 289, 871 P.2d at 340 (concluding an inventory search was unconstitutional where the inventory list included only 8 items, but the vehicle contained approximately 100 items including a wallet with money and identification and $150 in cash that were not listed). We conclude that while Deputy Nollan deviated from the standardized policy, and these deviations are concerning, he made a good faith effort and prepared a nearly complete inventory list with the items that appeared to him to be of potential value. Thus, this factor weighs against the reasonableness of the search, but not significantly so.

The search performed did not exceed the scope expected of an inventory search

The second metric in the reasonableness inquiry is whether the search's scope was as expected in light of the underlying justifications of inventory searches, i.e., to protect the owner's property interests and protect police from liability for missing property and against danger. Here, the entire search spanned approximately 15 minutes, and Deputy Nollan and another deputy searched the pockets of the car doors, the floor, the seats, under the seats, the center console, and the trunk. As the district court concluded, all of these locations are areas in a vehicle that were "certain to be searched during an inventory." Thus, as the district court also properly concluded, the handgun, which was found under the seat, and the drugs, which were found in the console, were also "almost certain to be found if an inventory search were conducted," whether or not the officer inventorying the vehicle strictly adhered to the inventory search protocol. *See* 3 Wayne R. LaFave, *Search and*

Seizure 863-64 (6th ed. 2020) (an inventory search customarily will "extend to all parts of the car where personal property might be found, and to include an inventory of containers found within the vehicle" (footnotes omitted)); *cf. Greenwald*, 109 Nev. at 809-11, 858 P.2d at 37-38 (concluding that a search exceeded the scope of an administrative search where the law enforcement officer examined the contents of the gas and oil tanks and even dismantled a flashlight). We thus conclude that the search's scope was appropriate for an inventory search.

The search served the underlying purpose of the inventory search exception to the warrant requirement

Finally, we conclude that Deputy Nollan's search served the purposes of an inventory search. *Bertine*, 479 U.S. at 372-73. Again, the inventory sheet prepared by Deputy Nollan did not include several items that potentially were valuable. In this way, the search fell short of serving the purpose of protecting Gilbert's property that was impounded and protecting police from claims that said property was lost or stolen while in police custody. The inventory sheet was not the only documentation of the search, however. Throughout the entire search, Deputy Nollan was wearing his body camera, and the entire search was captured by this recording. The district court found the footage "provided a relatively clear audio and video recording of the inventory search." While it does not satisfy Churchill County Sheriff's Office Policy 3.415, the district court found that the recording showed Deputy Nollan handling virtually every item that was located in the car, which the parties do not dispute.[2] This is distinguishable from *Nye*, which involved an unrecorded search when the inventory search policy required it be performed on camera. Conversely, the inventory search policy here required no such recording, but the entire search was recorded on Deputy Nollan's body camera. Therefore, we conclude that the district court did not err in determining that the search performed by Deputy Nollan served the underlying purpose of the inventory search exception to the warrant requirement of the Fourth Amendment.

The district court extensively analyzed these factors in determining that the search was reasonable under the totality of the circumstances. Based on our independent review, we agree. While the failure to list several items in the car on the inventory is concerning and reduces the efficacy of the inventory procedure, weighing all of the circumstances under the factors we have identified leads us to conclude that the inventory search was reasonable and the district court correctly denied the motion to suppress.

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[2]The body-camera footage of the search was not provided on appeal.

CONCLUSION

Even when a warrantless inventory search does not comply with the department policies and procedures, it may be constitutional if it is reasonable under the totality of the circumstances. We conclude that an investigatory motive does not necessarily invalidate an inventory search so long as the search that occurred is the same as the inventory-based search that would have happened even absent any investigatory or other intent or motivation. We hold instead that a court deciding a suppression motion in these circumstances must determine the search's reasonableness under the totality of the circumstances by evaluating (1) the extent to which law enforcement departed from the standardized procedure, (2) whether the scope of the search was as expected in light of the underlying justifications for inventory searches, and (3) whether the inventory produced served the purposes of an inventory search. We conclude that, after weighing these factors, the search here was reasonable, and we perceive no error in the district court's denial of Gilbert's motion to suppress. We therefore affirm the judgment of conviction.

Pickering and Bell, JJ., concur.

CAPITAL ADVISORS, LLC, a Utah Limited Liability Company; and DANZIG, LTD., a North Carolina Corporation, Individually and Derivatively on Behalf of NOMINAL DEFENDANT CAM GROUP, INC., a Nevada Corporation, Appellants, *v.* WEI HENG CAI, an Individual; and WEI XUAN LUO, an Individual, Respondents.

No. 84732

CAPITAL ADVISORS, LLC, a Utah Limited Liability Company; and DANZIG, LTD., a North Carolina Corporation, Individually and Derivatively on Behalf of NOMINAL DEFENDANT CAM GROUP, INC., a Nevada Corporation, Appellants, *v.* WEI HENG CAI, an Individual; and WEI XUAN LUO, an Individual, Respondents.

