APCO CONSTRUCTION, INC., a Nevada Corporation; and SAFECO INSURANCE COMPANY OF AMERICA, Appellants, *v.* HELIX ELECTRIC OF NEVADA, LLC, a Nevada Limited Liability Company, Respondent.

No. 80177

May 5, 2022 509 P.3d 49

Appeal from a district court judgment after a bench trial in a contract action. Eighth Judicial District Court, Clark County; Elizabeth Gonzalez, Judge.

Affirmed.

[Rehearing denied June 3, 2022]

[En banc reconsideration denied July 1, 2022]

Fennemore Craig, P.C., and *Christopher H. Byrd*, Las Vegas; *Fennemore Craig, P.C.*, and *John Randall Jefferies*, Phoenix, Arizona, for Appellants.

Peel Brimley LLP and *Cary B. Domina* and *Ronald J. Cox*, Henderson, for Respondent.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Silver, J.:

The covenant of good faith and fair dealing "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017) (internal quotation marks omitted). In this appeal, we consider whether the district court properly applied the covenant of good faith and fair dealing when it awarded delay damages to a subcontractor. We also, for the first time, interpret NRS 338.490 and determine whether the subcontractor waived its right to receive delay damages by signing a waiver and release to receive its retention. We conclude that the district court properly determined the covenant of good faith and fair dealing applies here, the contractor breached the covenant, and the subcontractor did not waive its delay claims under NRS 338.490.

FACTS AND PROCEDURAL HISTORY

The City of North Las Vegas (CNLV) contracted with appellant APCO Construction, Inc.,[1] for a construction project. Subcontractor

[1]We refer to appellants APCO and Safeco Insurance Company of America collectively as APCO.

and respondent, Helix Electric, Inc., contracted with APCO for the project's electrical work. The project was originally scheduled to be completed on January 9, 2013, but the project was not substantially completed until October 25, 2013.

After the original project completion date passed, Helix notified APCO that it reserved the right to receive payment for the additional costs incurred due to the delay. In response, APCO indicated that Helix must timely pursue reimbursement for those costs and provide all related documentation to APCO, so that APCO could then submit Helix's claim to CNLV. Helix thereafter sent APCO a list of delay costs totaling $72,960. Helix later submitted a revised claim for $102,000 based on the calculation of $640 per day for 32 weeks. APCO created a change order request for Helix's $102,000 delay claim and submitted it to CNLV. APCO also told Helix it was in the process of preparing a time impact analysis, which would "open the door for Helix" to present its case.

CNLV rejected the change order request because CNLV did not have a contract with Helix. APCO informed Helix it needed backup documentation to reverse CNLV's rejection but did not tell Helix that CNLV rejected the claim on the basis that CNLV did not have a contract with Helix. In fact, at trial, the CNLV construction manager testified that providing backup information would not have changed CNLV's decision "because [the information] still would be coming from a contractor that does not have a contract with the city." Moreover, CNLV expected APCO to include its subcontractors' claims in its own claim for general conditions, rather than submit the subcontractors' claims separately. On October 2, 2013, APCO settled its own $1,090,066 delay claim with CNLV for $560,724. As part of the settlement, APCO agreed to forgo any claim, present or future, that may occur on the project. The record shows APCO did not notify Helix that it had settled with CNLV or that CNLV had paid APCO's delay claim.

On October 18, 2013, Helix also billed APCO for its retention payment of $105,677 and included a conditional waiver and release upon final payment that indicated a disputed-claim amount of "zero." On November 5, 2013, APCO submitted a revised change order to CNLV seeking a total of $111,847 for Helix's delay claim, which CNLV again rejected. On November 13, 2013, Helix submitted another claim to APCO in the amount of $26,304, accounting for the extended overhead costs for the months of September and October. APCO submitted Helix's claim to CNLV, which CNLV rejected on grounds that CNLV did not have a contract with Helix and, moreover, CNLV had already settled with APCO.

