JACK PAUL BANKA, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 80181

December 10, 2020 476 P.3d 1191

Appeal from a judgment of conviction, pursuant to an *Alford* plea, of driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Reversed and remanded.

Pariente Law Firm, P.C., and *John Glenn Watkins* and *Michael D. Pariente*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Taleen R. Pandukht*, Chief Deputy District Attorney, and *Michael G. Giles*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, Gibbons, Stiglich and Silver, JJ.

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider whether a defendant must be informed of the existence of a mandatory minimum fine in order to make a knowing, voluntary decision to enter a plea. Here, the defendant was informed that he faced a mandatory fine of up to $5,000, but not that the fine would be at least $2,000. Because a fine is a form of punishment, we conclude that a defendant must be informed of any mandatory minimum as well as maximum fine in order to be fully

informed of the direct consequences of a plea. Therefore, the district court abused its discretion by denying appellant's presentence motion to withdraw his guilty plea. Accordingly, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.

BACKGROUND

In December 2016, a car driven by appellant Jack Banka struck another vehicle while on a public road, fracturing the sternum of the other vehicle's passenger. Banka fled the scene until his vehicle stopped working. A blood draw administered within two hours of the original accident revealed Banka's blood-alcohol content to be 0.193. The State charged Banka under NRS 484C.110(1) and NRS 484C.430(1) with driving and/or being in actual physical control of a motor vehicle while under the influence of an intoxicating liquor or alcohol resulting in substantial bodily harm.

Banka subsequently entered an *Alford* plea.[1] In the written plea agreement, Banka acknowledged that he understood the consequences of the plea, including that he may be fined up to $5,000. During the district court's canvass of Banka, the court clarified that the fine was mandatory and reiterated that it was "up to five thousand," while also saying "because of the language of up to five thousand, I could do something much less than that obviously, but I have to . . . impose a fine."

Banka moved to withdraw his *Alford* plea before sentencing, arguing that he did not understand the consequences of his plea because he did not know the mandatory minimum fine for the offense was $2,000. The district court denied the motion on the ground that, since Banka was informed of a mandatory fine up to a maximum of $5,000, he was on notice for a fine of at least $2,000.

At sentencing, the district court adjudged Banka guilty, and imposed a prison term of 48 to 120 months and a fine of $2,000 (plus other fees). Banka appeals, challenging the denial of the motion to withdraw his plea.

DISCUSSION

A defendant must be informed of any mandatory minimum fine before entering a plea

Banka claims that the district court abused its discretion by denying his presentence motion to withdraw his guilty plea. Banka argues that he should have been permitted to withdraw his plea since he mistakenly believed the fine could be any amount up to $5,000, including a nominal sum. We agree.

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[1]*North Carolina v. Alford*, 400 U.S. 25 (1970).

A presentence motion to withdraw a guilty plea may be granted "for any reason where permitting withdrawal would be fair and just." *Stevenson v. State*, 131 Nev. 598, 604, 354 P.3d 1277, 1281 (2015). To enter a knowing and voluntary plea, a defendant must have "a full understanding of . . . the *direct consequences* arising from a plea of guilty." *Little v. Warden*, 117 Nev. 845, 849, 34 P.3d 540, 543 (2001). "A consequence is deemed 'direct' if it has 'a definite, immediate and largely automatic effect on the range of the defendant's punishment.'" *Id*. (quoting *Torrey v. Estelle*, 842 F.2d 234, 236 (9th Cir. 1988) (internal quotation marks omitted)). A mandatory statutory fine is a direct consequence arising from a guilty plea because it is a form of punishment that has an immediate and automatic effect and the range is defined by the statute, and thus, a defendant is required to be informed of the statutory range of the fine. *See Martinez v. State*, 120 Nev. 200, 203, 88 P.3d 825, 827 (2004) (stating that criminal fines are pecuniary forms of punishment); *see also White v. State*, 99 Nev. 760, 761, 670 P.2d 576, 577 (1983) (requiring that a defendant understand "the range of possible punishments that could flow from his plea"). Although a defendant does not necessarily need to be informed during the district court's plea canvass of the consequences of his or her plea, "it must affirmatively appear, somewhere in the record," that he or she was so informed. *Skinner v. State*, 113 Nev. 49, 50, 930 P.2d 748, 749 (1997); *see also Little*, 117 Nev. at 854-55, 34 P.3d at 546 (concluding that the district court's failure to inform the defendant of his ineligibility for parole is harmless error where the totality of the circumstances demonstrate that the defendant knew of his ineligibility). "Absent an abuse of discretion, the district court's decision regarding the validity of a guilty plea will not be reversed on appeal." *Hubbard v. State*, 110 Nev. 671, 675, 877 P.2d 519, 521 (1994).

The required fine for a violation of NRS 484C.430 is "not less than $2,000 nor more than $5,000." NRS 484C.430(1). Banka's guilty plea agreement failed to capture either of these statutory requirements. The agreement erroneously stated that he "may" (as opposed to *must*) be fined up to $5,000, thereby failing to inform Banka that the fine was mandatory, and the agreement omitted entirely that there was also a statutory minimum fine amount of $2,000. During Banka's plea canvass, the district court clarified that he would be subject to a mandatory fine up to a maximum of $5,000, in addition to restitution. But the district court failed to apprise Banka that the mandatory fine penalty had a statutory minimum of $2,000. This failure to inform Banka of the statutory minimum fine amount was "compounded by the district court further commenting, 'I could[,] . . . because of the language of up to five thousand, I could do something much less than that obviously . . . .'" This comment suggested that while the court had to impose a fine, the fine could be a nominal one.

The State counters that, since Banka was informed of a mandatory fine up to $5,000 and at sentencing received a lesser fine of $2,000, his plea was sufficiently knowing and voluntary. We disagree. The fact that an individual could have anticipated a potential punishment is not enough to ensure that a defendant is fully aware of the actual direct consequences of the plea. Every decision on whether to enter a guilty plea involves a weighing of risks by the defendant, and knowing the range of possible punishments is necessary for a defendant to determine whether he or she should instead proceed to trial. When a defendant believes a nominal fine is possible when, in fact, a substantial fine is required, he or she clearly does not know the actual range of punishment that could be imposed. *See Little*, 117 Nev. at 849, 34 P.3d at 543 (holding that a defendant did not plead with knowledge of the possible punishments when he was not informed that his sentence was not probationable, since "ineligibility for probation means . . . there is not even a remote possibility that the district court will exercise its discretion and suspend the execution of sentence"). Where there is a range of punishments—by fine or by imprisonment—the defendant must be informed of both the floor and ceiling of that range in order to make a knowing and voluntary decision. Because Banka was not informed of the mandatory minimum statutory fine, we conclude that the district court abused its discretion in denying Banka's presentence motion to withdraw his guilty plea.

CONCLUSION

Having concluded that the district court abused its discretion in denying Banka's presentence motion to withdraw his guilty plea, we reverse the judgment of conviction and remand for further proceedings consistent with this opinion.[2]

Gibbons and Silver, JJ., concur.

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[2]In light of our reversal, we need not discuss Banka's remaining assignments of error.

CLARK COUNTY SCHOOL DISTRICT (CCSD), Appellant, *v.* MARY BRYAN, Mother of ETHAN BRYAN; and AIMEE HAIRR, Mother of NOLAN HAIRR, Respondents.

No. 73856

CLARK COUNTY SCHOOL DISTRICT (CCSD), Appellant, *v.* MARY BRYAN, Mother of ETHAN BRYAN; and AIMEE HAIRR, Mother of NOLAN HAIRR, Respondents.

No. 74566

December 24, 2020 478 P.3d 344

Consolidated appeals from a district court judgment and post-judgment attorney fees award in a civil rights action. Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded with instructions.

Lewis Roca Rothgerber Christie LLP and *Joel D. Henriod, Daniel F. Polsenberg, Dan R. Waite, Brian D. Blakley*, and *Abraham G. Smith*, Las Vegas, for Appellant.

Allen Lichtenstein, Ltd., and *Allen Lichtenstein*, Las Vegas; *Scott Law Firm* and *John Houston Scott*, San Francisco, California, for Respondents.

Before the Supreme Court, Hardesty, Stiglich and Silver, JJ.

OPINION

By the Court, Silver, J.:

The plaintiffs below raised Title IX and 42 U.S.C. § 1983 claims against a school district for student-on-student harassment after two sixth-graders targeted classmates Nolan and Ethan with sexual slurs, other insults, and physical assaults in the fall of 2011. Nolan's and Ethan's mothers reported the harassment and the physical assaults to the school in September and again in October, but school administrators failed to conduct an official investigation as required by NRS 388.1351 or to prevent continued harassment. Nolan and Ethan eventually withdrew from the school, and their parents (collectively Bryan) later filed the underlying lawsuit. The district court found for Bryan on both their Title IX and § 1983 claims following a bench trial.

On appeal, the school district contests nearly every element of the district court's decision, beginning with whether the harassment was "on the basis of sex," as required for a Title IX claim. Recently the United States Supreme Court ruled that Title VII's prohibition against discrimination "because of . . . sex" extends to homosexual

and transgender individuals. *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). Applying *Bostock*'s reasoning to the analogous language in Title IX prohibiting harassment "on the basis of sex," we first conclude sufficient facts support a claim under Title IX.

The school district also challenges the district court's sole reliance on the violation of state law to satisfy "deliberate indifference," an essential element of both the Title IX and § 1983 claims. Although the state law violation is a factor in determining deliberate indifference, it does not constitute *per se* deliberate indifference under federal law. We therefore reverse the judgment in Bryan's favor on both claims and remand for further findings on the Title IX claim.

FACTS

In the fall of 2011, Nolan and Ethan were sixth-graders at Greenspun Junior High, where they played the trombone in band class. Fellow trombone player C., along with his friend D., bullied Nolan by calling him homophobic names and touching his shoulder-length blond hair. In mid-September, C., who sat next to Nolan in band, called Nolan a tattletale and stabbed him in the groin with a pencil, commenting he wanted to know if Nolan was a boy or a girl. Nolan, who had reported C.'s harassment to the dean a few days earlier, believed C. was retaliating for that report.

Nolan and Ethan were friends, and Nolan told Ethan about the incident. Ethan's mother, Mary, overheard the boys talking and thereafter obtained the details from Ethan. On September 15, Mary emailed the band teacher and school counselor to report the bullying and the pencil-stabbing incident, but she did not mention the homophobic slurs. Mary attempted to include Principal Warren McKay on the email but misspelled his email address. The band teacher spoke with C. and D. and rearranged the trombone section, and the school counselor met with Nolan, who stated he was fine.

Nolan's mother, Aimee, learned about the stabbing incident for the first time on September 21. Aimee spoke with both the dean and the vice principal on September 22. She told the vice principal that C. had assaulted Nolan by stabbing him in the genitals while asking "if [Nolan] was a little girl." The school counselor again met with Nolan and walked Nolan to the dean's office, encouraging him to file a report of the stabbing and other bullying. Nolan filed a report stating that C. was messing with his hair, blowing air in his face, kicking his instrument, and calling him and other students names like "duckbill Dave." Nolan did not report the stabbing or the homophobic slurs. The dean met with C. and his mother in late September to discuss the school's hands-off policy for students and to prohibit C. from name-calling.

C. and D. nevertheless continued to harass Nolan by calling him names and bumping into him as he entered or exited the band room.

C. and D. also began targeting Ethan and Nolan jointly, calling them "faggots" and teasing them about being boyfriends and engaging in sexual conduct with each other. Nolan and Ethan later testified they did not identify as homosexual, nor did they believe others at Greenspun thought they were homosexual, despite the homophobic slurs.

On October 18, C. scratched Ethan on the leg with a trombone. Ethan told Mary of the incident and that C. had continued to say that Nolan and Ethan were boyfriends and faggots. Mary recalled Ethan reporting, for example, that C. had asked Ethan whether he was learning about shoving staffs "up people's asses so that you can jerk each other off" and "putting penises in somebody's ass."

Mary emailed Principal McKay and the school counselor again on October 19—although she again misspelled Principal McKay's email address. Mary reported the trombone-scratching incident and referenced the September 15 email, reiterating that C. and D. continued to bully Ethan and Nolan. As in her prior email, she omitted mention of the homophobic conduct. The school counselor forwarded the email to the dean. Mary also met with the dean on October 19, telling her of the full extent of the harassment, including the homophobic slurs.

C. and D. continued to call Ethan and Nolan names. Nolan began to withdraw and show signs of stress. Ethan began contemplating suicide. Nolan and Ethan began avoiding class and eventually stopped going to school. The boys withdrew from Greenspun in early 2012 and thereafter enrolled in private schools. Mary sent a third email on February 7 to school administrators and the school district, detailing the homophobic slurs and the sexual nature of the harassment. Principal McKay suspended C. and D. at the direction of district supervisors.

Mary and Aimee filed the underlying lawsuit, which proceeded to trial against Clark County School District (CCSD) on a Title IX claim under 20 U.S.C. § 1681 and a civil rights claim under 42 U.S.C. § 1983.[1] The district court presided over a five-day bench trial during November 2016. The CCSD employees generally testified that they believed at least one of Greenspun's administrators had investigated both the September and October reports, and that they did not know of the homophobic nature of the bullying until after Nolan and Ethan withdrew from school. But the CCSD employees gave varied testimony regarding the administrators' exact response to the September and October reports, and no administrator could recall conducting an investigation complying with NRS 388.1351 (2011),[2] the statute governing bullying complaints.

The district court found CCSD liable for student-on-student harassment under both Title IX and § 1983. In its two written orders,

[1]We focus only on the claims and parties that proceeded to trial and do not address the dismissed claims and parties.

[2]All references to this statute refer to the 2011 version.

the district court focused on the school's failure to conduct any investigation, let alone one as required by Nevada law under NRS 388.1351, when the bullying occurred. The court awarded physical and emotional distress damages of $600,000 apiece to Nolan and Ethan, $50,000 apiece for the cost of alternative schooling over five years, and attorney fees and costs.

CCSD now appeals.