No. 85378

May 23, 2024 548 P.3d 1202

Consolidated appeals from district court orders granting a motion for judgment as a matter of law and awarding attorney fees and costs. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Affirmed in part, reversed in part, vacated in part, and remanded.

[Rehearing denied July 8, 2024]

[En banc reconsideration denied September 19, 2024]

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Womble Bond Dickinson (US) LLP* and *Edward S. Kim*, Irvine, California, for Appellants.

Jones Lovelock and *Nicole E. Lovelock* and *Sue Trazig Cavaco*, Las Vegas; *Brown Brown & Premsrirut* and *Puoy K. Premsrirut*, Las Vegas; *Ellenoff Grossman & Schole LLP* and *John Brilling Horgan* and *Fawn M. Lee*, New York, New York, for Respondents.

Before the Supreme Court, Herndon, Lee, and Bell, JJ.

OPINION

By the Court, Lee, J.:

It is well recognized that a corporation should be treated as a separate legal entity unless the corporate veil is pierced and the corporation is shown to be the alter ego of a controlling individual. Likewise, we have recognized the use of the alter ego doctrine where a subsidiary company is shown to be the alter ego of the parent company. We have yet to consider, however, whether officers and directors of a parent company can be held liable for actions taken by a wholly owned subsidiary of a wholly owned subsidiary without the use of the alter ego doctrine. We also have yet to consider whether shareholders may file derivative suits that compel the company to sue its own officers and directors based on actions implemented through a wholly owned subsidiary of a wholly owned subsidiary to the parent. We conclude that officers and directors of a parent company who allow a wholly owned subsidiary to take action adverse to the parent can be held liable without use of the alter ego doctrine. Such liability is imposed because directors and officers have a fiduciary duty to act in the best interests of the parent company and its stockholders and thus cannot intentionally cause or knowingly fail to stop adverse actions by a wholly owned subsidiary company. We likewise hold that shareholders may file derivative suits against officers and directors of a parent company based on wrongful actions that occurred at a wholly owned subsidiary of a wholly owned subsidiary without asserting alter ego. As a result, fiduciaries at a parent company have a duty not to intentionally implement or knowingly permit a wholly owned subsidiary to effect a transaction that is unfair to the parent company on whose board they serve, regardless of the presence of intermediate subsidiaries between the parent and the subsidiary where the challenged action is alleged to have taken place. Because the district court found that officers and directors of a parent company cannot be held liable for actions taken by a wholly owned subsidiary without piercing the corporate veil, and because appellants presented sufficient evidence to defeat a motion for judgment as a matter of law as to some of their causes of action, we affirm in part, reverse in part, vacate in part, and remand the matter for further proceedings.

FACTS AND PROCEDURAL HISTORY

Appellants Capital Advisors, LLC, and Danzig, Ltd., filed a shareholder derivative action as minority shareholders of Cam Group, Inc. (CAMG) against nine CAMG officers and directors. Seven of the defendants refused to appear for their depositions, and the district court entered defaults against those defendants as sanctions. Respondents Wei Heng Cai (Ricky) and Wei Xuan Luo (Tracy) were the only defendants who proceeded to trial.

CAMG is a Nevada company and is the publicly traded U.S. parent holding company of a stack of Chinese subsidiary holding companies. At the relevant time, the structure of CAMG and its subsidiaries was as follows: CAMG wholly owned China Agriculture Media Group Co., Ltd. (CAM Group); CAM Group wholly owned China Agriculture Media Hong Kong Group Co., Ltd. (CAM HK); and CAM HK owned 98% of China Agriculture Media Hebei Co., Ltd. (CAM Hebei). The only revenue-producing company in this stack was the subsidiary at the bottom, CAM Hebei. All of the other companies were holding companies.

Ricky served as the President and a member of CAMG's board of directors from April 21, 2012, to July 29, 2013. From November 16, 2012, to November 15, 2013, Tracy, Ricky's then-spouse, served as the CAMG Chief Financial Officer. Appellants alleged that, in 2013, Ricky arranged for and issued a $1.85 million unsecured loan at zero-percent interest to a company called Parko Ltd. Appellants further alleged that Tracy failed to fulfill her duties as CFO by failing to stop the loan to Parko.

The circumstances surrounding the alleged loan transaction were as follows. On July 15, 2013, Parko entered into a Share Purchase Agreement with a third entity called National Agricultural Holdings Limited (NAHL) to acquire a majority stake in NAHL. Ten days later, a CAM company made the challenged loan to Parko. Appellants allege that the loan was made by CAMG, and respondents allege that the loan was made by CAM HK. Appellants further alleged that Parko used the loan to help fund the purchase of NAHL. Appellants contended that the loan drained approximately 80% of the cash reserves for the consolidated CAM companies.[1]

After making the challenged loan to Parko, Ricky resigned from CAMG to focus on developing business opportunities for NAHL and his own company Precursor Management Inc. (PMI), which in pertinent part managed an equity fund. Through the equity fund, PMI made loans structured as a convertible bond to Parko that were repayable with shares of NAHL. Parko later transferred shares of NAHL to PMI as a part of this transaction. Ricky's new spouse (not Tracy) later joined NAHL as a director.