In October 2014, APCO sent a copy of a check in the amount of Helix's retention and an updated unconditional waiver for Helix to

sign upon final payment. The waiver—which Helix did not sign—included the retention amount, and Helix added the delay amount to the payment line next to the retention amount. Helix did not list the delay claim as a disputed claim on the waiver, but Helix's president emailed APCO's contract manager expressing concern about Helix's delay claim. Helix's senior vice president also wrote to APCO, explaining that Helix reserved its rights to its delay claim. Helix's president also emailed a promissory note to APCO's contract manager laying out a payment plan for Helix's delay costs. Ultimately, Helix claimed APCO owed $134,724.68 for Helix's delay costs.

APCO did not pay Helix's delay costs, and Helix filed the underlying complaint. The district court ruled in favor of Helix after a three-day bench trial, finding that APCO breached the covenant of good faith and fair dealing by not including Helix's delay damages claim as part of APCO's own claim to CNLV and thereafter settling its own claim with CNLV without notifying Helix. Notably, the district court found that CNLV rejected Helix's claims because APCO did not include Helix's claim under its own claim and that APCO waived and released Helix's claim by settling with CNLV. The court further found that under NRS 338.490, the waiver Helix signed applied to retention only and not to Helix's claim for delay damages. The district court awarded Helix $43,992.39 in delay damages and $1,960.85 in interest along with attorney fees. APCO appeals.

DISCUSSION

The primary issue before us on appeal is whether the district court erroneously found Helix was entitled to damages. In addressing this question, we consider, first, whether Helix properly received delay damages pursuant to the covenant of good faith and fair dealing and the subcontract and, second, whether the conditional release and waiver Helix signed precludes it from receiving delay damages from APCO.

We give deference to the district court's factual findings and will uphold them so long as they are not clearly erroneous and are supported by substantial evidence. *Weddell v. H2O, Inc.*, 128 Nev. 94, 101, 271 P.3d 743, 748 (2012). "Substantial evidence is evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.* (quoting *Whitemaine v. Aniskovich*, 124 Nev. 302, 308, 183 P.3d 137, 141 (2008)). We review issues of statutory and contractual interpretation de novo. *Id.*

The covenant of good faith and fair dealing allows for Helix to receive delay damages

APCO argues that the district court erred by applying the covenant of good faith and fair dealing here because APCO and Helix's

subcontract limits Helix's remedy to an extension of time and the court found that this provision was enforceable. APCO further argues that by applying the covenant of good faith and fair dealing, the district court effectively modified or superseded the subcontract's provisions and frustrated the parties' reasonable expectations under the contract for monetary damages. APCO contends that substantial evidence does not support the district court's finding that it breached the covenant of good faith and fair dealing.[2] We disagree with APCO on all points.

We interpret contracts by "discern[ing] the intent of the contracting parties" and employing "[t]raditional rules of contract interpretation." *Am. First Fed. Credit Union v. Soro*, 131 Nev. 737, 739, 359 P.3d 105, 106 (2015) (quoting *Davis v. Beling*, 128 Nev. 301, 321, 278 P.3d 501, 515 (2012)). If "the language of the contract is clear and unambiguous," we will enforce the contract as written. *Id.* (internal quotation marks omitted).

"[A]n implied covenant of good faith and fair dealing exists in *all* contracts." *A.C. Shaw Constr., Inc. v. Washoe County*, 105 Nev. 913, 914, 784 P.2d 9, 10 (1989). A plaintiff can recover damages for breach of the covenant of good faith and fair dealing "[e]ven if a defendant does not breach the express terms of a contract." *State, Dep't of Transp. v. Eighth Judicial Dist. Court*, 133 Nev. 549, 555, 402 P.3d 677, 683 (2017). The covenant of good faith and fair dealing "prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Id.* (quoting *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007)). "When one party performs a contract in a manner that is unfaithful to the purpose of the contract and the justified expectations of the other party are thus denied, damages may be awarded against the party who does not act in good faith." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 234, 808 P.2d 919, 923 (1991). Reasonable expectations are "determined by the various factors and special circumstances that shape these expectations." *Id.* at 234, 808 P.2d at 924.