DISCUSSION

CCSD contests the district court's decision as to nearly every element of the Title IX and § 1983 claims and further contests the awards for damages and attorney fees. While the students' harassment is disturbing and the administrators' response deficient under NRS 388.1351, we are constrained to follow federal law governing Title IX and § 1983 claims for student-on-student harassment, which allows for the recovery of damages only in very narrow circumstances. We first address the Title IX claim and remand for findings regarding deliberate indifference under the applicable law. We then address the § 1983 claim and reverse the decision as to that claim.

Title IX

Title IX is a federal civil rights law enacted in 1972 that provides the following: "No person in the United States shall, on the basis of sex, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under any education program or activity receiving Federal financial assistance." 20 U.S.C. § 1681(a) (2012) (Title IX).

The first requirement for imposing Title IX liability is that the harassment be "on the basis of sex." *Id*. For liability to attach to a school district in cases of student-on-student harassment, the plaintiff must also show that the school exercised substantial control over the harasser and the situation, the harassment was so severe as to deprive the plaintiff of educational opportunities, a school official with authority to correct the situation had actual knowledge of the harassment, and the school was deliberately indifferent to the known harassment. *Reese v. Jefferson Sch. Dist. No. 14J*, 208 F.3d 736, 739 (9th Cir. 2000) (relying on *Davis v. Monroe Cty. Bd. of Educ.*, 526 U.S. 629 (1999)). We address these elements in turn.

The harassment fell within the purview of Title IX

The district court based Title IX liability upon perceived sexual orientation harassment, finding the bullying was sexual in nature due to the homophobic name calling.[3] On appeal, CCSD contends

[3]The district court's findings on this point are limited. We caution district courts in the future to make express, detailed findings on this point in order to clarify their reasoning and, if necessary, facilitate appellate review. *See, e.g.*,

that the bullying was "sexually tinged" but was not sexual harassment under Title IX because Nolan and Ethan testified they were not homosexual and the evidence showed the bullying was retaliatory.

In addressing this issue, we may look to Title VII, as the prohibition there is substantially similar to Title IX's prohibition and courts have frequently looked to Title VII jurisprudence to interpret Title IX's antidiscrimination provision. *See Grimm v. Gloucester Cty. Sch. Bd.*, 972 F.3d 586, 616 (4th Cir. 2020) (explaining that caselaw interpreting Title VII "guides our evaluation of claims under Title IX"); *Adams v. Sch. Bd. of St. Johns Cty.*, 968 F.3d 1286, 1305 (11th Cir. 2020) (using caselaw interpreting Title VII to address whether a school's bathroom policy discriminated against transgender status in violation of Title IX because both titles prohibit discrimination based on sex and use a but-for causation standard); *Emeldi v. Univ. of Or.*, 698 F.3d 715, 724 (9th Cir. 2012) (explaining the legislative history of Title IX implies Congress intended that legislation to have substantive standards similar to Title VII).

We recognize that, at the time this appeal was filed, there was substantial conflicting law regarding whether Title IX's protections extended to homosexual and transgender individuals or protected against perceived sexual orientation harassment. *Compare Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 115 (2d Cir. 2018) (broadly construing Title VII based on the statute's language and concluding that "because sexual orientation discrimination is a function of sex, and is comparable to sexual harassment, gender stereotyping, and other evils long recognized as violating Title VII, the statute must prohibit it"), *with Tumminello v. Father Ryan High Sch., Inc.*, 678 Fed. Appx. 281, 285-86 (6th Cir. 2017) (addressing Title IX and concluding the plaintiff's allegations of sexual orientation discrimination did not amount to a viable sex-stereotyping claim).

In deciding the question of whether the harassment here was "on the basis of sex" within the purview of Title IX, we are aided by the United States Supreme Court's recent Title VII decision in *Bostock v. Clayton County*, 140 S. Ct. 1731 (2020). *See, e.g.*, *Grimm*, 972 F.3d at 616 (applying *Bostock* to evaluate a Title IX claim); *Adams*, 968 F.3d at 1305 (using *Bostock* to address a Title IX violation).

In *Bostock*, the Supreme Court addressed whether Title VII prohibited employers from firing employees "simply for being homosexual or transgender." 140 S. Ct. at 1737. Title VII provides that an employer may not lawfully discharge an employee "because of such individual's . . . sex." *Id.* at 1738 (quoting 42 U.S.C. § 2000e-2(a)(1) (Title VII)). The Court ex-

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Jitnan v. Oliver, 127 Nev. 424, 433, 254 P.3d 623, 629 (2011) (recognizing that a lack of findings supporting the district court's decision hampers meaningful appellate review, even when such review is deferential, "because [the appellate court is] left to mere speculation").

plained that "the ordinary meaning of 'because of' is 'by reason of' or 'on account of,'" and that the statute's language therefore incorporated a "but-for causation" standard. *Id.* at 1739 (quoting *Univ. of Tex. Sw. Med. Ctr. v. Nassar*, 570 U.S. 338, 350 (2013)). The Court recognized that, under this "sweeping standard," more than one factor could lead to the discrimination and held that "[s]o long as the plaintiff's sex was one but-for cause of that decision, that is enough to trigger the law." *Id.* at 1739. The Court then addressed the question of what constitutes discrimination under Title VII, holding that "an employer who intentionally treats a person worse because of sex . . . discriminates against that person in violation of Title VII." *Id.* at 1740. In reaching its conclusion, the Court noted that "it is impossible to discriminate against a person for being homosexual or transgender without discriminating against that individual based on sex." *Id.* at 1741.

Bostock clarifies that Title VII prohibits employment discrimination against transgender and homosexual individuals. Turning to Title IX, and applying *Bostock*'s reasoning, we conclude that Title IX's prohibition of discrimination "on the basis of sex" likewise encompasses discrimination against homosexual or transgender individuals. *See Grimm*, 972 F.3d at 616-17 (construing Title IX as encompassing discrimination against transgender individuals pursuant to *Bostock*). It follows that harassment based upon perceived sexual orientation also falls under Title IX, as in both situations the perpetrator's view of the victim's sexual orientation is a factor motivating the harassment. *See Zarda*, 883 F.3d at 112 (explaining that "sexual orientation discrimination is predicated on assumptions about how persons of a certain sex can or should be"); *see also Bostock*, 140 S. Ct. at 1739-40 (explaining Title VII is triggered where an employer "intentionally treats a person worse because of sex"). Thus, regardless of whether the harassment arises from the person's actual sexual orientation or perceived sexual orientation, the harassment is prohibited by Title IX. *See, e.g.*, *Bostock*, 140 S. Ct. at 1739-40; *Zarda*, 883 F.3d at 112.

Following a bench trial, the district court here found that Nolan and Ethan were harassed because of their perceived sexual orientation. Unlike cases dismissed for failure to state a claim or resolved on summary judgment, which we review completely de novo, here we only review issues of law de novo and give deference to the district court's factual findings that are supported by substantial evidence in the record. *See, e.g.*, *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012) (explaining we will uphold factual findings so long as they are supported by substantial evidence and not clearly erroneous, but will review legal issues de novo); *see also Pack v. LaTourette*, 128 Nev. 264, 267, 277 P.3d 1246, 1248 (2012) (reviewing a dismissal for failure to state a claim de novo); *Wood*

v. Safeway, Inc., 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (reviewing summary judgment de novo). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Weddell*, 128 Nev. at 101, 271 P.3d at 748 (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)).

With those standards in mind, we conclude substantial evidence supports the district court's finding. Although testimony supported that Nolan and Ethan were neither gay nor perceived as gay by C. and D., it was within the district court's discretion to weigh this testimony against the other evidence at trial and determine the evidence as a whole nevertheless established perceived sexual orientation harassment—harassment on the basis of sex—within the meaning of the statute. In particular, we note the continual homophobic slurs, including those that went far beyond mere name-calling and described specific sex acts. We also note that C. and D. touched Nolan's long, blond hair as part of the harassment and, on one occasion, stabbed Nolan in the genitals while questioning his gender. Further, C. and D. targeted Nolan and Ethan jointly for their alleged sexual relationship. These facts support that the harassment was motivated, at least in part, by perceived sexual orientation and therefore falls within the purview of Title IX. *See, e.g.*, *Bostock*, 140 S. Ct. at 1739-40 (explaining that, so long as sexual discrimination is one of the motivations behind the harassment, the harassment falls under Title VII).

The school exercised substantial control over the harasser and the situation

The district court found that CCSD had substantial control, since the harassment occurred during band class. This prong is typically established where the misconduct occurs at school and during school hours. *See Davis*, 526 U.S. at 646. The facts establish this prong, as the harassment occurred while the boys were at school, and CCSD does not challenge this point on appeal.

The harassment was so severe as to deprive the plaintiff of educational opportunities

The district court found that the harassment deprived Nolan and Ethan of their educational opportunities where both boys suffered emotional distress, skipped band class, and eventually left school. CCSD argues that the harassment was not so severe, pervasive, and objectionably offensive as to deprive the boys of their educational opportunities or to have a concrete, negative effect on the boys' education. CCSD points out that Ethan and Nolan testified they were not prevented from participating in school activities and both did well academically.

Under this factor, "the plaintiff [must] suffer[ ] 'sexual harassment . . . that is so severe, pervasive, and objectively offensive that it can be said to deprive the victims of access to the educational opportunities or benefits provided by the school.'" *Reese*, 208 F.3d at 739 (alteration in original) (quoting *Davis*, 526 U.S. at 650). The Supreme Court and the Ninth Circuit have cautioned that "simple acts of teasing and name-calling," even if gendered, will not warrant Title IX liability. *Id.* (quoting *Davis*, 526 U.S. at 652). The Supreme Court has also explained that "in the school setting, students often engage in insults, banter, teasing, shoving, pushing, and gender-specific conduct that is upsetting to the students subjected to it." *Davis*, 526 U.S. at 651-52. Thus, in considering this prong, courts should "bear in mind that schools are unlike the adult workplace and that children may regularly interact in a manner that would be unacceptable for adults," such that "[d]amages are not available for simple acts of teasing and name-calling among school children . . . even where these comments target differences in gender." *Reese*, 208 F.3d at 739 (alterations in original) (quoting *Davis*, 526 U.S. at 651-52).

While the record does not reflect that the district court here expressly considered the schoolroom setting or that the harassers were minors, we nevertheless conclude the record contains sufficient evidence to support the district court's finding. The conduct at issue here went far beyond mere insults and banter—the language was ugly, pervasive, and resulted in a serious physical assault. Although the evidence suggested the boys did well academically despite the harassment, the facts nevertheless demonstrate that Nolan began skipping band and other classes and eventually skipped school, while Ethan began faking illness to stay home and contemplating suicide. We therefore conclude substantial evidence supports that the boys were denied educational opportunities as a result of the harassment. *See Davis*, 526 U.S. at 654 (suggesting this element is satisfied where the harassment has a "concrete, negative effect" on the victim's ability to participate in the educational program).

A school official with authority to correct the situation had actual knowledge of the harassment

The district court found that the collective complaints and discussions with Mary and Aimee put CCSD on notice of the bullying and "should have prompted a mandatory investigation." CCSD on appeal contends it did not have actual knowledge of the continuing harassment because Nolan and Ethan concealed the harassment.

This prong requires that a school "official 'who at a minimum has authority to address the alleged discrimination and to institute corrective measures'" have "actual knowledge of the discrimination." *Reese*, 208 F.3d at 739 (quoting *Gebser v. Lago Vista Indep. Sch. Dist.*, 524 U.S. 274, 290 (1998)).

The parties introduced substantial conflicting evidence regarding the extent to which Greenspun administrators knew of the ongoing sexual harassment. The CCSD employees all denied knowing of the sexual slurs until after the boys left school and, to varying degrees, denied knowing details of the physical and nonsexual harassment. But Nolan's mother, Aimee, testified to telling school administrators on September 22 that C. had stabbed Nolan in the genitals while asking if Nolan was a girl. Moreover, Ethan's mother, Mary, testified to reporting the full details of the harassment to the dean on October 19. We will not disturb the district court's determination that the parents were more credible than the school district employees on this fact. *See Weddell*, 128 Nev. at 101, 271 P.3d at 748; *Ellis v. Carucci*, 123 Nev. 145, 152, 161 P.3d 239, 244 (2007) (acknowledging the conflicting evidence presented on an issue of fact and noting, "we leave witness credibility determinations to the district court and will not reweigh credibility on appeal"). And, because the administrators had the ability to address the bullying and institute corrective measures, we conclude CCSD had actual notice for purposes of Title IX. *See, e.g.*, *Reese*, 208 F.3d at 739.

Further findings are necessary to establish deliberate indifference

As to the deliberate indifference element, the district court determined it had been satisfied because Greenspun administrators violated state law by failing to investigate the complaints. The court particularly faulted them for failing to comply with NRS 388.1351(2), which, at the time, required a school, upon learning of a bullying incident, to "initiate an investigation not later than 1 day after receiving notice" and to complete the investigation within 10 days.[4] The court found that the administrators undertook "no investigation, much less one conforming to statute," in 2011, and that this failure was "significant evidence of an overall posture of deliberate indifference toward Ethan's and Nolan's welfare." The parties vehemently disagree over whether the facts establish deliberate indifference—most notably, about whether the failure to investigate as required by state statute established *per se* deliberate indifference under federal law.

To succeed on a Title IX claim, a plaintiff must establish that the defendant acted with "deliberate indifference" to the harassment. *See Davis*, 526 U.S. at 643. Deliberate indifference is a stringent standard that requires more than mere negligence. *Id.* at 642-43 (declining to impose liability under a negligence standard); *see also*

[4]If the investigation found bullying, the school then had to make "recommendations concerning the imposition of disciplinary action or other measures . . . in accordance with the policy governing disciplinary action adopted by the board of trustees of the school district." NRS 388.1351(2).

Karasek v. Regents of Univ. of Cal., 956 F.3d 1093, 1105 (9th Cir. 2020) (explaining that "[t]his is a fairly high standard—a 'negligent, lazy, or careless' response will not suffice" (quoting *Oden v. N. Marianas Coll.*, 440 F.3d 1085, 1089 (9th Cir. 2006))).