Following discovery and pretrial motions, appellants brought the following causes of action to trial: (1) breach of fiduciary duty and self-dealing, (2) breach of fiduciary duty for usurping CAMG's business opportunities, (3) corporate waste, (4) civil conspiracy, and (5) unjust enrichment. There was no allegation of alter ego.

Appellants presented the testimony of a CAMG board member, Enrique Marchese, who testified that the loan to Parko was made by CAMG and approved by the board of directors. Marchese also testified that he was concerned by the fact that the board was asked in November to backdate approval of the loan to Parko, which had been made a few months earlier in July.

After appellants rested, Ricky and Tracy moved for judgment as a matter of law pursuant to NRCP 50(a). The district court granted the motion as to all causes of action. The district court permitted

[1]In 2014, one of the CAM companies made additional zero-percent interest, unsecured loans to Parko. The 2014 loans are not at issue in the present appeal, but we note them for context.

appellants to submit their remaining claims for damages against the seven defaulted defendants to the jury. The jury awarded appellants $130 million on the defaulted claims. Post-trial, based on its NRCP 50(a) dismissal, the district court awarded Ricky and Tracy over $2 million in attorney fees and costs pursuant to NRS 18.010(2)(b) and NRS 78.751 (requiring corporations to indemnify directors and officers when successful in defense).

DISCUSSION

Appellants assert that officers and directors of a parent corporation can be held liable for breaching their fiduciary duties based on the wrongful conduct of a wholly owned subsidiary and that, consequently, the district court erred by granting the respondents' motion for judgment as a matter of law under NRCP 50(a). Pursuant to NRCP 50(a), "the district court may grant a motion for judgment as a matter of law if the opposing party has failed to prove a sufficient issue for the jury, so that his claim cannot be maintained under the controlling law." *Nelson v. Heer*, 123 Nev. 217, 222, 163 P.3d 420, 424 (2007) (internal quotation marks omitted); *see also Bielar v. Washoe Health Sys., Inc.*, 129 Nev. 459, 471, 306 P.3d 360, 368 (2013) ("To overcome a motion brought pursuant to NRCP 50(a), the nonmoving party must have presented sufficient evidence such that the jury could grant relief to that party." (internal quotation marks omitted)). We review de novo a district court's order under NRCP 50(a), "view[ing] the evidence and all inferences in favor of the nonmoving party." *Nelson*, 123 Nev. at 222-23, 163 P.3d at 424-25. "If there is conflicting evidence on a material issue, or if reasonable persons could draw different inferences from the facts, the question is one of fact for the jury and not one of law for the court." *Broussard v. Hill*, 100 Nev. 325, 327, 682 P.2d 1376, 1377 (1984).

Appellants allege Ricky and Tracy, as officers or directors of CAMG, are liable for their actions regarding the challenged loan to Parko. Directors and officers are not liable to the corporation or its stockholders unless the claimant rebuts the business judgment rule and "show[s] a breach of fiduciary duty involving intentional misconduct, fraud, or a knowing violation of the law." *Guzman v. Johnson*, 137 Nev. 126, 131, 483 P.3d 531, 537 (2021); *see also* NRS 78.138(7). As to the first requirement, "[t]he business judgment rule states that directors and officers, in deciding upon matters of business, are presumed to act in good faith, on an informed basis and with a view to the interests of the corporation." *Chur v. Eighth Jud. Dist. Ct.*, 136 Nev. 68, 71, 458 P.3d 336, 340 (2020) (internal quotation marks omitted). The business judgment rule's presumption of good faith may be rebutted by showing the director or officer "had a personal interest in the transaction," *Guzman*, 137 Nev. at 132, 483 P.3d at 537, or by showing "that the director failed to exercise due care in reaching the decision," *Wynn Resorts, Ltd. v. Eighth Jud. Dist. Ct.*, 133 Nev. 369, 377, 399 P.3d 334, 343 (2017) (internal quotation marks omitted). As to the second requirement, "[i]n Nevada, directors and officers owe the fiduciary duties of care and loyalty to the corporation." *Chur*, 136 Nev. at 72, 458 P.3d at 340. In order to establish a knowing violation of law or intentional misconduct pursuant to NRS 78.138(7), "the claimant must establish that the director or officer had knowledge that the alleged conduct was wrongful." *Id.* at 75, 458 P.3d at 342.

Officers and directors of a parent corporation may be liable for intentionally implementing or knowingly permitting actions by a wholly owned subsidiary that are adverse to the parent corporation and its stockholders

Before considering the district court's grant of judgment as a matter of law, we must first address the district court's determination that directors and officers of a parent company cannot be liable for actions of a subsidiary without an allegation of alter ego. The district court found that the subsidiary CAM HK made the challenged loan to Parko and, therefore, that Ricky and Tracy could not be held liable without appellants first piercing the corporate veil. We disagree.