As an initial matter, we conclude substantial evidence supports the district court's finding that APCO breached the covenant of good faith and fair dealing. When APCO settled with CNLV, APCO acted contrary to the spirit and purpose of its subcontract with Helix by keeping its claim separate from Helix's claim and failing to preserve Helix's claim where CNLV would only accept claims

[2]APCO also argues that Helix failed to prove the delay increased its costs and damaged Helix and that Helix is not entitled to attorney fees. After carefully reviewing the record, we conclude substantial evidence supports the district court's finding that Helix suffered damages from the delay. And we are not persuaded by APCO's arguments against the attorney fees award.

from APCO and not from Helix.[3] APCO entered into a settlement agreement with CNLV without Helix's knowledge and waived all claims arising from the project delay, including Helix's delay costs. Moreover, APCO misrepresented to Helix the reasons for CNLV's rejection of Helix's claim, telling Helix the rejection was due to a lack of backup information when CNLV rejected the claim because it did not have a contract with Helix. APCO also resubmitted Helix's delay claim after Helix provided APCO with more backup information despite already knowing CNLV rejected Helix's claim for a different reason. Accordingly, the district court did not err in finding APCO breached the covenant of good faith and fair dealing.

We next address whether the APCO-Helix subcontract prohibited the district court from finding APCO breached the covenant and is liable for Helix's delay damages. Courts "should not rewrite contract provisions that are otherwise unambiguous . . . [ ]or . . . attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations." *Senteney v. Fire Ins. Exch.*, 101 Nev. 654, 656-57, 707 P.2d 1149, 1150-51 (1985) (deciding a person in a motor vehicle accident could not recover from the motorcycle owner's homeowner insurance company where the homeowner's policy expressly excluded coverage for motor vehicle incidents).

The language in the APCO-Helix subcontract, read as a whole, supports the district court's decision. We acknowledge, as APCO points out, that under section 6.5 of the subcontract, Helix's exclusive remedy for most delays was an extension of time. Nevertheless, section 6.3 provides an exception wherein Helix may obtain extra compensation from APCO for delays if "specifically agreed to in writing by [APCO] and [CNLV] and paid for by [CNLV]." Here, Helix notified APCO that it reserved the right to receive payment for the additional costs incurred due to the delay, and in response, APCO agreed to submit Helix's claim to CNLV. But APCO did not properly submit Helix's claim to CNLV and thereby prevented Helix from receiving extra compensation under section 6.3. Further, section 6.1 of the addendum requires APCO to make available to Helix "all information . . . that affects [Helix's] ability to meet its obligations under the subcontract . . . [including] information relating to . . . delays [and] modifications to [APCO's] agreement with [CNLV] . . . ." Yet the record demonstrates that APCO misled Helix into believing CNLV's denial was based on the lack of detail in Helix's claims. Therefore, APCO performed the subcontract in a

[3]APCO's reliance on *Nelson v. Heer* is misplaced because that case dealt with a seller's duty to disclose certain conditions on the property and that duty was limited by statute. 123 Nev. 217, 227, 163 P.3d 420, 427 (2007). Here, APCO does not point to any statute that would similarly limit its duty as the contractor to take steps for its subcontractors to receive payment.

manner that was unfaithful to its purpose, and the district court did not err by applying the covenant of good faith and fair dealing.

The conditional release and waiver Helix signed does not preclude it from receiving delay damages from APCO

APCO argues the district court misapplied NRS 338.490 and erred by not enforcing the release and waiver Helix signed to receive its retention payment.[4] We disagree.