Addressing deliberate indifference in the context of student-on-student harassment, the Supreme Court has explained that Title IX liability will arise only from "an official decision by the recipient not to remedy the violation," citing the "high standard imposed" in *Gebser v. Lago Vista Independent School District*. *Davis*, 526 U.S. at 642-43 (first quote quoting *Gebser*, 524 U.S. at 291), 653 (also warning that "[p]eer harassment, in particular, is less likely to satisfy [Title IX] requirements than teacher-student harassment"); *see also Karasek*, 956 F.3d at 1104-05, 1108-09 (explaining damages are not recoverable for a Title IX violation unless the defendant made an official decision not to remedy the situation, and considering this point in the context of deliberate indifference). The Court has also admonished district courts to "refrain from second-guessing the disciplinary decisions made by school administrators," who "will continue to enjoy the flexibility they require" so long as the school "merely respond[s] to known peer harassment in a manner that is not clearly unreasonable." *Davis*, 526 U.S. at 648-49. The Ninth Circuit later explained that, "[a]bsent an unreasonable response, [courts] cannot 'second-guess[ ] the disciplinary decisions made by school administrators.' And the reasonableness of the response depends on the educational setting involved . . . ." *Karasek*, 956 F.3d at 1105 (citation omitted) (quoting *Davis*, 526 U.S. at 648-49).[5]

The Ninth Circuit has explained that Title IX also requires "the deliberate indifference [to], at a minimum, cause students to undergo harassment or make them liable or vulnerable to it," and that " 'deliberate indifference' occurs 'only where the recipient's response to the harassment or lack thereof is clearly unreasonable in light of the known circumstances.'" *Reese*, 208 F.3d at 739 (quoting *Davis*, 526 U.S. at 645, 648); *see also Karasek*, 956 F.3d at 1105 (addressing deliberate indifference and causation). Even ineffective responses may still satisfy the school's obligation where the response was not clearly unreasonable and therefore does not amount to deliberate indifference. *See, e.g.*, *Sauls v. Pierce Cty. Sch. Dist.*, 399 F.3d 1279, 1285 (11th Cir. 2005). And, again, negligence is not enough—the response or inaction must constitute an official decision against remedying the situation. *See, e.g.*, *Davis*, 526 U.S. at 642-43.

The Ninth Circuit recently addressed whether a school's violation of its own regulations and policies is deliberate indifference *per se*

[5]*Davis* gave an example of actionable student-on-student sexual harassment where male students physically threatened female peers in order to prevent them from using a school resource, and the school district administrators, while "well aware" of the harassment, "deliberately ignore[d] requests for aid." *Davis*, 526 U.S. at 650-51.

for purposes of Title IX liability. *Karasek*, 956 F.3d at 1107-08; *see also Per Se*, *Black's Law Dictionary* (11th ed. 2019) (defining "per se" as "standing alone, without reference to additional facts"). The Ninth Circuit held it is not, as a school can fail to follow federal or self-imposed regulations without being deliberately indifferent under federal law. *Karasek*, 956 F.3d at 1107-08 ("A damages remedy for Title IX violations is judicially implied, not statutorily created. . . . The Supreme Court in *Davis*, not Congress, articulated the deliberate-indifference standard."). Thus, although a school's noncompliance with statutes, regulations, and policies can be a significant factor in analyzing deliberate indifference, "particularly when it reflects 'an official decision . . . not to remedy the [Title IX] violation,'" noncompliance is not dispositive evidence of deliberate indifference. *Id.* at 1108 (quoting *Gebser*, 524 U.S. at 290 (alterations in original)).

We agree with *Karasek* that the violation of a regulation or policy—or here, a state statute—is not *per se* deliberate indifference. The foregoing clarifies that deliberate indifference is an exacting standard established by federal caselaw and requires the plaintiff to show, for instance, that the defendant was more than negligent, the response was clearly unreasonable in light of the known circumstances, and the indifference caused the plaintiff to either undergo harassment or made the plaintiff more vulnerable to it. *See, e.g.*, *Davis*, 526 U.S. at 642-43, 648-49; *Karasek*, 956 F.3d at 1104-05, 1108-09; *Reese*, 208 F.3d at 739. Moreover, Title IX damages are appropriate only where the plaintiff shows an official decision not to remedy the violation. *See, e.g.*, *Davis*, 526 U.S. at 642-43; *Karasek*, 956 F.3d at 1108.

Accordingly, although the violation of a statute, regulation, or policy may inform a finding of deliberate indifference, the state law violation could not constitute *per se* deliberate indifference. Our careful review of the district court's orders shows it erroneously focused on the statutory violation in finding deliberate indifference without expressly analyzing the elements of deliberate indifference under the applicable federal standards. The relevant question under the pleaded claims was not whether Greenspun administrators failed to comply with NRS 388.1351, but whether the response was more than negligent, was clearly unreasonable in light of the known circumstances, and caused the boys to either undergo harassment or be more vulnerable to it. *See, e.g.*, *Davis*, 526 U.S. at 642-43, 648-49; *Karasek*, 956 F.3d at 1104-05, 1108-09; *Reese*, 208 F.3d at 739. Again, while the facts underlying the statutory violation may inform a finding of deliberate indifference, the statutory violation and the deliberate indifference are separate legal questions.

And, after reviewing the record, we cannot say that substantial evidence supports the district court's finding of deliberate indifference regardless of this error. *See Saavedra-Sandoval v. Wal-Mart*

Stores, Inc., 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing that we can affirm a district court's decision on different grounds than those used by the district court). In regard to the September reports[6] of Nolan's harassment, despite whether Greenspun administrators failed to comply with NRS 388.1351 at that time, the record shows that CCSD's employees were at most negligent and their response was not unreasonable in light of the known circumstances. The dean followed the school's procedure and met with C. and his mother to remind C. about the school's hands-off policy for students and instructed him to stop bullying Nolan. She also spoke to the band teacher about rearranging the classroom seating. Although the band teacher and the school counselor were not school administrators, both took action as well. The band teacher spoke to C. and D. about their behavior and rearranged the seating to move Nolan away from C. and to where he could easily watch the boys. The school counselor met with Nolan, encouraged him to report the stabbing incident to the dean, and walked Nolan to the dean's office for that purpose. With the advantage of hindsight, it is clear the response failed to prevent further harassment. Nevertheless, the record does not demonstrate that CCSD deliberately failed to take action or that any of the actions taken amounted to more than mere negligence in light of the known circumstances. *See, e.g.*, *Karasek*, 956 F.3d at 1104. Accordingly, to the extent the district court found deliberate indifference based upon CCSD's action or inaction in September, that finding is not supported by the record. *See Karasek*, 956 F.3d at 1107-08.

The school's response following the October report, however, presents a closer call. Although all of CCSD's employees denied receiving notice of the sexual nature of the harassment until after the boys left the school, and Ethan and Nolan hid the harassment from the administrators, Mary testified she informed the dean of the full details of the harassment on October 19. Thus, the record supports that, by October, Greenspun administrators knew the harassment was sexual in nature, ongoing, unresolved by the school's earlier efforts, and now involved Ethan as well as Nolan. Moreover, no administrator could recall actually investigating that report or whether another employee had actually done so.

Importantly, the information gained from the investigation of the September incident, and Greenspun's administrators' failure to prevent future harassment, informs the October incident. Indeed, at

[6]While the district court did not separately address the responses to the September and October reports of harassment, we choose to do so because the record does not support that CCSD employees knew of the sexual nature of the harassment before October, Mary failed to inform Principal McKay of the harassment in September by misspelling his email address, and Nolan did not report the sexual harassment and downplayed the harassment when school officials asked about it in September.

that point it was clear that further investigation and more serious intervention was necessary to stop the sexual and other harassment against Nolan and Ethan, as well as to prevent further bullying and physical assaults. But by finding that the school's violation of a state statute constituted *per se* deliberate indifference, the district court bypassed the key questions of whether the evidence demonstrated CCSD was more than negligent, that its inaction was clearly unreasonable in light of the known circumstances, and that its inaction caused the boys to either undergo harassment or be more vulnerable to it. *See Davis*, 526 U.S. at 642-43, 648-49; *Karasek*, 956 F.3d at 1104-05, 1108-09; *Reese*, 208 F.3d at 739. And because there was substantial conflicting testimony regarding what occurred during and following the harassment, we decline to resolve this issue on appeal, as in light of the evidence adduced at trial it is an issue more appropriately determined by the district court.[7] *See, e.g.*, *Davis*, 526 U.S. at 639-54 (addressing the elements of a Title IX claim and reversing the dismissal of a complaint after concluding the plaintiff presented facts that, if supported by evidence the fact-finder found credible, would support a violation); *Ellis*, 123 Nev. at 152, 161 P.3d at 244 (recognizing that it is the district court's duty to make credibility determinations regarding conflicting evidence).

We therefore reverse the decision insofar as it was based upon the September complaint but remand for additional findings as to whether the events following the October report constituted deliberate indifference under the applicable federal standards.

Section 1983 liability

On appeal, CCSD contends Bryan's § 1983 claim fails on multiple grounds, including, again, on the deliberate indifference prong. As set forth below, we agree Bryan's § 1983 claim fails, and we therefore reverse the district court's finding of liability under that statute.[8]

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[7]While evidence supports the district court's conclusion that CCSD's inaction made the boys more vulnerable to harassment, the district court, by focusing on the statutory violation, failed to appropriately analyze this issue. We therefore do not address this particular point here, instead leaving this element for the district court to address on remand when determining whether Bryan established deliberate indifference.

[8]Our above analysis regarding deliberate indifference under Title IX equally applies to the § 1983 claim. *See, e.g.*, *Flores v. Morgan Hill Unified Sch. Dist.*, 324 F.3d 1130, 1133, 1135 (9th Cir. 2003) (addressing the plaintiff's § 1983 claim alleging student-on-student harassment and quoting *Davis*, 526 U.S. at 649, for the proposition that the deliberate indifference required for such a claim exists where school administrators "respond[ ] to known peer harassment in a manner that is . . . clearly unreasonable"). In light of the foregoing and our decision regarding *Monell* liability, we need not separately address deliberate indifference here.

42 U.S.C. § 1983 provides as follows:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State . . . subjects, or causes to be subjected, any citizen of the United States . . . to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law . . . .

To prove liability under § 1983, the plaintiff must show "(1) the conduct complained of was committed by a person acting under color of state law; and (2) the conduct deprived the plaintiff of a federal constitutional or statutory right." *Patel v. Kent Sch. Dist.*, 648 F.3d 965, 971 (9th Cir. 2011). Because the "state is not liable for its omissions," and § 1983 "does not impose a duty on [the state] to protect individuals from third parties," *id.* (alteration in original) (quoting *Munger v. City of Glasgow Police Dep't*, 227 F.3d 1082, 1086 (9th Cir. 2000), and *Morgan v. Gonzales*, 495 F.3d 1084, 1093 (9th Cir. 2007)), a plaintiff cannot recover for student-on-student harassment unless the plaintiff shows the state affirmatively placed the plaintiff in danger.[9] *See id.* at 971-72 (addressing the state-created danger exception).

In addition, a school *district* will not be liable for student-on-student harassment unless the school district's official policies caused the deprivation of the protected rights (*Monell* liability). *Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690-94 (1978) (addressing how a governmental entity may be held liable for injuries caused by its employees and agents); *Lansberry v. Altoona Area Sch. Dist.*, 318 F. Supp. 3d 739, 758 (W.D. Pa. 2018) (explaining that for a school district to have liability under *Monell*, it "must establish that the [district] had a 'policy or custom' and that the policy or custom 'caused' the constitutional violations" (quoting *Natale v. Camden Cty. Corr. Facility*, 318 F.3d 575, 584 (3d Cir. 2003))); *see also L.A. Cty. v. Humphries*, 562 U.S. 29, 35 (2010) (concluding a municipality and other governing bodies (such as school districts) typically cannot be held vicariously liable under § 1983).

More specifically, and as applicable here, *Monell* liability will attach if the "district employee was acting as a 'final policymaker.'" *Lytle v. Carl*, 382 F.3d 978, 982 (9th Cir. 2004) (quoting *Webb v. Sloan*, 330 F.3d 1158, 1164 (9th Cir. 2003)) (addressing the three circumstances under which *Monell* liability applies to a school district). To be a final policymaker for purposes of *Monell* liability, the district employee "must be in a position of authority such that a final decision by that person may appropriately be attributed to the District." *Id.* at 983. A plaintiff satisfies this element by showing that

[9]There is a second exception, the "special relationship" exception, which is not at issue here.

a decisionmaker with final authority to establish policy with respect to the issue takes action that effectively binds the school district. *See Lansberry*, 318 F. Supp. 3d at 758. Authority to make school district policy can be granted by the legislature or delegated by an official who possesses the policymaking authority. *Lytle*, 382 F.3d at 983.

In considering *Monell* liability, courts must look to the particular situation to determine whether the district employee is a policymaker, asking "whether he or she has authority '*in a particular area, or on a particular issue.*'" *Id.* (emphasis in *Lytle*) (quoting *McMillian v. Monroe Cty.*, 520 U.S. 781, 785 (1997)). Courts must therefore consider "whether there is an actual opportunity for meaningful review" of the subject decision. *Holloman v. Harland*, 370 F.3d 1252, 1292 (11th Cir. 2004) (internal quotation marks omitted). "If a higher official has the power to overrule a decision but as a practical matter never does so, the decision-maker may represent the effective final authority on the question." *Bowen v. Watkins*, 669 F.2d 979, 989 (5th Cir. 1982). We review de novo the district court's decision regarding final policymaker authority. *See Holloman*, 370 F.3d at 1292.