"[D]erivative suits allow shareholders to compel the corporation to sue and to thereby pursue litigation on the corporation's behalf against the corporation's board of directors and officers, in addition to third parties." *Shoen v. SAC Holding Corp.*, 122 Nev. 621, 633, 137 P.3d 1171, 1179 (2006) (internal quotation marks omitted), *abrogated on other grounds by Chur*, 136 Nev. 68, 458 P.3d 336, *and Guzman*, 137 Nev. 126, 483 P.3d 531. As outlined above, a claimant must show that an officer or director breached a fiduciary duty. *See Guzman*, 137 Nev. at 131, 483 P.3d at 537.

Similar to other courts that have considered the issue, we adopt the logic of *Grace Bros., Ltd. v. UniHolding Corp.* and conclude that officers and directors of a parent corporation can breach their fiduciary duties by intentionally implementing or knowingly permitting actions adverse to the parent corporation through a wholly owned subsidiary. *See* No. Civ.A. 17612, 2000 WL 982401, at *12 (Del. Ch. July 12, 2000) ("To the extent that members of the parent board are on the subsidiary board or have knowledge of proposed action at the subsidiary level that is detrimental to the parent, they have a fiduciary duty, as part of their management responsibilities, to act in the best interests of the parent and its stockholders."); *In re: Bayou Steel BD Holdings, LLC*, 651 B.R. 179, 185 (Bankr. D. Del. 2023) (recognizing that directors of a parent company who controlled operations of a wholly owned subsidiary could breach fiduciary duties to the parent company even if the challenged actions took place through the subsidiary); *Refco Grp. Ltd. v. Cantor Fitzgerald, LP*, No. 13 Civ. 1654(RA), 2014 WL 2610608, at *20 (S.D.N.Y. June 10, 2014) (same).

We agree with the Delaware Court of Chancery and hold that "[d]irectors of a parent board can breach their duty of loyalty if they purposely cause—or knowingly fail to make efforts to stop—action by a wholly-owned subsidiary that is adverse to the interests of the parent corporation and its stockholders." *Grace Bros.*, 2000 WL 982401, at *1. It is unquestionable that the value of a parent company may be in part or in whole derived from its subsidiaries. Therefore, an action that harms a wholly owned subsidiary by diminishing its value may diminish the value of intermediate subsidiaries and, in turn, may diminish the value of the ultimate parent company. Thus, it is reasonable to extend derivative theories of harm to a parent based on claims from the wholly owned subsidiary of a wholly owned subsidiary. And we reason that a breach can occur even if the challenged actions were implemented through a wholly owned subsidiary that is separated from the parent company by one or more intermediate wholly owned subsidiaries. As a result, fiduciaries at a parent company have a duty not to intentionally implement or knowingly "permit a wholly-owned subsidiary to effect a transaction that is unfair to the parent company on whose board they serve," regardless of the presence of intermediate wholly owned subsidiaries between the parent and the subsidiary where the challenged action is alleged to have taken place. *See Grace Bros.*, 2000 WL 982401, at *13; *see also Bayou Steel*, 651 B.R. at 185 (refusing to adopt the "uncontrollable child" theory of parent-subsidiary relationships and instead adopting the rule from *Grace Bros.*).

We note that this theory of liability is predicated upon an officer or director of a parent company breaching their fiduciary duty to the parent company. This liability is separate and apart from claims seeking to pierce the corporate veil by application of the alter ego doctrine. Likewise, the amount of control is that which officers and directors are normally expected to maintain and not that the fiduciary controlled the parent or subsidiary as an alter ego of themselves. *Grace Bros.*, 2000 WL 982401, at *12 ("Although the defendants-directors would have me find that they were powerless to control the actions of UniHolding's wholly-owned subsidiary, they have not supported that implausible assertion with legal authority, and I hesitate to adopt an 'uncontrollable child' theory of parent-subsidiary relations."). The theory of liability runs from the directors and officers of the parent company to the corporation itself, as is proper in a derivative suit.

Turning to the district court's determination in this case, the dispute as to which CAM entity made the challenged loan is not dispositive. Regardless of which entity made the loan, Ricky and

Tracy had a fiduciary duty not to intentionally cause or knowingly allow a loan by CAMG or its wholly owned subsidiaries that was adverse to the interests of CAMG and its shareholders. Because appellants may assert derivative suits through multiple layers of subsidiaries against the parent company's directors and officers, and the directors and officers may not escape liability for actions they intentionally implement or knowingly fail to stop at the wholly owned subsidiary level, we conclude that the district court erred by finding that appellants could not maintain any cause of action against respondents based on the finding that the wholly owned subsidiary CAM HK made the loan. We next consider the district court's grant of judgment as a matter of law to each of the causes of action against Ricky and Tracy.