If the meaning of a statute is clear on its face, then this court does not look beyond the statute's language. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). NRS 338.490 provides,

> Any release or waiver required to be provided by a contractor, subcontractor or supplier to receive a progress payment or retainage payment must be:
>
> 1. Conditional for the purpose of receiving payment and shall be deemed to become unconditional upon the receipt of the money due to the contractor, subcontractor or supplier; and
>
> 2. *Limited to claims related to the invoiced amount* of the labor, materials, equipment or supplies *that are the subject of the progress bill or retainage bill*.

(Emphases added.)

APCO does not dispute that this statute applies; instead, it argues the release, which covered the "final payment to the undersigned for all work" on the project, confirmed that no outstanding claims remained and, therefore, Helix was barred from pursuing its later claims. The plain language of NRS 338.490, however, limits any waiver or release to the claimed costs that are the subject of the progress or retainage bill, and we must enforce the statute as written. *See In re George J.*, 128 Nev. 345, 349, 279 P.3d 187, 190 (2012). Here, the subject of the release is the retention payment for the work completed prior to the delay costs, and the release is therefore limited to that payment. Moreover, Helix has never received its delay costs, so it follows that APCO never withheld a retention amount from those costs and Helix could therefore pursue a claim for those delay costs that were not contemplated by the waiver. Accordingly, we conclude that under NRS 338.490, the waiver Helix signed does not preclude it from receiving delay damages from APCO.[5]

[4]We are not persuaded by APCO's argument that Helix waived its delay claim where the record shows Helix submitted change order requests to APCO twice for its delay costs, provided more backup information for those costs upon APCO's request, and sent emails and letters to APCO confirming its intent to reserve the right to seek delay damages.

[5]We have carefully considered the remaining arguments and conclude they are without merit.

CONCLUSION

We affirm the district court's decision. The covenant of good faith and fair dealing applies, and APCO breached the covenant of good faith and fair dealing by misrepresenting the reasons for CNLV's rejection of Helix's delay costs and by settling with CNLV, which effectively waived Helix's claims. And Helix did not waive its delay claims by signing a conditional waiver because NRS 338.490 limits that waiver to claims concerning the subject of the retainage bill.

Cadish and Pickering, JJ., concur.

EFREN AGUIRRE, JR., Appellant, *v.* ELKO COUNTY SHERIFF'S OFFICE, Respondent.

No. 82445

May 5, 2022 508 P.3d 886

Appeal from a district court judgment in a forfeiture action. Fourth Judicial District Court, Elko County; Nancy Porter, Judge.

Reversed.

Gerber Law Offices, LLP, and *Zachary A. Gerber* and *Travis W. Gerber*, Elko, for Appellant.

Tyler J. Ingram, District Attorney, and *Rand J. Greenburg*, Deputy District Attorney, Elko County, for Respondent.

Before the Supreme Court, Silver, Cadish, and Pickering, JJ.

OPINION

By the Court, Cadish, J.:

In this appeal, we primarily consider whether Nevada's homestead exemption protects real property from civil forfeiture and whether an incarcerated individual who records a homestead declaration while serving his or her prison sentence qualifies as a bona fide resident of the homestead property. In the proceeding below, the district court determined that the homestead exemption may, as a general matter, protect against civil forfeiture. The court found that the appellant did not substantially comply with the residency requirement of the homestead exemption under NRS 115.020, however, because he made his declarations of homestead while incarcerated. Accordingly, the district court entered a judgment of forfeiture against appellant, from which this appeal was taken.

As to the homestead exemption's reach, we hold that there is no forfeiture exception to the homestead exemption and public policy does not support the creation of such an exception. Regarding bona fide residence status, we hold that incarcerated individuals may still be deemed residents for purposes of the homestead exemption under NRS 115.020. Applying these standards, we conclude that appellant's homestead declaration substantially complied with NRS 115.020, and the district court therefore erred when it entered a judgment of forfeiture. Accordingly, we reverse.