Here the district court concluded that the elements of *Monell* liability were satisfied because under NRS 388.1351(2)'s directive, the principal or his designee investigate bullying reports and Principal McKay was a decisionmaker with final authority to make policy (a final policymaker) with respect to student discipline. For the reasons below, we conclude the § 1983 claim fails on this element.[10]

Although the above caselaw makes clear that, in some circumstances, a principal may be a final policymaker for purposes of *Monell* liability, in this matter, the appellate record does not support that Principal McKay was a final policymaker. While NRS 388.1351 clearly tasked principals and their designees with investigating bullying allegations and recommending discipline for violations, those recommendations are to be in accordance with the district's disciplinary policies. *See* NRS 388.1351(2). More importantly, the record established that Principal McKay did not have the final say over student discipline, as his superiors could overrule his decisions. Even in this case, Principal McKay did not have the final say over C.'s and D.'s discipline, as the school district ordered him to suspend both students—overriding Principal McKay's concerns regarding D.'s suspension. Accordingly, the district court erred by concluding Bryan established this element.

Based on the foregoing, we reverse the district court's decision as to the § 1983 claim.

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[10]Given our disposition under *Monell,* we need not address the other elements of § 1983 liability, but after carefully reviewing the record and the law, we find Bryan's arguments with respect to the federal constitutional right and the state-created danger exception to be without merit.

CONCLUSION

Following *Bostock v. Clayton County*, we hold Title IX's protections against sex-based discrimination extend to prohibit discrimination against homosexual and transgender individuals, as well as discrimination based on perceived sexual orientation. 140 S. Ct. 1731 (2020). Here, we conclude the record supports the district court's finding that the harassment was "on the basis of sex" for purposes of Title IX. While we conclude the record does not support the finding of deliberate indifference with respect to the September incident, we remand for additional findings as to whether the events following the October report demonstrate deliberate indifference. And finally, we reverse the decision as to the 42 U.S.C. § 1983 claim. In light of our decision, we necessarily reverse the damages and attorney fees awards.[11]

Hardesty and Stiglich, JJ., concur.

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[11]We do not reach the substantive arguments regarding the damages and attorney fees awards here. We note, however, several concerns with the damages award. First, Mary and Aimee merely speculated to their out-of-pocket expenses, and the record does not support the district court's calculation for five years of out-of-pocket expenses for each boy. We are also troubled by the district court's reliance on a settlement agreement in an unrelated federal case to calculate physical and emotional distress damages. We caution that damages cannot be merely speculative or simply based on another case's settlement agreement. *See Frantz v. Johnson*, 116 Nev. 455, 469, 999 P.2d 351, 360 (2000) (explaining there must be an evidentiary basis for an award). We also caution courts in civil rights cases to consider whether the plaintiffs have a duty to mitigate damages. *See* 2 Civ. Actions Against State & Local Gov't § 13:15 (2d ed. 2002) (addressing the plaintiff's responsibility to mitigate damages when suing under civil rights statutes due to the application of common-law tort principles to determine the remedies for such claims).

To the extent CCSD argues state law caps on damages awards apply, we note that where liability arises from the violation of a federal law, state law damages caps will likely not apply. *See, e.g.*, *Beard v. Wexford Health Sources, Inc.*, 900 F.3d 951, 956-57 (7th Cir. 2018) (noting the variations on damages caps among the states, declining to apply state law caps to punitive damages under § 1983, and considering whether federal caps should apply); *Commonwealth Div. of Risk Mgmt. v. Va. Ass'n of Cty.'s Grp. Self Ins. Risk Pool*, 787 S.E.2d 151, 160 (Va. 2016) (concluding that state statutory caps on damages in medical malpractice cases applied only to state claims, not to federal civil rights claims, based on the language of the relevant state statutes).

MICHAEL KOSOR, JR., a Nevada Resident, Appellant, *v.* OLYMPIA COMPANIES, LLC, a Nevada Limited Liability Company; and GARRY V. GOETT, a Nevada Resident, Respondents.

No. 75669

December 31, 2020 478 P.3d 390

Appeal from a district court order denying an anti-SLAPP special motion to dismiss in a defamation action. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

Reversed and remanded.

Barron & Pruitt, LLP, and *William H. Pruitt* and *Joseph R. Meservy*, North Las Vegas, for Appellant.

Kemp, Jones & Coulthard, LLP, and *J. Randall Jones* and *Nathanael R. Rulis*, Las Vegas, for Respondents.

Before the Supreme Court, Pickering, C.J., Hardesty and Cadish, JJ.[1]

OPINION

By the Court, Pickering, C.J.:

This case arises in the context of Nevada's anti-SLAPP protections, which appellant Michael Kosor says apply to his vociferous criticisms of the homeowners' association and developers/managers of the residential community of Southern Highlands in Clark County. Respondents, Olympia Companies, LLC, and its president and CEO, Garry V. Goett (collectively, Olympia)—said developers/managers—bore the brunt of those criticisms, which Kosor voiced at open meetings of the homeowners' association, distributed in a pamphlet and letter supporting his campaign for a seat on the homeowners' association board, and posted online; accordingly, Olympia sued Kosor for defamation. Because we conclude that each of Kosor's statements was "made in direct connection with an issue of public interest in a place open to the public or in a public forum," *see* NRS 41.637(4), we reverse the district court's decision to the contrary and remand for further proceedings consistent with this opinion.

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself and took no part in the consideration of this appeal. The Honorable Kristina Pickering, Chief Justice, sits in his place.

I.

After purchasing a home in Southern Highlands, Kosor became an avid and outspoken participant at meetings for the community, serving as board member of a homeowners' sub-association and ultimately mounting several campaigns for election to the overarching Southern Highlands Community Association (the HOA). During the course of his activism, Kosor criticized the HOA for its decision to continue Southern Highlands' contracts with its developer, turned manager and operator, Olympia. Kosor claimed that these contracts financially benefited Olympia and the HOA at the expense of the community's individual homeowners.

The defamation complaint claims that Kosor made the first set of allegedly defamatory statements at an HOA sub-association board meeting: specifically, it claims that Kosor stated that Olympia met with Clark County Commissioners in a "dark room" and coerced them to act or vote in a particular manner, and that Olympia was "lining its pockets" at the homeowners' expense. Though Olympia says it subsequently sent Kosor a cease-and-desist letter, the complaint claims he continued to speak at meetings, including about how Olympia and the HOA had allegedly violated the law and breached their fiduciary duties to the homeowners. Kosor also posted a statement on the social media platform Nextdoor.com, in which he stated that Olympia obtained a "lucrative agreement" with Clark County by agreeing to shift expenses for the maintenance of public parks to the Southern Highlands homeowners.

Kosor made additional statements in connection with his first campaign for election to the HOA board of directors. His campaign website compared Olympia to a sort of foreign dictatorship and further raised the same allegations of supposed "sweetheart deals" between Olympia and Clark County officials to shift the costs of park maintenance from the county to Southern Highlands homeowners, statutory violations, breaches of fiduciary duty, and improper cost shifting. Kosor also distributed a pamphlet and letter to the Southern Highlands community echoing statements made on his website and further claiming that Olympia's actions have "already cost the homeowners millions."

Olympia sued Kosor for defamation and defamation per se. After filing an answer, Kosor moved to dismiss under NRS 41.660, Nevada's anti-SLAPP statute. The district court held that Kosor had failed to establish a prima facie case under NRS 41.660 and entered an order denying the motion. Kosor appealed. *See* NRS 41.670(4) (providing a right of interlocutory appeal from a district court order denying a special motion to dismiss under NRS 41.660). The district court subsequently denied Kosor's motion for reconsideration in an order filed while this appeal was pending.

II.

Nevada's anti-SLAPP statutes deter lawsuits targeting good-faith speech on important public matters. *See Coker v. Sassone*, 135 Nev. 8, 10, 432 P.3d 746, 748 (2019). If a party to a defamation lawsuit files a special motion to dismiss under Nevada's anti-SLAPP statutes and prevails, then that party is entitled to a speedy resolution of the case in its favor and recovery of attorney fees incurred in defending the action. *See* NRS 41.660 (rights); NRS 41.670 (remedies). We review a district court's decision refusing to dismiss under the anti-SLAPP statutes de novo. *Abrams v. Sanson*, 136 Nev. 83, 86, 458 P.3d 1062, 1065-66 (2020). And, "[i]n making such a determination, we conduct an independent review of the record." *Taylor v. Colon*, 136 Nev. 434, 439, 482 P.3d 1212, 1217 (2020).

A.

To establish a prima facie case for anti-SLAPP protection, a movant needs to demonstrate "by a preponderance of the evidence, that [the underlying defamation] claim is based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a); NRS 41.637 (defining qualifying communications). Because the district court does not appear to have considered in depth whether Kosor made his communications in "good faith," we leave it to the district court to evaluate on remand whether Kosor can so demonstrate. Our analysis here addresses only whether Kosor's statements fall within the specific statutory category of speech protected, for anti-SLAPP purposes, by NRS 41.637(4): "any . . . [c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum."

1.

To judge whether Kosor's statements addressed an issue of public interest, we apply five guiding principles. *Shapiro v. Welt*, 133 Nev. 35, 39, 389 P.3d 262, 268 (2017) (adopting five-factor test for "public interest" from *Piping Rock Partners, Inc. v. David Lerner Associates, Inc.*, 946 F. Supp. 2d 957, 968 (N.D. Cal. 2013), *aff'd*, 609 F. App'x 497 (9th Cir. 2015)). First, we cautioned in *Shapiro* that a "'public interest' does not equate with mere curiosity," *id*. at 39, 389 P.3d at 268; but here, each of Kosor's criticisms of Olympia fundamentally related back to his strident support for democratic participation in and governance over the large residential community where he resided, which undoubtedly goes beyond the airing of some trivial private dispute between private parties. *Cf. Rivero v. Am. Fed'n of State, Cty., & Mun. Emps., AFL-CIO*, 130 Cal. Rptr. 2d 81, 90 (Ct. App. 2003) (holding that the manner of a janitorial

supervisor's "supervision of . . . eight individuals is hardly a matter of public interest"). Second, and relatedly, we stated in *Shapiro* that a matter of public interest is one of concern "to a substantial number of people," 133 Nev. at 39, 389 P.3d at 268, which Kosor's statements on matters pertinent to the "democratic subsociety" governing the nearly 8,000 Southern Highlands residences were. *See Damon v. Ocean Hills Journalism Club*, 102 Cal. Rptr. 2d 205, 209, 212 (Ct. App. 2000) (quoting *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1282 (Cal. 1994)) (citing *Macias v. Hartwell*, 64 Cal. Rptr. 2d 222, 225 (Ct. App. 1997)) (concluding that statements were about public issues because they were about an HOA's decisions regarding governance, including whether the manager was competent to continue managing the community of 3,000 community members).

Third, in keeping with *Shapiro*, 133 Nev. at 39, 389 P.3d at 268, Kosor's statements were also directly tied to the public interest asserted above; that is, the appropriate governance of Southern Highlands. Kosor's questions and criticisms of Olympia and the HOA board were made in the context of his attempts to encourage homeowner participation in and oversight of the governance of their community. Finally, the subject matter of Kosor's statements makes evident that his "focus" in making them was not to prosecute any private grievance against Olympia, whether by "gather[ing] ammunition" or publicly communicating private matters, as prohibited by *Shapiro*'s fourth and fifth factors. 133 Nev. at 39, 389 P.3d at 268. Rather, his statements "concerned the very manner in which this group . . . would be governed—an inherently political question of vital importance to each individual and to the community as a whole." *Damon*, 102 Cal. Rptr. 2d at 212-13. Thus, we easily conclude that all of the complained-of statements concerned matters of public interest under NRS 41.637(4).

2.

With regard to whether Kosor's statements were made "in a place open to the public or in a public forum," NRS 41.637(4), this court has not yet adopted a test to determine that answer. Nor is the plain language of the statute alone sufficient to guide our inquiry. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017) (looking to the language of the anti-SLAPP statutes first). But we are not without recourse. For one, as we have previously indicated, California's anti-SLAPP law includes a similarly phrased category of speech subject to anti-SLAPP protections, and the case law of our sister state can therefore appropriately inform our analysis. *See Patin v. Lee*, 134 Nev. 722, 724, 429 P.3d 1248, 1250 (2018) (noting that in the anti-SLAPP context, where "no Nevada precedent is instructive on this issue, we [may] look to California precedent for

guidance"); *compare* NRS 41.637(4) (providing that anti-SLAPP protection applies to "any . . . [c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum"), *with* Cal. Civ. Proc. Code § 425.16(e)(3) (West 2016) (protecting "any written or oral statement or writing made in a place open to the public or a public forum in connection with an issue of public interest"). And, where further guidance might still be necessary, federal First Amendment precedent can also be instructive. *See Abrams v. Sanson*, 136 Nev. 83, 87, 458 P.3d 1062, 1066 (2020) (interpreting anti-SLAPP provision, in part, with reference to federal case law); *Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (adopting federal case law that collected and summarized California anti-SLAPP cases); *cf. Damon*, 102 Cal. Rptr. 2d at 209, 211 (defining "public forum" for anti-SLAPP purposes by reference to a First Amendment case, *Clark v. Burleigh*, 841 P.2d 975 (Cal. 1992), and concluding that a publication was a "public forum" for anti-SLAPP purposes because it had "a purpose analogous to [that of] a [traditional] public forum").

With regard to the allegedly defamatory statements Kosor made at HOA open meetings, the California case, *Damon*, is directly on point. In *Damon*, several homeowners in a large residential community made critical statements about the homeowners' association manager, who brought suit for defamation; the defendants moved to dismiss the lawsuit under California's anti-SLAPP statutes. 102 Cal. Rptr. 2d at 209-10. Several of the statements at issue were made at homeowners' association board meetings, which the California court of appeal held were "public forums" for the purposes of the state's anti-SLAPP statutes. *Id*. at 210. In reaching this conclusion, the *Damon* court reasoned that the homeowners' association "played a critical role in making and enforcing rules affecting the daily lives of [community] residents" and further recognized that "[b]ecause of [a homeowners' association's] broad powers and the number of individuals potentially affected by [a homeowners' associations'] actions, the Legislature has mandated [they] hold open meetings and allow the members to speak publicly at the meetings." *Id.* The HOA here is no less of "a quasi-government entity" than that in *Damon*, "paralleling in almost every case the powers, duties, and responsibilities of a municipal government." *Id.* (quoting *Cohen v. Kite Hill Cmty. Ass'n*, 191 Cal. Rptr. 209, 214 (Ct. App. 1983)). Accordingly, the meetings at which Kosor made his statements here were likewise open, by legislative mandate, to all community members. NRS 116.31085 (creating a right of homeowners to attend HOA sessions, with several exceptions). We therefore conclude, consistent with the reasoning and holding of the California court of appeal in *Damon*, that the HOA meetings at which Kosor made certain of the statements at issue were "public forums" for the purposes of our

anti-SLAPP statutes, because the meetings were "open to all interested parties, and . . . a place where members could communicate their ideas. Further, the . . . meetings served a function similar to that of a governmental body." 102 Cal. Rptr. 2d at 209.