Breach of fiduciary duty and self-dealing

As outlined above, to hold Ricky and Tracy liable as directors and officers of CAMG, appellants had to rebut the business judgment rule and show a breach of a fiduciary duty that involved intentional misconduct, fraud, or a knowing violation of the law. Appellants presented evidence that Ricky had a personal interest in the challenged loan to Parko and thus rebutted the business judgment rule for the purposes of evading judgment as a matter of law. *See Guzman*, 137 Nev. at 132, 483 P.3d at 537. After Parko obtained the loan and completed its purchase of NAHL shares, it transferred over 10 million shares to Ricky's company PMI. Appellants also rebutted the business judgment rule as to Tracy when evidence was presented that she did not exercise due care. *See Wynn*, 133 Nev. at 377, 399 P.3d at 343. Tracy testified that she did not take any action to fix the internal company controls for monitoring the dispensation of assets, and there was evidence she knew of the loan before it was made, knew the challenged loan was a potential violation of federal law, specifically the Sarbanes-Oxley Act of 2002, Pub. L. No. 107-204, 116 Stat. 745, and still she did nothing. There was also conflicting evidence as to whether she consulted with attorneys and auditors before or only after the loan was made. Thus, it is unclear whether her actions were made on an informed basis.

As to a breach, there was evidence that Ricky and Tracy knew of the loan before it was made and that Ricky and some of CAMG's board approved the loan before it was made and attempted to obtain backdated approval for the loan from the full board.[2] There was also evidence that CAMG made the challenged loan and that Tracy, while still Ricky's spouse, was CFO of CAMG at the time but knowingly failed to take action to stop the loan. Lastly, there was evidence

[2]We note that respondents argue that Tracy's inaction was not the cause of the damage. There is conflicting evidence here; thus, this was a question for the jury.

presented that Ricky and Tracy had knowledge of CAMG's code of ethics, which prohibited self-interested and related-party transactions, and thus that Ricky and Tracy intentionally engaged in misconduct.

Appellants also presented evidence of damage to the corporation. The loan, which transferred approximately 80% of all cash reserves, was initially made with zero-percent interest and was unsecured by collateral. Although the loan's terms were subsequently updated to include interest, the interest did not backdate to the issuance date. CAMG or CAM HK was thus deprived of reasonable interest from the loan until the terms were amended. There was also conflicting evidence as to whether the loan was repaid.[3] Based on all of the above, we conclude that appellants presented sufficient evidence by which a jury could grant relief, and the district court erred by granting judgment as a matter of law as to the claim for breach of fiduciary duty and self-dealing.

Usurpation of business opportunity[4]

"Directors breach their fiduciary duty if they 'exploit an opportunity that belongs to the corporation.'" *Bedore v. Familian*, 122 Nev. 5, 12 n.25, 125 P.3d 1168, 1173 n.25 (2006) (quoting *Leavitt v. Leisure Sports Inc.*, 103 Nev. 81, 87, 734 P.2d 1221, 1225 (1987)). "An opportunity belongs to the corporation if it is one in which the corporation has an expectancy interest or property right." *Id.* In order to demonstrate usurpation or diversion of corporate opportunity, a claimant must demonstrate that the corporation "had the financial ability to acquire the asset or property." *Astarte, Inc. v. Pac. Indus. Sys., Inc.*, 865 F. Supp. 693, 707 (D. Colo. 1994). There must be "a practical, not a mere theoretical, basis for the opportunity." *Id.*

CAMG's opportunity to invest in NAHL

Appellants assert there was evidence that CAMG had discussed plans to purchase NAHL and that Ricky diverted that opportunity by approving the loan to Parko, which subsequently purchased NAHL. Regardless of whatever plans CAMG made, there was no evidence presented that CAMG had any practical financial ability to participate in a general offer for the controlling shares of NAHL. Appellants similarly did not put forth evidence that CAMG could

[3]We note concerns with foundation and authenticity when respondents submitted a screenshot of a bank account in a foreign language as evidence that the loan was repaid. The witness testified that the document was meaningless to him. Regardless, there was conflicting evidence as to repayment, and thus the admission of this evidence does not alter our conclusion.

[4]As appellants do not challenge the judgment in favor of Tracy for usurpation of business opportunity, we do not consider it.

have or would have participated in a partial purchase of NAHL and obtained anywhere near the same price term as Parko. Given the lack of evidence as to financial and practical opportunity, we conclude that the district court properly granted judgment as a matter of law on this issue.

CAMG's business opportunities diverted to NAHL

Appellants assert that two business opportunities were diverted to NAHL: (1) an opportunity to set up an electronic payment processing system with a company called UnionPay in the Hebei province of China, and (2) an opportunity to establish an electronic trading platform for the purchase and sale of fertilizer. The district court ruled that CAMG did not have an expectancy interest or right to these business opportunities. But there was conflicting evidence as to whether the presentation of a business plan from UnionPay to CAMG was evidence that CAMG had the ability to enter into this opportunity, as well as to whether Ricky was the cause of the diversion. There was also conflicting evidence as to whether CAMG had both an expectancy interest and the capability to bring an electronic trading platform into being based on its projected year-over-year growth, its preexisting activity as both a seller and trading agent for fertilizer, and its attempts to create a commodity exchange. Considering the evidence in the light most favorable to appellants, we conclude that sufficient evidence was presented by which a jury could grant relief, and the district court erred by granting judgment as a matter of law on this issue.

Corporate waste

"To recover on a claim of corporate waste, the plaintiffs must shoulder the burden of proving that the exchange was so one sided that no business person of ordinary, sound judgment could conclude that the corporation has received adequate consideration." *In re Walt Disney Co. Derivative Litig.*, 906 A.2d 27, 74 (Del. 2006) (internal quotation marks omitted).