FACTS AND PROCEDURAL HISTORY

In 2016, appellant Efren Aguirre, Jr.'s parents conveyed to him a home and real property located in Spring Creek, Nevada (the

Property). In October 2017, Aguirre was arrested for trafficking controlled substances after a search of the Property revealed over 80 grams of heroin. The State subsequently charged Aguirre with two counts of Trafficking a Schedule I Controlled Substance. On November 2, 2017, respondent Elko County Sheriff's Office filed a complaint for forfeiture of the Property, the proceedings for which were stayed pending resolution of Aguirre's criminal case. On November 21, 2017, while in jail, Aguirre recorded his initial Declaration of Homestead, which stated his intent to claim and use the Property as a homestead. In August 2018, the court accepted Aguirre's guilty plea to one count of Trafficking a Schedule I Controlled Substance. In October 2018, the court entered a judgment of conviction, sentencing Aguirre to a term of incarceration of 48 to 120 months and imposing a fine of $100.

In December 2018, while incarcerated, Aguirre leased the Property to a third party on a week-to-week basis. The lease agreement specifically acknowledged that Aguirre claimed and intended that the Property remain his homestead and that he intended to occupy the Property after his release from prison.

In March 2020, the Sheriff moved for summary judgment in the civil forfeiture action, arguing that Aguirre's declaration of homestead was invalid because he did not reside at the Property when he recorded it and all right, title, and interest in the Property had vested in the Sheriff before Aguirre claimed a homestead exemption. Aguirre opposed the motion, arguing that under Article 4, Section 30 of the Nevada Constitution, and NRS 115.010(1), his recorded homestead declaration protected the Property from forfeiture. He asserted that because he recorded his homestead declaration before any final process in the forfeiture action, his declaration preempts forfeiture. Recognizing that NRS 115.010(5) excludes property held under allodial title from protection from forfeiture, Aguirre argued that by specifically excluding that type of title, the Legislature intended for the homestead protections to preempt forfeiture of real property held under other forms of title, including his Property. Aguirre also moved for summary judgment in his favor on the same grounds.

In May 2020, while in prison and while a decision on the parties' summary judgment motions was pending, Aguirre recorded an amended Declaration of Homestead. In July 2020, following a hearing, the district court denied both summary judgment motions, concluding, as relevant here, that (1) on its face, NRS 115.010(1)'s homestead protections appear to apply to the Property, as neither party alleged that Aguirre holds allodial title to the Property such that it would not be afforded protection under NRS 115.010(5); (2) other states have found that a homestead exemption protects covered properties from forfeiture; and (3) "[t]he Nevada Constitution and Nevada Revised Statutes have expressly stated the

exceptions to the homestead exemption," and "[f]orfeiture is not one of them." The district court determined that Aguirre's homestead declaration was timely because it was recorded before execution of sale, but issues of fact remained as to whether his declaration substantially complied with NRS 115.020(2)'s requirements for a valid homestead declaration, particularly including whether he was a bona fide resident of the Property when he recorded the declaration.

In September 2020, after conducting a bench trial and considering post-trial briefing, the district court concluded that Aguirre did not "substantially comply" with NRS 115.010's requirements for a homestead exemption because he filed his declarations of homestead while incarcerated and, thus, did not have actual possession of the Property for homesteading purposes. The court further concluded that forfeiture was proper because Aguirre used the Property to commit a drug offense. In so concluding, the court rejected Aguirre's claim that forfeiture of the Property valued at roughly $298,000 violated the Eighth Amendment's Excessive Fines Clause. The court reasoned that a forfeiture of nearly three times the maximum $100,000 fine allowed by statute when Aguirre was convicted did not per se violate the Eighth Amendment and, considering the gravity of Aguirre's offense, the fine was not excessive. Accordingly, the district court awarded the Sheriff a judgment of forfeiture. Aguirre appeals.

DISCUSSION

A valid homestead is exempt from civil forfeiture

In denying summary judgment, the district court determined that forfeiture is not one of the exceptions to the homestead protections under either the Nevada Constitution or the Nevada Revised Statutes, such that the Property was not subject to forfeiture if Aguirre met the requirements for a valid homestead declaration. Although the district court ultimately determined that Aguirre did not qualify as a "householder," i.e., the occupier of the Property in actual possession of it, and that Aguirre consequently could not validly declare a homestead exemption, we conclude that the court correctly determined that a valid homestead is exempt from forfeiture.