The anti-SLAPP motion in *Damon* also dealt with allegedly defamatory statements made by homeowners' association members in printed materials, there a newsletter called the Village Voice that functioned as "a mouthpiece for a small group of homeowners who generally would not permit contrary viewpoints to be published." *Id.* at 210. Despite the alleged editorial limitations on the opinions expressed in the Village Voice, the *Damon* court determined that the newsletter was a "public forum." *Id.* at 211. As a threshold matter, we agree with the *Damon* court that "[u]nder its plain meaning, a public forum is not limited to a physical setting, but also includes other forms of public communication." *Id.* at 210; *see also Abrams*, 136 Nev. at 88-89, 458 P.3d at 1067 (holding that an "email listserv may constitute a public forum for purposes of the anti-SLAPP statutes"). And we likewise agree that even a publication with a tightly controlled message—whether a community newsletter or, as in this case, an HOA election pamphlet and direct letter to Southern Highlands' homeowners—may qualify as a public forum where "it [is] a vehicle for communicating a message about public matters to a large and interested community." *See Damon*, 102 Cal. Rptr. 2d at 211. Here, the printed materials in question were another part of Kosor's efforts to drive civic engagement among community members and to affect management changes via democratic pressure—"If democracy is to work in Southern Highlands it requires your participation. . . . [Y]ou must vote. Do not assume others will." And inasmuch as the materials were distributed directly to the very members of the 8,000-home community that Kosor sought to mobilize, there could hardly be a more "interested" group of people with whom he could engage. Accordingly, we hold that the allegedly defamatory statements Kosor made in his election pamphlets and letter to homeowners were likewise made in a public forum for the purposes of NRS 41.637(4).

Finally, there are statements Kosor made online, whether on his personal campaign website or on the social media platform Nextdoor.com. On this question—that is, precisely when a privately established website qualifies as a public forum for the purposes of an anti-SLAPP defense—again, we have no clear precedent. We have firmly held that a government watch group's Facebook page qualifies as a public forum under anti-SLAPP laws, *see Stark v. Lackey*, 136 Nev. 38, 41 n.2, 458 P.3d 342, 345 n.2 (2020), but we have not yet elaborated on the limits of that reasoning. And, while it is well-settled in California law that all "[w]eb sites accessible to the public . . . are 'public forums' for purposes of the anti-SLAPP

statute," *Barrett v. Rosenthal*, 146 P.3d 510, 514 n.4 (Cal. 2006), we are not prepared to paint with such bold strokes here.[2]

For one, the United States Supreme Court has indicated that we should take "extreme caution" in this context—

> While . . . the Cyber Age is a revolution of historic proportions, we cannot appreciate yet its full dimensions and vast potential to alter how we think, express ourselves, and define who we want to be. The forces and directions of the Internet are so new, so protean, and so far reaching that courts must be conscious that what they say today might be obsolete tomorrow.

Packingham v. North Carolina, 582 U.S. 98, 105 (2017). And we are loath that our anti-SLAPP "cure [could] become the disease." *Navellier v. Sletten*, 52 P.3d 703, 714 (Cal. 2002) (Brown, J., dissenting); *cf.* Xiang Li, *Hacktivism and the First Amendment: Drawing the Line Between Cyber Protests and Crime*, 27 Harv. J.L. & Tech. 301, 316 (2013) (suggesting that cyberattacks on private websites could qualify for constitutional protection if those sites were deemed "public forums"); Micah Telegen, *You Can't Say That: Public Forum Doctrine and Viewpoint Discrimination in the Social Media Era*, 52 U. Mich. J.L. Reform 235, 248 (2018) (noting that various private social networking sites' hate speech limitations would be constitutionally questionable if government-created pages on the site were deemed "public forums").

Moreover, California courts' broad holding regarding the public character of the internet comports with the particular legislative instruction it has been given, that the state's anti-SLAPP provision "*be construed broadly.*" Cal. Civ. Proc. Code § 425.16(a) (emphasis added). But Nevada's anti-SLAPP provisions contain no such mandate. And where Nevada's statutory language differs from that of an otherwise similar statute, foreign precedent applying that language—by which we are not bound in any case—becomes even less persuasive. *See Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 122 Nev. 132, 154, 127 P.3d 1088, 1103-04 (2006) (noting that "the presumption that the Legislature, in enacting a state statute similar to a federal statute, intended to adopt the federal courts' construction of that statute, is rebutted when the state statute clearly reflects a contrary legislative intent").[3]

Additionally, perhaps as a result of the legislatively mandated breadth of California's anti-SLAPP statutes, *Barrett*'s blanket hold-

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[2]While we cited *Barrett*, 146 P.3d at 514 n.4, in a footnote in *Lackey* to support our agreement with the parties that the Nevada Department of Wildlife Facebook page was a public forum, we did not purport to endorse *Barrett* in its entirety.

[3]NRS 41.665(2) endorses California anti-SLAPP law with respect to the burden of proof, but this does not apply more broadly to the statutory interpretation issues addressed in the text.

ing and the progeny that extends therefrom leapfrog what is traditionally a critical initial step in public forum analysis. To wit: when examining statements made online, the California cases at issue broadly discuss the entire internet as the "public forum" in question. *See Wilbanks v. Wolk*, 17 Cal. Rptr. 3d 497, 505 (Ct. App. 2004) (analogizing "the Web, as a whole" to a public bulletin board that "does not lose its character as a public forum simply because each statement posted there expresses only the views of the person writing that statement"). But, given that the Legislature has not demanded the same breadth in our application of Nevada's anti-SLAPP statutes, we look to Supreme Court precedent on this point, which, in the First Amendment context, suggests that the scope of the relevant forum should be more closely tailored to the specific circumstances at issue. *See Cornelius v. NAACP Legal Def. & Educ. Fund, Inc*., 473 U.S. 788, 800-02 (1985) (narrowing scope of relevant forum from the physical site of a federal workplace to the intangible site of a charitable campaign for workers at the site, and collecting cases); *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 44 (1983) (defining school's internal mail system and the teachers' mailboxes as forum rather than school property as a whole and stating that "the First Amendment [does not] require[ ] equivalent access to all parts of a school building in which some form of communicative activity occurs"); *Lehman v. City of Shaker Heights*, 418 U.S. 298, 300-02 (1974), (treating the advertising space on buses, rather than city-owned public transportation more generally, as the forum). Simply put, we are not prepared to say that nearly every website is a "public forum" simply because "[o]thers can create their own Web sites or publish letters or articles through the same medium [i.e., the internet], making their information and beliefs accessible to anyone interested in the topics discussed," *Wilbanks*, 17 Cal. Rptr. 3d at 505; in our view, the question is, more limitedly, whether the particular post or website at issue "bear[s] the hallmarks of a public forum." *Davison v. Randall*, 912 F.3d 666, 682 (4th Cir. 2019).

We have previously looked toward related federal precedent in applying our anti-SLAPP laws. *See Shapiro*, 133 Nev. at 39, 389 P.3d at 268 (adopting the principles enunciated in *Piping Rock Partners*, 946 F. Supp. 2d at 968). And federal courts' application of First Amendment "public forum" concepts to electronic mediums offers a reasoned, limited departure from the sweeping holding that California's requirement for a "broad reading" of anti-SLAPP statutes demands. For instance, in determining whether a government official's Facebook page was a public forum within the context of First Amendment restrictions, the Fourth Circuit analyzed according to traditional characteristics of public forums, specifically: whether the site was "compatib[le] with expressive activity" and the extent

to which the site allowed free interaction between the poster and constituent commentators. *Davison*, 912 F.3d at 682 (quoting *Cornelius*, 473 U.S. at 802).[4] And, in a decision that was subsequently affirmed by the Second Circuit, the Southern District of New York seemed to tailor the scope of the public forum in question even more narrowly, using the same traditional public forum principles to hold that the "*interactive space of a tweet* sent by [Donald Trump]" qualified as a public forum. *Knight First Amendment Inst. at Columbia Univ. v. Trump*, 302 F. Supp. 3d 541, 574 (S.D.N.Y. 2018) (emphasis added), *aff'd*, 928 F.3d 226 (2d Cir. 2019). The question then, in federal courts, is whether the limited page, or as appropriate, post, at issue creates a forum for citizen involvement. *See City of Madison Joint Sch. Dist. No. 8 v. Wis. Emp't Relations Comm'n*, 429 U.S. 167, 175 (1976); *Page v. Lexington Cty. Sch. Dist. One*, 531 F.3d 275, 284-85 (4th Cir. 2008) (applying traditional public forum analysis before holding that a school district's website was not a public forum because there was no interactive space).

Looking toward this federal guidance, we believe that Kosor's Nextdoor.com post qualifies as a public forum for the purposes of anti-SLAPP protections. The appellate record includes a printout of Kosor's post and the responses thereto, from which it appears that Kosor's post, like his HOA meeting commentary, campaign flyer, and printed letter, sought to open conversation among Southern Highlands community members and enlist their participation in the community's decision-making process: "[W]rite/email/call our Commissioners and . . . [t]hen join us at Wednesday's Clark County Commission meeting . . . ." And Kosor's post opened up an opportunity for other community members to publicly respond to its content, which they did; for example, one respondent asked "What do you think, neighbors? . . . [t]his is an opportunity for all of us to be heard and to decide as a COMMUNITY . . . ." Other responses simply thanked Kosor for his "yeoman service and doggedness. Without [which] . . . none of this detail would have bubbled up to the knowledge of the residents." Accordingly, Kosor's post sought and ultimately facilitated an exchange of views on what we have already deemed to be subject matter of public interest. *Davison*, 912 F.3d at 682 (reasoning that Facebook page was a public forum because "[a]n 'exchange of views' is precisely what [the page creator] sought—and what in fact transpired—when she expressly invited 'ANY Loudoun citizen' to visit the page and comment 'on ANY issues,' and received numerous such posts and comments"); *see also*

[4]Importantly, the Fourth Circuit also rejected arguments that traditional public forum analysis did not apply because the Facebook page was not government property, noting that the United States Supreme Court "never has circumscribed forum analysis solely to government-owned property." *Davison*, 912 F.3d at 682-83.

Packingham, 582 U.S. at 104 (describing the internet as "the most important place[ ] (in a spatial sense) for the exchange of views"); *Page*, 531 F.3d at 284 (holding that a school district website was not a public forum, but that if there was a "'chat room' or 'bulletin board' in which private viewers could express opinions or post information, the issue would, of course, be different"). And while printouts of certain Nextdoor.com pages in the record suggest that parties must enter their name and address in order to view website posts—that is, that Kosor's post might not have been entirely, freely accessible to every member of the public without any limitation—these steps do not seem to differ significantly from that which might be required to view posts on Facebook; that is, a post on Nextdoor.com is as compatible with expressive activity as one on the other platform, which we have already held can support a public forum. *See Stark*, 136 Nev. at 41 n.2, 458 P.3d at 345 n.2 (agreeing that a government watch group's Facebook page was a public forum). Kosor's statements in his Nextdoor.com post were therefore made in a public forum under the federal standards discussed above and our anti-SLAPP statute.[5]

With regard to statements on Kosor's personal website, the main, related, interactive space appears to be a "Contact Me" form included at the bottom of each page. But the printouts from his website also demonstrate some additional interactivity, given that Kosor seems to have posted on the site responses to "Frequently Asked Questions," as well as links to *Las Vegas Review-Journal* articles discussing topics relevant to the Southern Highland community. Moreover, the overall thrust of subject matter on Kosor's site is consistent with the purpose discussed above, that is, to promote civic engagement; his site is replete with attempted calls of Southern Highlands to action—"Our community must engage on the political front as others are doing"; "Unless we intervene as a community the Sports Park we were originally promised will never happen"; "The collective owners in [Southern Highlands] have a much larger investment in the community than does the Developer. We deserve a fair share vote"; "We have a large political block as a community capable of insisting on quality maintenance." Kosor's site also appears to include a copy of the letter discussed above, which urges homeowner "participation" in the Southern Highlands community and promotes voting in the HOA board election as a way to make "democracy work in Southern Highlands." In light of the site's interactive components, content, and purpose, we believe Kosor's site qualifies as a public forum within the meaning of our anti-SLAPP statutes.

[5]Note that, in keeping with *Knight*, 302 F. Supp. 3d at 574, we do not hold that every Nextdoor.com post creates a public forum; the content of any particular post could affect whether the forum is, in fact, one for citizen engagement.

III.

Accordingly, we conclude that Kosor met his prima facie burden to demonstrate that the statements in question were all made in public forums on a matter of public interest. We therefore reverse the district court and remand with direction that it consider whether Kosor made his communications in "good faith," in light of all the supporting evidence provided by Kosor. *See Rosen v. Tarkanian*, 135 Nev. 436, 439, 453 P.3d 1220, 1223 (2019) (examining all submitted evidence in an anti-SLAPP case even where the moving party had failed to attach an affidavit).

Hardesty and Cadish, JJ., concur.

In the Matter of the ESTATE OF THEODORE ERNEST SCHEIDE, JR.

ST. JUDE CHILDREN'S RESEARCH HOSPITAL, Appellant, *v.* THEODORE E. SCHEIDE, III, Respondent.

No. 76924

December 31, 2020 478 P.3d 851

Appeal from a district court order denying a petition to admit a lost will in a probate matter. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

[Rehearing denied February 4, 2021]

Hutchison & Steffen, PLLC, and *Michael K. Wall* and *Russel J. Geist*, Las Vegas, for Appellant.