As previously mentioned, the challenged loan was unsecured, offered at zero-percent interest, and allegedly drained approximately 80% of all cash reserves. The loan was subsequently amended to include interest, but there was conflicting evidence regarding whether the loan was repaid. Based on this evidence, appellants presented sufficient evidence by which a jury could conclude that no ordinary business person could find the loan was made under terms that were anything other than one-sided.[5] As a jury could find that the complete lack of consideration and interest when the loan was

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[5]We note that a lack of security or zero-percent interest loan terms are not per se one-sided, as additional terms or circumstances may alter the analysis and provide adequate consideration, none of which are present here.

issued was corporate waste, we conclude that the district court erred by granting judgment as a matter of law on this issue.

Civil conspiracy

"An actionable civil conspiracy is a combination of two or more persons who, by some concerted action, intend to accomplish some unlawful objective for the purpose of harming another which results in damage." *Collins v. Union Fed. Sav. & Loan Ass'n*, 99 Nev. 284, 303, 662 P.2d 610, 622 (1983). "Agents and employees of a corporation cannot conspire with their corporate principal or employer where they act in their official capacities on behalf of the corporation and not as individuals for their individual advantage." *Id.*

Here, the district court granted judgment as a matter of law because it found no evidence of damages, personal benefit, participation in an unlawful objective, an explicit or implicit agreement with anyone to further an unlawful objective, or respondents undertaking an intentional act in furtherance of such. As an initial matter, Nevada does not require an "individual benefit" in order to find civil conspiracy but instead requires a purpose of harm that results in damage. *Id*. Here, the harm that resulted in damage is the same as the damages discussed above, in that 80% of the entire CAM stack's cash reserves were extended in an unsecured, zero-percent interest loan, and it is unclear whether this loan was repaid.

As to an unlawful objective, evidence was presented that Ricky conspired with the other board members to intentionally divert money away from CAMG, including backdating the loan approval to Parko. As to Tracy, Ricky's interrogatory responses indicate that she was aware of the loan prior to it being made, that the loan was made by CAMG, and that Tracy took no action despite knowing the loan was one-sided and knowing that Ricky was on both sides of the transaction. Therefore, we conclude that sufficient evidence was presented by which a jury could grant relief on this claim, and the district court erred by granting judgment as a matter of law.

Unjust enrichment[6]

Unjust enrichment is "the unjust retention . . . of money or property of another against the fundamental principles of justice or equity and good conscience." *Topaz Mut. Co. v. Marsh*, 108 Nev. 845, 856, 839 P.2d 606, 613 (1992) (internal quotation marks omitted). "Unjust enrichment occurs whenever a person has and retains a benefit which in equity and good conscience belongs to another." *Unionamerica Mortg. & Equity Tr. v. McDonald*, 97 Nev. 210, 212, 626 P.2d 1272, 1273 (1981). "Benefit in the unjust enrichment context . . . denotes any form of advantage, and is not confined

[6]As appellants do not challenge the judgment on their claim against Tracy for unjust enrichment, we do not consider it.

to retention of money or property." *Certified Fire Prot., Inc. v. Precision Constr., Inc.*, 128 Nev. 371, 382, 283 P.3d 250, 257 (2012) (alteration and internal quotation marks omitted).

Appellants presented evidence that, after securing the challenged loan and purchasing NAHL shares, Parko transferred some 10.7 million of those shares to PMI, Ricky's company. Although Ricky testified that PMI transferred the NAHL shares to the individual investors in the fund managed by PMI, Ricky is the sole owner of PMI. When viewed in the light most favorable to appellants, we conclude that there was evidence that Ricky was unjustly enriched at the expense of CAMG and its shareholders and therefore the district court erred by granting judgment as a matter of law as to this issue.

CONCLUSION

Officers and directors of a parent company can be individually liable where those officers and directors have knowledge of proposed action by a wholly owned subsidiary that is adverse to the parent company and intentionally implement or knowingly permit the adverse action. That liability is not dependent upon piercing the corporate veil and is not limited to wholly owned subsidiaries directly beneath the parent company. After considering the evidence presented, we affirm the district court's grant of judgment as a matter of law as to usurpation of a business opportunity based on CAMG's opportunity to invest in NAHL. We affirm as to the claims of usurpation of a business opportunity and unjust enrichment as to Tracy, because appellants do not raise these claims on appeal. We reverse the district court's grant of judgment as a matter of law as to the other challenged causes of action and remand for proceedings consistent with this opinion. Based on our reversal in part and remand, we vacate the district court's award of attorney fees and costs. *See Halbrook v. Halbrook*, 114 Nev. 1455, 1460, 971 P.2d 1262, 1266 (1998) (reversing the order granting attorney fees due to the reversal on other issues); *Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018) (vacating attorney fees when the recipient is no longer the prevailing party).

Herndon and Bell, JJ., concur.

BARRY RASHAD HARRIS, Appellant, *v.* WILLIAM A. GITTERE, Warden, Respondent.