The Nevada Constitution provides that "[a] homestead as provided by law, shall be exempt from forced sale under any process of law." Nev. Const. art. 4, § 30. The Constitution creates two specific exceptions to the homestead exemption, namely, that "no property shall be exempt from sale for [1] taxes or [2] for the payment of obligations contracted for the purchase of said premises, or for the erection of improvements thereon." *Id.* NRS 115.010(1) codifies the general rule exempting homesteads from any "forced sale on execution or any final process from any court," while NRS 115.010(3) codifies the constitutional exceptions to the homestead exemption.

The Sheriff argues on appeal that even if Aguirre's homestead declaration were valid, the Property would nevertheless be subject to forfeiture because Aguirre used the Property in trafficking several Schedule I substances, as evidenced by the drugs found in the search of the Property. While acknowledging that the Nevada Constitution and NRS 115.010(3) establish specific exceptions that are inapplicable here, the Sheriff, relying on *Breedlove v. Breedlove*, 100 Nev. 606, 691 P.2d 426 (1984), and *Maki v. Chong*, 119 Nev. 390, 75 P.3d 376 (2003), asserts that public policy warrants creating a forfeiture exception to the homestead exemption.[1] We disagree, as neither *Breedlove* nor *Maki* supports creating a forfeiture exception to the homestead exemption and such an exception would thwart the goal of the homestead exemption.

With the understanding that Nevada's "constitutional and statutory provisions relating to homesteads should be liberally construed" and require only substantial compliance, *McGill v. Lewis*, 61 Nev. 28, 40, 116 P.2d 581, 583 (1941), and that "[t]he law does not favor forfeitures and statutes imposing them must be strictly construed," *Wilshire Ins. Co. v. State*, 94 Nev. 546, 550, 582 P.2d 372, 375 (1978), we turn to *Breedlove* and *Maki*. In *Breedlove*, the homesteader invoked the homestead exemption in an attempt to avoid paying a child-support judgment, 100 Nev. at 607, 691 P.2d at 426, a tactic which clearly contravened the purpose of the homestead exemption, *see Jackman v. Nance*, 109 Nev. 716, 718, 857 P.2d 7, 8 (1993) ("The purpose of the homestead exemption is *to preserve the family home* despite financial distress, insolvency or calamitous circumstances, and *to strengthen family security and stability for the benefit of the family, its individual members*, and the community and state in which the family resides." (emphases added)). Moreover, the homesteader in *Breedlove* consistently acted in bad faith to avoid paying child support, most notably by creating a fraudulent trust to attempt to protect his home against his ex-wife's attempts to collect on the child-support judgment. 100 Nev. at 607, 691 P.2d at 426.

Here, creating an exception would result in Aguirre's family losing their home, which would conflict with the purpose of the homestead exemption by rendering the declarant and his family homeless. *See Jackman*, 109 Nev. at 718, 857 P.2d at 8. The Sheriff focuses on the harm that drug dealing inflicts on the community and asserts that the public policy behind the homestead exemption is not furthered by its application here. While we certainly do not condone such conduct or discount its detrimental impact, the Sheriff's

[1]At oral argument, the Sheriff disclaimed any textual basis for creating a forfeiture exception to the homestead exemption and instead specifically asserted that public policy alone warranted creating a forfeiture exception. Thus, we address only whether public policy warrants creating a forfeiture exception to the homestead exemption, not whether any statute provides a basis for creating such an exception.

argument overlooks that the purpose of the homestead is to protect families against homelessness, *see id.*; *see also Maroun v. Deutsche Bank Nat'l Tr. Co.*, 109 A.3d 203, 207 (N.H. 2014) ("The exemption protects the family from destitution . . . ."), and to protect communities from the harm caused by homelessness, *see Redmond v. Kester*, 159 P.3d 1004, 1007 (Kan. 2007) ("The homestead exemption was established for the benefit of the family and society to protect the family from destitution, and society from the danger of her citizens becoming paupers." (internal quotation marks omitted)); *see also Maroun*, 109 A.3d at 207. Moreover, unlike the homesteader in *Breedlove*, there is no evidence that Aguirre acted in bad faith in recording a homestead declaration.