Cary Colt Payne, Chtd., and *Cary Colt Payne*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Silver, J.:

Theodore Scheide, Jr.'s (Theodore) will disinherited his biological son, respondent Theodore Scheide, III (Chip), and left his estate to appellant St. Jude Children's Research Hospital. After Theodore's death, the original will could not be found, and St. Jude petitioned to probate the lost will. NRS 136.240(3) allows the probate of a lost will if it was in existence at the testator's death and at least two

credible witnesses prove the will's provisions. A copy of Theodore's executed will existed, and St. Jude provided affidavits of proof of lost will from the attorney who drafted the will and the attorney's assistant. Both witnessed the will's execution, but only the attorney could testify to the will's provisions—the assistant did not read the will when it was drafted. St. Jude also provided evidence to the district court that prior to his death, Theodore repeatedly affirmed he wanted his estate to pass to St. Jude. Chip did not contest the copy's accuracy, instead arguing Theodore revoked the will by destruction and that St. Jude's witnesses did not satisfy NRS 136.240(3). Agreeing with Chip, the district court denied St. Jude's petition, leaving Chip free to inherit the estate, valued at approximately $2.6 million, through intestate succession.

In this opinion, we address whether St. Jude met its burden to show the will was in legal existence and satisfied NRS 136.240(3)'s requirement that two witnesses prove the will's provisions. As to the former, evidence of the testator's unchanged testamentary intent showed the will was in legal existence at the testator's death. As to the latter, an accurate copy of the will existed, the drafting attorney testified to its contents, and the second witness testified to witnessing the will's execution and to her signature on the copy, thereby proving the will's provisions for purposes of the statute. We therefore conclude that under these facts, St. Jude satisfied the requirements of NRS 136.240(3) and the district court erred by denying St. Jude's petition to probate the will.

FACTS

In June 2012, Theodore executed a will leaving his estate to his life partner, Velma Shay, or to St. Jude in Tennessee if Velma predeceased him (the June will). St. Jude is a research hospital and nonprofit organization that studies childhood illnesses and provides free medical care to sick children. While alive, Theodore donated substantial sums to St. Jude, and both he and Velma held the hospital in high esteem.

Chip was Theodore's only biological child. The two had been estranged for more than 20 years, and Theodore expressly disinherited Chip and Chip's descendants in the June will. The drafting attorney, Kristen Tyler, and her assistant, notary Diane DeWalt, witnessed the June will's execution and signed as declarants. Theodore requested that Tyler retain the original June will. Four months later, in October 2012, Theodore executed a second will solely to replace the executor (the October will). Tyler and DeWalt again witnessed the will's execution and signed as declarants. Theodore took the executed October will with him.

Velma died in early 2013. Theodore spoke with Tyler several times during 2013 and 2014 and did not mention wishing to recon-

cile with Chip or revoke his will. To the contrary, Theodore stated he did not want Tyler to locate Chip, reiterating that he wished his estate to pass to St. Jude now that Velma had died.

Kathy Longo, Theodore's stepdaughter from a prior marriage, began assisting Theodore following Velma's death. Longo recalled seeing the will or a copy on a shelf in Theodore's study. Longo did not know Chip and Theodore did not mention Chip to her, although she recalled Theodore mentioning in December 2013 that he was leaving his estate to St. Jude. Theodore began to behave strangely in late 2013 and increasingly struggled to care for himself, even with Longo's help. Theodore's residential lease expired at the end of November, and Theodore moved into a group home, at which time the majority of his belongings were sold. In December, Longo informed Tyler that she could no longer help care for Theodore and he needed a guardian.

In January 2014, Tyler visited Theodore at the group home and Theodore told Tyler he kept his will with him in a bag or box with other important papers. Susan Hoy from Nevada Guardian Services (NGS) became Theodore's guardian in February 2014 after a physician deemed Theodore unable to care for himself. Thereafter, Hoy moved Theodore into a nursing home and moved his belongings, including his documents, into storage. During that move, Hoy saw a copy of the October will, on which Theodore had written, in blue ink, "OCTOBER 2, 2012" and "UP-DATED" and noted that he was an organ donor. Theodore had also signed the top of that document in blue ink. Hoy later returned the documents to Theodore.

Theodore became increasingly unstable and expressed anger towards everyone involved in his care. He died in August 2014, leaving a multi-million dollar estate. Theodore's facility boxed up the belongings Theodore had kept with him, and Hoy's office retrieved them. Hoy was unable to find Theodore's original October will, although she did find the written-upon copy, which she delivered to the estate's attorney.

The district court appointed Hoy the special administrator of the estate. Hoy opened Theodore's safe deposit box but still did not find the original October will. Hoy speculated to the court that Theodore had destroyed the original will and recommended the estate pass to Chip. Tyler learned of Hoy's recommendation and contacted the estate's attorney and St. Jude. Tyler also filed the original June will that she retained with the court, noting it was substantively identical to the October copy of the will. Hoy petitioned the court to approve distribution to St. Jude but, after Chip contested Hoy's recommendation, Hoy withdrew it. St. Jude petitioned to probate the lost will.

Both Tyler and DeWalt filed affidavits of proof of lost will, stating that they witnessed Theodore sign the October will and that, to their knowledge, Theodore had not intentionally destroyed or revoked it.

Tyler additionally provided that Theodore did not change the beneficiary designations in the October will. Chip, however, submitted a declaration claiming Theodore attempted to reconcile with him before his death.

The court held an evidentiary hearing, at which Tyler, DeWalt, Longo, and Hoy all testified. Tyler testified to the execution of the June and October wills, the accuracy of the copy of the October will, and Theodore's unchanged wish to leave his estate to St. Jude. Tyler also testified that, in early 2014, Theodore affirmatively advised her against contacting Chip. DeWalt, a notary, likewise testified to witnessing the will's execution and, while she could not recall the date of execution, she verified her signature as declarant on the copy of the October will. Longo testified to seeing either the original will or a copy in Theodore's study before he moved into the group home, and testified Theodore told her in December 2013 that he wanted St. Jude to inherit his estate. She also testified Theodore made an annual contribution to St. Jude. Hoy testified she was not aware of Theodore ever discussing his estate planning with anyone at NGS or indicating to them that he wanted to change his will. Hoy maintained she believed Theodore had destroyed his will, although she admitted this was her own speculation.[1]

The district court denied the petition to admit the lost will. Relevant here, it found the evidence supported that Theodore had lost the will, but also noted Theodore's erratic behavior before he moved into an assisted living facility and found Theodore may have destroyed the will. The district court further found that only Tyler's testimony satisfied NRS 136.240(3)'s two-witness requirement because DeWalt could not recall the will's provisions. And because the district court concluded that two witnesses had not proved the lost will's provisions, it determined St. Jude failed to meet its burden of proof to show Theodore had not revoked the will. The district court therefore denied St. Jude's petition to probate the lost will.

St. Jude appealed and the court of appeals affirmed the petition's denial. *See In re Estate of Scheide*, Docket No. 76924-COA (Order of Affirmance, Mar. 26, 2020). St. Jude filed a petition for review, which we granted and limited to the issues addressed in this opinion.[2] *See* NRAP 40B(g) (providing this court "may limit the question(s) on review").

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[1]Hoy testified Theodore once mentioned to an NGS employee that they could find his ex-wife and Chip but, because Hoy was not present for that conversation, she could not provide further details and neither party called that employee to testify.

[2]Chip argues this court should summarily deny the petition for review because St. Jude filed it one day late. Because St. Jude timely filed the petition, albeit with a caption that prevented it from immediately coming to this court, we conclude the petition was timely filed under NRAP 40B(c).

DISCUSSION

This case centers on the interpretation of NRS 136.240(3) (2009),[3] which reads as follows:

> [N]o will may be proved as a lost or destroyed will unless it is proved to have been in existence at the death of the person whose will it is claimed to be, or is shown to have been fraudulently destroyed in the lifetime of that person, nor unless its provisions are clearly and distinctly proved by at least two credible witnesses.

Restated more plainly, this statute prevents probate of a lost will unless (1) the lost will either (a) existed at the time of the testator's death or (b) was fraudulently destroyed, and (2) two credible witnesses clearly and distinctly prove its provisions. In this case, the two issues are whether the will was "in existence at" Theodore's death[4] and whether two witnesses "clearly and distinctly proved" the will's "provisions."[5] *Id.*

Standard of review

A court's "primary aim in construing the terms of a testamentary document must be to give effect, to the extent consistent with law and public policy, to the intentions of the testator." *Zirovcic v. Kordic*, 101 Nev. 740, 741, 709 P.2d 1022, 1023 (1985) (quoting *Concannon v. Winship*, 94 Nev. 432, 434, 581 P.2d 11, 13 (1978)). NRS 132.010 instructs courts to liberally construe statutes governing wills "so that a speedy settlement of estates is accomplished at the least expense to the parties." Whether the testator revoked a will is a question for the trier fact, *In re Estate of Irvine v. Doyle*, 101 Nev. 698, 703, 710 P.2d 1366, 1369 (1985), and we will not disturb the district court's findings so long as they are supported by substantial evidence, *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013).

We review questions of law, including statutory interpretation, de novo. *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019). If the statute's language is clear, this court interprets the plain meaning. *Id.* If the statute is ambiguous, this court will consid-

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[3]The statute was amended in October 2017 and again in 2019. Because this case went to trial in June 2017 and the underlying events occurred in 2013-14, we draw from the 2009 statute unless otherwise noted. 2009 Nev. Stat., ch. 358, § 7, at 1624-25.

[4]St. Jude does not contend the will was fraudulently destroyed during Theodore's lifetime, and we do not address that portion of the statute.

[5]We need not address the effect of NRS 136.240(5), which the parties did not raise below and the district court did not address. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (holding we need not address issues that were not raised below).

er the legislative intent and public policy in construing the statute. *Id.* A statute may be ambiguous where the language lends itself to two or more reasonable interpretations. *Id.* And "[w]hen the material facts of a case are undisputed, the effects of the application of a legal doctrine to those facts are a question of law that this court reviews de novo." *Am. Sterling Bank v. Johnny Mgmt. LV, Inc.*, 126 Nev. 423, 428, 245 P.3d 535, 538 (2010).

Whether the will was in existence at Theodore's death

NRS 136.240(3) states that "no will may be proved as a lost or destroyed will unless it is proved to have been *in existence at the death* of the person whose will it is claimed to be." (Emphasis added.) St. Jude argues the district court properly concluded the will was lost but conflated the issue of whether the will was "in existence" with whether two witnesses could establish the will's provisions; whereas, Chip asserts the will must have been in actual existence at Theodore's death[6] and contends the evidence supports the will was revoked by destruction.

Under common law, a will that could not be found after the testator's death was presumed revoked by destruction. *Irvine*, 101 Nev. at 703, 710 P.2d at 1369. But we explained in *Irvine* that NRS 136.240(3) only requires the will to be in *legal* existence at the testator's death. *Id.* at 702-03, 710 P.2d at 1368-69. A will is in legal existence if it was validly executed and unrevoked by the testator, even if the will is no longer in physical existence. *Id.*; *see also In re Estate of Cunningham*, 574 S.W.3d 214, 217 n.3 (Ark. Ct. App. 2019) (citing *Irvine* and holding that legal existence does not require physical existence). Thus, despite the common law presumption, a lost will may be probated where the will's proponent can "prove that the testator did not revoke the lost or destroyed will during his lifetime." *Irvine*, 101 Nev. at 703, 710 P.2d at 1369. Because the legal existence element does not provide a burden of proof, we apply a preponderance of the evidence standard. *See Betsinger v. D.R. Horton, Inc.*, 126 Nev. 162, 165, 232 P.3d 433, 435 (2010) (explaining that in the absence of clear legislative intent, "a preponderance of the evidence is all that is needed to resolve a civil matter").

We have never squarely addressed how the proponent of a lost will meets its burden of proof to show the will was in legal existence at the testator's death. Other courts addressing this question have concluded that the will's proponent may meet its burden by pre-

[6]Chip relies on *Howard Hughes Medical Institute v. Gavin*, 96 Nev. 905, 621 P.2d 489 (1980). But *Gavin*, which we address further below, dealt with NRS 136.240(3)'s second requirement, the two-witness requirement. *See, e.g.*, *id.* at 907, 621 P.2d at 490 ("[A] will may not be proved as a lost or destroyed will unless it was in existence at the death of the testator *and* unless its provisions can be clearly and distinctly proved by at least two credible witnesses." (emphasis added)).

senting evidence of the testator's unchanged intent toward the will's disposition. For example, a proponent may rebut the presumption of a lost will's revocation by presenting "evidence indicating an unchanged attitude respecting the disposition in the will. That may be direct evidence, such as declarations of the testator, or circumstantial, from other acts and circumstances which permit an inference of such an unchanged attitude," *In re Estate of Babcock*, 456 N.E.2d 671, 676 (Ill. App. Ct. 1983), such as "that [the testator] entertained a kind and loving attitude toward the proposed beneficiary under the will up to the time of death," *In re Estate of Strong*, 550 N.E.2d 1201, 1206 (Ill. App. Ct. 1990). *See also Williams v. Miles*, 94 N.W. 705, 705 (Neb. 1903) ("[T]his is a presumption of fact only. It may be overcome by evidence, circumstantial or otherwise, to the contrary . . . ."); *In re Estate of Capps*, 154 S.W.3d 242, 245-46 (Tex. Ct. App. 2005) (explaining the presumption of revocation may be overcome by circumstantial evidence); *In re Estate of Wheadon*, 579 P.2d 930, 932 (Utah 1978) (recognizing the presumption of revocation can be overcome by evidence of the testator's attitude toward the beneficiaries or declarations indicating the testator's state of mind regarding the will); *Jackson v. Hewlett*, 77 S.E. 518, 520 (Va. 1913) (concluding that the testator's declarations showed "a continued and unchanged purpose as to the disposition" of his estate, rebutting the presumption of revocation); *In re Auritt's Estate*, 27 P.2d 713, 715 (Wash. 1933) (holding that the presumption of revocation may be rebutted by "evidence as to the testator's attitude of mind and his declarations made between the time of executing the will and the time of his death"); *In re Estate of Richards*, 45 V.I. 287, 289 (2003) (providing that "if the decedent's declarations are consistent with the terms of the lost will, that fact is evidence that the decedent did not revoke his will").[7]

We likewise agree that the proponent of a lost will may show the will was in legal existence at the time of the testator's death by presenting evidence relevant to whether the testator's wishes remain unchanged following execution of the will. This furthers the legislative goal of ensuring the testator's wishes are honored where the evidence supports that the testator did not intend to revoke the lost will. *See* Hearing on S.B. 277 Before the Assembly Judiciary Comm., 75th Leg. (Nev., May 6, 2009) (testimony of Mark Solomon, Chair, Probate & Trusts Leg. Subcomm., explaining an intent

[7]Additional relevant evidence may include the access other individuals have to the will, as those individuals, rather than the testator, may have destroyed the will. *See, e.g.*, *Whatley v. Estate of McDougal*, 430 S.W.3d 875 (Ark. Ct. App. 2013) (concluding the circumstances supported rebuttal of the presumption where no evidence showed the testator wished to revoke the will and parties who may have had an interest in destroying the will had access to it); *Strong*, 550 N.E.2d at 1206-07 (addressing whether evidence rebutted the presumption of revocation and noting that many people had access to the testator's home and that some of the testator's personal items were missing after her death).

to "soften[ ] up the requirements and ma[k]e it easier to prove a lost will when it is obvious that it was not intended to be revoked"); Hearing on S.B. 277 Before the Senate Judiciary Comm., 75th Leg. (Nev., Mar. 24, 2009) (testimony of Mark Solomon, Chair, Probate & Trusts Leg. Subcomm., noting the revisions were "designed to make it easier to prove a lost will where it is obvious that it was not intended to be revoked").