No. 86029

May 30, 2024 548 P.3d 1213

Appeal from a district court order denying a postconviction petition for a writ of habeas corpus. Eighth Judicial District Court, Clark County; Christy L. Craig, Judge.

Reversed and remanded.

Dustin R. Marcello, Chtd., and *Dustin R. Marcello*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Herndon, Lee, and Bell, JJ.

OPINION

By the Court, Herndon, J.:

In this case, the district court determined that an evidentiary hearing was warranted on appellant's postconviction petition for a writ of habeas corpus. Due to a communication mishap, appellant was not transferred from prison to attend the evidentiary hearing. The district court proceeded with the hearing in appellant's absence and without a waiver from appellant of his statutory right to be present. In this opinion, we clarify that counsel may not waive a petitioner's right to be present at an evidentiary hearing on a postconviction habeas petition where the record does not indicate that the petitioner personally waived the right to be present. Because the record does not support a valid waiver of the statutory right to be present at the evidentiary hearing, we conclude that the district court violated appellant's statutory right to be present at the hearing. And because we cannot say that this error was harmless given the circumstances presented, we reverse the district court's order and remand for a new evidentiary hearing.

FACTS AND PROCEDURAL HISTORY

On charges arising from a physical altercation between appellant Barry Rashad Harris and his girlfriend, Harris received a jury trial and was convicted of first-degree kidnapping resulting in substantial bodily harm, battery constituting domestic violence, misdemeanor assault, and battery resulting in substantial bodily harm constituting domestic violence. Harris was sentenced to an aggregate term of 15 years to life. This court affirmed the judgment of conviction. *Harris v. State*, No. 76774, 2019 WL 6999882 (Nev. Dec. 19, 2019) (Order of Affirmance).

Harris timely petitioned pro se for a postconviction writ of habeas corpus, raising several claims of ineffective assistance of pretrial, trial, and appellate counsel. The district court appointed postconviction counsel, who supplemented the petition with additional claims of ineffective assistance of counsel. The district court set the matter for an evidentiary hearing.

Harris, who was incarcerated, was not transported to attend the hearing. The district judge observed that there was an apparent miscommunication and that consequently a transport order was not served on the prison. Harris's postconviction counsel announced that he would proceed notwithstanding Harris's absence, noting that the victim had traveled from Texas to testify and that he did not want to require her to do so again at a rescheduled hearing. At the State's suggestion, the district court offered to bifurcate the hearing for Harris to testify at a later date. Postconviction counsel indicated that he did not intend to call Harris to testify. The evidentiary hearing commenced, and the victim, pretrial counsel, trial counsel, and appellate counsel testified. At the conclusion of the hearing, the district court concluded that Harris had not shown ineffective assistance of counsel and denied the petition.

DISCUSSION

Harris argues that the district court violated his right to be present when it conducted an evidentiary hearing on a postconviction habeas petition in his absence. The State counters that the error was harmless and, alternatively, that postconviction counsel waived Harris's right to be present such that relief is not warranted on this basis. We agree with Harris and reverse.

A postconviction habeas petitioner has a statutory right to be present at an evidentiary hearing on the merits of the petition.[1] *Gebers v. State*, 118 Nev. 500, 503-04, 50 P.3d 1092, 1094 (2002) (considering the interplay between NRS 34.390, NRS 34.400, NRS 34.440, NRS 34.470, and NRS 34.770). Once the district court decides to hold an evidentiary hearing on a petitioner's claims, the district court is "required by statute to grant the writ, to order [the petitioner] to be produced for the hearing, and to permit [the petitioner] an opportunity to deny, controvert, or present evidence to demonstrate that [the petitioner's] imprisonment was unlawful." *Id.* at 504, 50 P.3d at 1094. The petitioner's presence ensures that the

[1]This court has not determined whether a petitioner has a constitutional right to be present at an evidentiary hearing on a postconviction habeas petition. We need not address that issue to resolve this appeal.

petitioner's account is received with "empathy and nuanced understanding" and to protect against the "risk that the party will be less able to convey the message that his story is the truth." *Jones v. State*, 284 P.3d 853, 859 (Alaska Ct. App. 2012) (internal quotation marks omitted); *see also Fisher v. McCrary Crescent City, LLC*, 972 A.2d 954, 983 (Md. Ct. Spec. App. 2009) (recognizing that "[a] party's right to be present at a hearing or trial is a substantial right[,] . . . independent of the ability to present evidence," in the context of a right to be present provided by court rule). We review the violation of the statutory right to be present at a postconviction habeas evidentiary hearing for harmless error. *Gebers*, 118 Nev. at 504, 50 P.3d at 1094-95.

Harris was not transported to attend the evidentiary hearing, and the district court conducted the hearing without Harris present. This violated Harris's right to be present.

The State suggests that relief is not warranted because postconviction counsel did not intend to call Harris to testify. While postconviction counsel represented that he did not intend to call Harris to testify at the evidentiary hearing, the significance of Harris's presence extended beyond providing evidence. Harris was not able to communicate with counsel regarding the testimony presented, assist counsel in cross-examining witnesses, or inform counsel of his account of the material events, which Harris represents would contradict the accounts of his previous attorneys. Further, postconviction counsel acknowledged that he had not intended to question pretrial and trial counsel and that it was Harris who had subpoenaed them. This reinforces the importance of Harris's presence and indicates that his perspective may have illuminated elements of prior counsels' representation that postconviction counsel did not appreciate. *See State v. Jones*, 759 P.2d 558, 566 (Alaska Ct. App. 1988) (requiring a petitioner's presence at an evidentiary hearing when "the disputed issues involve facts within the [petitioner's] personal knowledge"); *State v. Webber*, 218 P.3d 1191, 1196 (Kan. Ct. App. 2009) (emphasizing a petitioner's right to be present at a hearing where trial counsel testifies about his representation of and communications with the petitioner), *abrogated on other grounds by Fischer v. State*, 295 P.3d 560 (Kan. 2013). Additionally, while counsel represented that *he* did not intend on calling Harris as a witness, that does not speak to what Harris may have desired to do. Because Harris was not present, it is unknown whether Harris, at the time of the hearing, may have intended to testify or would have desired to testify after evaluating the testimony of the State's witnesses and consulting with counsel.

The State alternatively argues that Harris's postconviction counsel waived Harris's right to be present or that counsel's purported waiver invited the error such that Harris cannot challenge that error on appeal. While we have not previously addressed whether postconviction counsel may waive a petitioner's statutory right to be present at a postconviction habeas evidentiary hearing, we agree with authorities directing that only *the petitioner*, not counsel, may waive the right. *See, e.g.*, *State v. Ware*, 498 N.W.2d 454, 457 (Minn. 1993) (stating that the "decision to waive [a statutory right to be present] is a decision not for counsel to make but a personal decision for defendant to make after consultation with counsel"); *see also Taylor v. Comm'r of Corr.*, 11 A.3d 160, 164 (Conn. App. Ct. 2010) (Beach, J., concurring in part and dissenting in part) (recognizing that a habeas petitioner has a right to be present provided by court rule "*unless the petitioner waives* the right").

For a waiver to be effective, it must be clear in the record that the petitioner personally waived the right to be present at the hearing. *See Cole v. State*, 199 So. 2d 480, 481 (Fla. Dist. Ct. App. 1967) (concluding a statutory right to be present was validly waived where it was discussed in the defendant's presence and apparent that the defendant understood the right and acquiesced in the reason to be absent); *State v. Soto*, 817 N.W.2d 848, 859-60 (Wis. 2012) (concluding that a formal colloquy was not necessary in determining whether a defendant waived a statutory right to be present when judgment was pronounced); *cf. People v. Davis*, 115 P.3d 417, 432-33 (Cal. 2005) (recognizing that a defendant may knowingly, voluntarily, and intelligently waive the constitutional right to be present and deeming invalid counsel's waiver in defendant's absence where the record did not show that the defendant personally waived the right). Where counsel purports to waive a petitioner's right to be present in the petitioner's absence and the record does not show that the petitioner had personally waived the right, the waiver may be effective if the petitioner subsequently acquiesces. *See People v. Wilkins*, 179 N.E.3d 646, 650-52 (N.Y. 2021) (concluding that relief was not warranted where a defendant later acquiesced to counsel's waiver of a statutory right to be present at sidebar conferences held during voir dire); *see also People v. Lawrence*, 766 N.Y.S.2d 261, 263 (App. Div. 2003) (concluding that counsel's waiver of a statutory right to be present was effective where made in the defendant's presence and the defendant did not object); *cf. Pennie v. State*, 520 S.E.2d 448, 451 (Ga. 1999) (requiring counsel's waiver of a defendant's state constitutional right to be present to be in the defendant's presence, by the defendant's express authority, or subsequently approved by the defendant).

Because the record does not reflect that Harris personally waived the right to be present, the district court erred in conducting the evidentiary hearing in Harris's absence. In light of the testimony adduced at the evidentiary hearing, Harris's proffered challenges to that testimony, and the other circumstances regarding the evidentiary hearing, we cannot say that this error was harmless. We urge district courts to exercise due care to ensure that an inmate is allowed to attend an evidentiary hearing held on a timely postconviction habeas petition, unless the court has ascertained from the inmate a clear intention to waive that right.[2]

CONCLUSION

Harris had a statutory right to be present at the postconviction evidentiary hearing. Postconviction counsel's purported waiver of that right was insufficient, given that the record does not show that Harris personally waived the right to be present. The district court thus erred in conducting the evidentiary hearing in Harris's absence. And in light of the particular circumstances of this case, we cannot say that the error was harmless. Accordingly, we reverse the judgment of the district court and remand this matter for the district court to conduct a new evidentiary hearing at which Harris shall be present absent a valid waiver of the statutory right to be present.[3]

Lee and Bell, JJ., concur.

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[2]The district court may exercise its discretion to decide whether attendance in a given case may be made through physical presence, simultaneous audiovisual transmission, or telephonic means.

[3]In light of our disposition, we need not reach Harris's remaining claims.