Here, the district court found the October will was lost and therefore applied the presumption that Theodore destroyed it. We agree with the district court on these initial points. The evidence showed that Theodore kept the original October will in his possession, that at least Longo and Hoy helped move Theodore's belongings after the will was executed, and that Theodore's belongings were sold before he moved into the group home. The record further suggested Theodore opted to keep his important papers on his study shelves and later in a bag or box, rather than in a secure location. Thus, the district court properly concluded the will was lost and, because the original was never found, properly applied the presumption of revocation. *See Irvine*, 101 Nev. at 703, 710 P.2d at 1369.

But the record ultimately supports that the will was in legal existence at Theodore's death. The parties submitted the original June will and a copy of the October will, both of which showed Theodore wished to disinherit Chip and leave his estate to St. Jude. Substantial evidence supported that Theodore's testamentary intent remained unchanged. Theodore made cash contributions to St. Jude during his life, including a substantial contribution during the year before his death and after he executed the 2012 wills. After Velma died, Theodore reiterated several times that he wanted his estate to go to St. Jude. Perhaps most telling, Theodore kept an "UP-DATED" copy of the October 2012 will with him, which he notated and signed on the first page while leaving the beneficiary designation unchanged. Theodore and Chip had long been estranged, and the evidence supporting Chip's claim that Theodore's testamentary disposition suddenly changed before his death is questionable[8] and contradicted by admissible evidence showing Theodore wished to remain estranged from Chip. And although we acknowledge that testimony established that Theodore came to dislike those involved in his care after a guardian had been appointed, this evidence does not support the district court's decision that Theodore changed the beneficiary of his will in favor of Chip. Finally, while Theodore's erratic behavior in the months immediately before his death provides a theory as to

[8]Notably, Hoy admitted her belief that Theodore had destroyed the will was speculation. As to Theodore's relationship with Chip, Hoy testified that an NGS employee told her that Theodore suggested the employee find Chip. Even assuming, arguendo, such testimony was not hearsay, *see* NRS 51.035; NRS 51.065; NRS 51.067, this testimony does not show that Theodore wished to change the disposition of his will to support finding revocation.

how the will may have gone missing,[9] it does not support that the will was no longer in *legal* existence at Theodore's death.

Accordingly, we conclude the evidence shows the will was in legal existence at the time of Theodore's death. We next consider whether St. Jude satisfied NRS 136.240(3)'s two-witness requirement.

Whether the witnesses satisfied NRS 136.240(3)

NRS 136.240(3) states, in addition to requiring that a will be in existence when the testator dies, that "no will may be proved as a lost or destroyed will . . . unless its provisions are clearly and distinctly proved by at least two credible witnesses."

St. Jude argues that because Chip does not dispute the contents of the October will and they were sufficiently proved at trial, this statute does not require the witnesses to independently establish the contents of the lost will and the court could consider the collective evidence to determine the will's provisions. And under the facts of this case, St. Jude contends the witnesses met NRS 136.240(3)'s requirement by having personal knowledge of either the will's provisions or its execution. Chip counters that this court has already held that the statute requires two witnesses who can independently testify to the will's contents, citing *Howard Hughes Medical Institute v. Gavin*, 96 Nev. 905, 621 P.2d 489 (1980).[10]

In *Gavin*, the petitioner sought to probate Howard Hughes' lost or destroyed will. *Id.* at 907, 621 P.2d at 490. The petitioner presented "only an unexecuted, unconfirmed draft" of the will, and evidence suggested that Hughes may have drafted at least three other wills thereafter. *Id.* The petitioner attempted to use "declarations made by Hughes" and the statements of "others with personal knowledge of the alleged will" as "substitute[s] for the second credible witness." *Id.* We disagreed that such evidence could establish the will's provisions as required by NRS 136.240(3). *Id.* We explained the testator's statements could not supply one of the credible witnesses and that the statute "require[s] that each of the two witnesses be able to testify from his or her personal knowledge" as to "the contents of the will," calling it a "strict statutory requirement[ ]." *Id.* at 908, 621 P.2d at 490 (and noting that this court rejected a similar argument in *In re Estate of Duffill*, 57 Nev. 224, 61 P.2d 985 (1936)). While we still agree with *Gavin*'s outcome, we are cognizant of important factual distinctions between that case and the present appeal that weigh against woodenly applying *Gavin*'s rationale and holding to situations where an authentic copy of the lost will is admitted into evidence.

[9]We note that because Theodore lacked testamentary capacity to revoke his will after guardianship was instituted in February 2014, his erratic behavior during the months before his death does not support that he revoked his will.

[10]Chip does not contest that Tyler and DeWalt properly witnessed and executed the October will.

The two-witness requirement "protect[s] against the probate of spurious wills," *Irvine*, 101 Nev. at 703, 710 P.2d at 1369, and in *Gavin*, substantial concerns existed as to whether the purported lost will represented Hughes' wishes: no evidence showed Hughes ever executed the will; little evidence existed to prove the will's provisions, which the parties hotly contested; and evidence suggested subsequent wills existed, 96 Nev. at 907-09, 621 P.2d at 490-91. No such concerns are present in this case. The copy of the will shows it was executed, the provisions at issue here remain unchanged from the earlier iteration of the will, and the parties do not contest the will's contents.

Other courts addressing similar situations have read the two-witness requirement more fluidly where other evidence in the case exists—such as a photocopy of the executed will—that lessens the necessity for both witnesses to testify to the will's contents, particularly where one witness drafted the will and can testify to the contents. In *In re Moramarco's Estate*, for example, a California appellate court addressed a lost will where the testator intentionally omitted his brother, Frank. 194 P.2d 740, 741-42 (Cal. Dist. Ct. App. 1948). The notary who prepared the will testified as to its provisions, and the notary's wife, who had signed as a witness but had not read the will, testified to her signature on the will. *Id.* at 742. As in NRS 136.240(3), the statute at issue in *Moramarco* required the provisions of the lost will to be "clearly and distinctly proved by at least two credible witnesses." *Id.* at 741-42 (internal quotation marks omitted). The district court probated a copy of the will over the objection of Frank's children (Frank had died), who argued the testator had revoked the will by destruction and that only one of the two witnesses could testify to its contents. *Id.* The appellate court rejected that argument, explaining that while proof of the contents from two witnesses would be "an indispensable requirement" where that testimony was the only evidence to establish the will's contents, the need for both witnesses to recall the contents lessened where a copy existed and the witnesses could identify it as a duplicate of the original will. *Id.* at 743. Thus, "[i]f it was proved to be a true copy, the terms of the will were thereby established," and under such circumstances, the will's proponent could meet the statute's requirements if the credible witnesses clearly and distinctly proved "the identity of the copy." *Id.*

We recognize that *Moramarco* is not without opposition,[11] and that historically the two-witness requirement has been construed as requiring both witnesses to have independent knowledge of the

[11]*See In re Estate of Ruben*, 36 Cal. Rptr. 752, 759 (Dist. Ct. App. 1964) (questioning *Moramarco*'s validity in light of the statutory language); *see also In re Estate of Lopes*, 199 Cal. Rptr. 425, 428 n.7 (Ct. App. 1984) (calling the two-witness requirement "unsettled" when a copy of the will is available). *Ruben*, however, represents an outdated distrust toward copy machines that is implicitly rejected in NRS Chapter 136. *Compare Ruben*, 36 Cal. Rptr. at 760

will's contents. *See* 54 Am. Jur. 3d *Proof of Facts* § 239 (1999) ("It is generally held that to be a credible witness, the witness must have independent knowledge of the contents, and an authenticated copy may not be used as a substitute for one of the required witnesses unless permitted by statute."). Yet it is equally established that exceptions to the two-witness requirement exist. *See* 95 C.J.S. *Wills* § 678 (2011) (recognizing an exception that "allow[s] proof by a correct copy of the will and the testimony of one witness");[12] A.M. Swarthout, Annotation, *Proof of contents in establishment of lost will*, 126 A.L.R. Ann. 1139, 1148 (IV)(c)(1) (1940) ("Although there is little express authority on the point, there seems to be no doubt that a properly identified copy of an alleged lost will is admissible in evidence to prove the contents thereof . . . ."). Moreover, some jurisdictions allow a copy to provide the will's contents where a witness can testify to the authenticity of the copy. *See* Ariz. Rev. Stat. Ann. § 14-3415 (2012) ("If a will is found to be valid and unrevoked and the original will is not available, its contents can be proved by a copy of the will and the testimony of at least one credible witness that the copy is a true copy of the original."); Wash. Rev. Code Ann. § 11.20.070 (1998) ("The provisions of a lost or destroyed will must be proved by clear, cogent, and convincing evidence, consisting at least in part of a witness to either its contents or the authenticity of a copy of the will."); *cf.* N.Y. Sur. Ct. Proc. Act Law § 1407 (McKinney 1995) ("A lost or destroyed will may be admitted to probate only if . . . [a]ll of the provisions of the will are clearly and distinctly proved by each of at least two credible witnesses or by a copy or draft of the will proved to be true and complete.").

Pennsylvania addressed what witnesses must do to prove a will and recognized that both witnesses need not prove a lost will's contents when a duly executed copy exists. *In re Estate of Wilner*, 142 A.3d 796 (Pa. 2016).[13] In that case, the testator Isabel Wilner left her estate to her church. *Id.* at 798. The drafting attorney and a legal secretary witnessed the will's execution. *Id.* The attorney kept a copy

(voicing concerns that "the ubiquitous duplicating machine" with "its sophisticated process" could "be used improperly" to replace the witnesses), *with* NRS 136.240(5)(b) (providing that if the will's proponent makes a prima facie showing the will was not revoked by the testator, then, in the absence of any objection, the court must accept a copy as proof of the will's terms).

[12]Consistent with the recognized exception, Arkansas allows a correct copy to stand in for one witness. *See, e.g.*, Ark. Code Ann. § 28-40-302 (1987) ("No will of any testator shall be allowed to be proved as a lost or destroyed will unless: (1) The provisions are clearly and distinctly proved by at least two (2) witnesses, a correct copy or draft being deemed equivalent to one (1) witness . . . .").

[13]*Wilner* addressed title 20, section 3132 of the Pennsylvania Consolidated Statutes, 20 Pa. Cons. Stat. Ann. § 3132 (1975), which provides that "[a]ll wills shall be proved by the oaths or affirmations of two competent witnesses." *See generally* 142 A.3d at 802-06. Although that statute does not expressly require the witnesses to prove the will's contents, the court nevertheless addressed why such proof would be unnecessary when a copy of the will was available. *Id.*

and gave the original to Wilner, who instructed her live-in caretaker to place the original in an unlocked metal box and put a copy in a safe. *Id.* Wilner's niece unexpectedly visited and pressured Wilner to move into a nursing home and to give the niece "certain family documents." *Id.* Shortly after Wilner died, her caretaker realized the will and copy were missing. *Id.* at 799. Yet Wilner never mentioned revoking the will to her caretaker or her attorney, who she continued to talk to regularly. *Id*. The district court admitted the copy to probate over the niece's objection after concluding the evidence rebutted the presumption of revocation. *Id.* at 799-800.

In the later appeal, the Pennsylvania Supreme Court concluded the witnesses must prove the validity of the signatures on the documents and prove that the will was a valid testamentary instrument. *Id.* at 802-03. In determining that both witnesses were not required to testify to the will's contents, the court observed that "in many cases it will be unlikely that anyone besides the testator and the drafting attorney is aware of the contents of the will" and that "it is unlikely that a disinterested witness—such as an attorney's secretary or paralegal—would be able to recall the document's contents in any event given the amount of time which may pass between execution and death and the large number of wills such persons may witness over time." *Id.* at 803. The court explained that under circumstances such as those present in *Wilner*, where a copy of the will existed, "there is no need for such knowledge by the witnesses for them to fulfill their role in confirming the validity of the testator's signature." *Id.*

We find the reasoning in *Wilner* and *Moramarco* persuasive. We recognize the plain language of NRS 136.240(3) requires the will's provisions be "clearly and distinctly proved by at least two credible witnesses." It follows that in situations where no copy of the will exists and the only proof of the will's contents comes from witness testimony, the two witnesses must each have personal knowledge of the will's contents. *See Gavin*, 96 Nev. at 908, 621 P.2d at 490.[14] However, construing NRS 136.240(3)'s two-witness requirement as necessarily requiring both witnesses to testify to the will's contents in cases where an accurate copy of the will exists and the drafting attorney can testify to the contents would create an absurd result of putting an unnecessary and onerous burden on the second witness and the petitioner. *See State, Private Investigator's Licensing Bd. v. Tatalovich*, 129 Nev. 588, 590, 309 P.3d 43, 44 (2013) (noting we avoid interpretations that would lead to absurd results). When an accurate copy of the will is available, a more liberal construction comports with NRS 132.010 and the legislative history discussed

[14]Again, we note the facts surrounding the lost will in *Gavin* differ significantly from the lost will in the present case. Notably, in *Gavin*, there was no copy of an executed will, there was evidence of at least three other subsequent wills, and the petitioner sought to use the testator's declarations and statements from the testator's deceased attorneys to establish the will's contents. 96 Nev. at 907, 621 P.2d at 490.

above demonstrating that the revisions to the lost wills statute were "designed to make it easier to prove a lost will where it is obvious it was not intended to be revoked." Hearing on S.B. 277 Before the Senate Judiciary Comm., 75th Leg. (Nev., Mar. 24, 2009) (testimony of Mark Solomon, Chair, Probate & Trusts Leg. Subcomm.).

As pertinent here, we conclude that where an accurate copy of the will exists and one of the witnesses can testify to the contents, the second witness may satisfy NRS 136.240(3)'s two-witness requirement by testifying to the testator's signature on the copy. The second witness's testimony that the copy contains a fair and accurate depiction of the testator's signature on the original will, combined circumstantially with the testimony of the other witness and the existence of an accurate copy, confirms the witness was present when the testator executed the will and proves the second witness's knowledge of that will. This in turn authenticates the document and proves the will's provisions for purposes of the statute.

Here, Chip does not contest the will's contents or argue the copy is inaccurate, and the record demonstrates the following: Hoy produced a copy of the October 2012 will, and Theodore's estate attorney, Tyler, produced the original June 2012 will, which is identical in substance to the October will. Tyler also testified to the will's contents. This evidence proves the October will's contents. The district court found that Tyler had a "distinct recollection of the terms of" the October will and provided testimony sufficient to satisfy NRS 136.240(3), and the record supports this finding. The second witness, DeWalt, provided an affidavit stating she had witnessed the will's execution by Theodore and signed the will, and at the trial she affirmed her signature on the copy and testified to the will's execution.[15] Based on the foregoing, we conclude that Tyler and DeWalt satisfied NRS 136.240(3)'s two-witness requirement in proving the will's provisions and the district court erred by concluding St. Jude failed to meet the statutory requirements to prove the lost will.

CONCLUSION

NRS 136.240(3) allows a lost will to be probated where the will was in legal existence at the time of the testator's death and at least two credible witnesses clearly and distinctly prove the will's provisions. Here, the evidence adduced at trial showed the testator's disposition toward the will's beneficiary remained unchanged, supporting that it was in legal existence at the testator's death. An accurate copy of the will existed. The drafting attorney testified to the con-

[15]Although at trial DeWalt could not recall the date on which she witnessed the will's execution, she verified her signature on the October will, thereby ultimately authenticating that copy. Moreover, her failure to recall the date does not create a credibility problem where she witnessed both the June and October wills and signed both as a declarant, and the provisions at issue here are identical in both wills.

tents of the will and provided an affidavit stating that she signed the will and that the testator signed and executed the will. The attorney's assistant, who acted as the second declarant, likewise provided an affidavit stating she was present at the will's execution, signed the will, and watched the testator sign the will, and at trial she testified to witnessing the will's execution and to her signature on the copy. Under these facts, NRS 136.240(3)'s two-witness requirement was satisfied. We therefore reverse and remand with instructions for the district court to probate the lost will.

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

SATICOY BAY LLC SERIES 133 McLAREN, Appellant, *v.* GREEN TREE SERVICING LLC; THE BANK OF NEW YORK MELLON, fka THE BANK OF NEW YORK, as Successor Trustee to JPMORGAN CHASE BANK, N.A., as Trustee for the CERTIFICATEHOLDERS OF CWABS MASTER TRUST, REVOLVING HOME EQUITY LOAN ASSET BACKED NOTES, SERIES 2004-T; and NATIONAL DEFAULT SERVICING CORPORATION, Respondents.

No. 78661

December 31, 2020 478 P.3d 376

Appeal from a district court judgment in a quiet title action. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Affirmed.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn* and *Adam R. Trippiedi*, Henderson, for Appellant.

Akerman LLP and *Scott R. Lachman, Ariel E. Stern*, and *Natalie L. Winslow*, Las Vegas, for Respondents.

Fennemore Craig P.C. and *Leslie Bryan Hart*, Reno, for Amicus Curiae Federal Housing Finance Agency.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

In this appeal, we consider the effect of conclusive deed recitals pursuant to NRS 116.31166 on title disputes after a homeowners' association (HOA) lien foreclosure sale. In particular, appellant Sa-

ticoy Bay LLC Series 133 McLaren (Saticoy Bay) presents the following issue for determination: When a party makes a valid pre-sale tender as to the superpriority portion of an HOA's lien, do recitals in a foreclosure deed stating that the HOA's lien was in default preclude the district court from granting equitable relief? As a threshold matter, we clarify that a valid pre-sale superpriority tender preserves the original deed of trust by operation of law. Thus, we reject Saticoy Bay's suggestion that when the district court finds that a valid tender preserved the deed of trust, it is granting equitable relief. We further hold that the district court may find that a valid pre-sale tender preserved the original deed of trust, despite NRS 116.31166 conclusive recitals of default in a foreclosure deed. Finally, we reject Saticoy Bay's remaining contentions that the district court erred in finding that the tender at issue here was valid and preserved the original deed of trust. We therefore affirm the judgment of the district court.

BACKGROUND

The original homeowners of 133 McLaren Street in Henderson (the property) executed a promissory note, secured by a deed of trust on the property, in 2004. That deed of trust was assigned in 2013 to respondent Green Tree Servicing LLC (Green Tree). The original homeowners became delinquent on their HOA assessments. After this default, Nevada Association Services, Inc. (NAS) recorded a notice of delinquent assessment lien against the property in January 2011 and a notice of default and election to sell in September 2011, on behalf of the HOA.

In October 2011, Miles, Bauer, Bergstrom & Winters, LLP (Miles Bauer), acting as agent for the deed of trust beneficiary's loan servicer, sent a letter to NAS. Miles Bauer requested that NAS provide the status of the foreclosure proceedings and indicated that the servicer intended to satisfy the superpriority portion of the lien. NAS did not respond. In December 2011, Miles Bauer sent another letter and a check for $276.75 to NAS. The letter stated, in pertinent part: "This is a non-negotiable amount and any endorsement of said cashier's check on your part, whether express or implied, will be strictly construed as an unconditional acceptance on your part of the facts stated herein and express agreement that [the servicer]'s financial obligations toward the HOA in regards to the real property located at 133 McLaren Street have now been 'paid in full.'"[1] NAS refused the payment.

The HOA proceeded with the foreclosure sale, after which the property was sold to Saticoy Bay. The foreclosure deed convey-

[1]While Miles Bauer's letter stated that it was sending a cashier's check, it was a standard check. Green Tree's predecessor arrived at this amount by using information it had on file for a different property belonging to the same HOA. Whether this amount was sufficient to cover the superpriority portion of the lien is not disputed in this appeal.

ing the property to Saticoy Bay contained recitals pursuant to NRS 116.31166, including that "[d]efault occurred as set forth in a Notice of Default and Election to Sell . . . which was recorded in the office of the recorder of [Clark County]."

Saticoy Bay brought an action to quiet title, and Green Tree counterclaimed for the same. Following a bench trial, the district court entered judgment for Green Tree, finding that the first deed of trust had not been extinguished because there had been a valid tender. Saticoy Bay appealed, and the Federal Housing Finance Agency filed an amicus brief supporting Green Tree's position. The court of appeals affirmed. We granted Saticoy Bay's subsequent petition for review under NRAP 40B, and we now issue this opinion addressing its arguments.

STANDARD OF REVIEW

Findings of fact are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence. *Sowers v. Forest Hills Subdiv.*, 129 Nev. 99, 105, 294 P.3d 427, 432 (2013). Conclusions of law are reviewed de novo. *Dewey v. Redev. Agency of Reno*, 119 Nev. 87, 93, 64 P.3d 1070, 1075 (2003).

DISCUSSION

Saticoy Bay argues that the district court erred in granting what it characterizes as equitable relief because the recitals in the foreclosure deed conclusively prove that the superpriority portion of the HOA's lien was in default at the time of the sale. In addition, Saticoy Bay makes three other arguments in support of its contention that the district court erred in finding that a valid tender by Green Tree's predecessor prevented the deed of trust from being extinguished by the HOA foreclosure sale.

Conclusive recitals of default in a foreclosure deed do not prevent a valid pre-sale tender from preserving a deed of trust

Saticoy Bay argues that the tender by Green Tree's predecessor could not preserve the original deed of trust because the foreclosure deed contained recitals that are conclusive according to NRS 116.31166. We disagree.

As it read at the time of the underlying events of this action, NRS 116.31166(1) (2013) stated that certain recitals in a deed pursuant to NRS 116.31164 "are conclusive proof of the matters recited." The enumerated recitals are "(a) [d]efault, the mailing of the notice of delinquent assessment, and the recording of the notice of default and election to sell; (b) [t]he elapsing of the 90 days; and (c) [t]he giving of notice of sale." *Id*.

Nothing in the text of NRS 116.31166 rules out the possibility, however, that a default can subsequently be deemed to have been

cured by a valid pre-sale tender. Indeed, this court has defined a tender as a payment that "operates to discharge a lien *or cure a default*." *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 606, 427 P.3d 113, 117 (2018) (emphasis added).

Moreover, we have never accepted the proposition that NRS 116.31166 recitals are dispositive of every conceivable issue in a quiet title action. For instance, in *Shadow Wood Homeowners Association v. New York Community Bancorp, Inc.*, this court held that the district court has equitable power to invalidate a foreclosure sale despite such recitals. 132 Nev. 49, 57-60, 366 P.3d 1105, 1110-12 (2016). There, we declined to give NRS 116.31166 a "breathtakingly broad" and unprecedented reading that would allow a deed recital to "conclusively establish[ ] a default justifying foreclosure when, in fact, no default occurred." *Id*. at 57, 366 P.3d at 1110 (internal quotation marks omitted). While that portion of *Shadow Wood* was arguably dictum, our reasoning was sound, and we adopt it here. Thus, we now expressly hold that NRS 116.31166's deed recitals do not "render[ ] such deeds unassailable." *Id*. at 51, 366 P.3d at 1107.

Accordingly, deed recitals pursuant to NRS 116.31166 do not insulate the circumstances attested to in the recitals from review by courts in appropriate cases. Applying the foregoing principles, we conclude that the district court properly found that the tender by Green Tree's predecessor preserved the original deed of trust such that Saticoy Bay took the property subject to Green Tree's interest, notwithstanding the recital of default in the foreclosure deed. Stated another way, the recital of default could not prevent the preservation of the deed of trust when, in fact, a valid tender cured the default.

Further, we reject Saticoy Bay's argument that the district court was required to weigh the equities before finding a valid tender. While a court's authority to look beyond a foreclosure deed in a quiet title action is an inherent equitable power, *see Shadow Wood*, 132 Nev. at 57, 366 P.3d at 1111, a valid tender cures a default "*by operation of law*"—that is, without regard to equitable considerations. *See Bank of Am.*, 134 Nev. at 610, 427 P.3d at 120 (emphasis added).

The valid tender by Green Tree's predecessor preserved the original deed of trust

Saticoy Bay next claims that it did not take title subject to the first deed of trust because (1) the tender of the superpriority portion of the HOA's lien was improperly conditional and therefore invalid; (2) NAS had a good-faith basis for rejecting the tender; and (3) any tender would merely assign the superpriority lien to the servicer, not extinguish it. We disagree and uphold the district court's finding that a valid tender preserved the first deed of trust.

In *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, this court concluded that "a first deed of trust holder's unconditional ten-

der of the superpriority amount due results in the buyer at the foreclosure taking the property subject to the deed of trust." 134 Nev. at 605, 427 P.3d at 116. A conditional tender is valid so long as the only conditions are ones "on which the tendering party has a right to insist." *Id*. at 607, 427 P.3d at 118.

This case is controlled by *Bank of America*. Here, as in *Bank of America*, Miles Bauer tendered a payment for nine months of HOA assessments, and the HOA rejected this tender. The letter from Miles Bauer contained identical language as the letter in *Bank of America*, which this court found to be not impermissibly conditional, but rather containing conditions the servicer could insist upon as of right. *See id.* at 607-08, 427 P.3d at 118. As such, under *Bank of America*, the tender in this matter was not improperly conditional.

Saticoy Bay's argument that NAS had a good-faith basis for rejecting the tender likewise fails. An alleged good-faith basis for rejecting a timely, complete tender is not relevant because, as noted above, the tender itself cures the default "by operation of law." *See id.* at 610, 427 P.3d at 120.

Finally, we reject Saticoy Bay's contention that a tender of payment for a superpriority lien does not *satisfy* the lien, but rather *assigns* the lien to the party proffering the tender. Under this novel argument, the superpriority foreclosure sale was sufficient to extinguish the first deed of trust because a superpriority lien was still in existence—albeit held by Green Tree's predecessor, the same party that held the deed of trust. This argument fails under *Bank of America*, which explicitly held that "[t]endering the superpriority portion of an HOA lien does not create, alienate, *assign*, or surrender an interest in land." *Id*. at 609, 427 P.3d at 119 (emphasis added). Rather, when the holder of a deed of trust or its agent tenders payment, we explained, it "*preserves*" its interest in the property. *Id.* (emphasis in original).[2]

CONCLUSION

Having concluded that a valid tender cured the default as to the superpriority portion of the HOA's lien, we affirm the district court's judgment that Saticoy Bay took title subject to Green Tree's first deed of trust.

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

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[2]Green Tree also raises an argument under the Federal Foreclosure Bar. Because we hold that Green Tree's deed of trust was preserved on other grounds, we need not discuss this alternative argument.