Similar to *Breedlove*, *Maki* concluded that "[u]nder equitable lien principles, the homestead exemption is inapplicable when the proceeds used to purchase real property can be traced directly to funds obtained through fraud or similar tortious conduct." 119 Nev. at 394, 75 P.3d at 379. There, the appellant signed a limited power of attorney that allowed the respondent to cash the appellant's State Industrial Insurance System settlement check. *Id.* at 391-92, 75 P.3d at 378. The respondent was supposed to use the settlement check to retain an attorney to help the appellant appeal his conviction, but she instead used the funds to purchase a home. *Id.* at 392, 75 P.3d at 378. After the appellant obtained a writ of execution, the respondent asserted that the homestead exemption protected her home from execution. *Id.* While the district court agreed, we did not. *Id.* at 392-94, 75 P.3d at 378-79. As we explained, "debtors who fraudulently acquire funds are 'not the type of debtor whom the legislature sought to protect.' " *Id.* at 394, 75 P.3d at 379 (quoting *Breedlove*, 100 Nev. at 609, 691 P.2d at 428). Concluding that "[t]he homestead exemption statute cannot be used as an instrument of fraud and imposition," *id.* (quoting *Webster v. Rodrick*, 394 P.2d 689, 692 (Wash. 1964)), we recognized that public policy "supports our application of an exception to homestead exemptions for victims of fraud or similar tortious conduct" because "the exemption's purpose is to provide protection to individuals who file the homestead exemption in good faith." *Id.*

Here, however, Aguirre did not obtain the Property with fraudulent funds, as his parents conveyed the Property to him. The Sheriff's argument that a person does not "make[ ] [a] declaration of homestead in good faith" if he or she "files a homestead to protect the property from forfeiture for crimes committed in the community" is not persuasive. First, the bad-faith finding in *Maki* was expressly tied to the use of fraudulently obtained funds to purchase a home, 119 Nev. at 394, 75 P.3d at 379, which did not occur here. Second, the Sheriff's theory would preclude any homestead declaration after any process of law begins, which contradicts our prior holding that a party can record a valid homestead up until the day

of the forced sale. *See In re Nilsson*, 129 Nev. 946, 952 n.4, 315 P.3d 966, 970 n.4 (2013) ("[W]e have held that a [homestead] declaration may be filed at any time before the actual sale under execution."). Finally, the homestead exemption protects against "calamitous circumstances," *Jackman*, 109 Nev. at 718, 857 P.2d at 8, which may include protecting the homestead when the declarant is arrested because the homestead also protects the declarant's family who live at the property, *see id.* We therefore reject the Sheriff's argument that even if Aguirre recorded a valid homestead declaration, the forfeiture of the Property would be proper.[2]

Aguirre satisfied NRS 115.020, and thus, the Property is a constitutionally protected homestead

The Sheriff does not dispute that Aguirre owns the Property or that he lived at the Property before his arrest, as declared in his homestead declarations. The Sheriff contends, however, that Aguirre failed to satisfy NRS 115.020(2)(b), which, in relevant part, requires a homestead declarant to state that he or she is "residing" on the premises. Relying on *Nilsson*, 129 Nev. at 946, 315 P.3d at 966, and *In re Ellis*, No. 19-14495-MKN, 2019 WL 11590521 (Bankr. D. Nev. Nov. 25, 2019), the Sheriff argues that, at most, Aguirre is a constructive resident of the Property because he was incarcerated when he filed his homestead declarations. Finally, the Sheriff suggests that Aguirre's act of renting the Property to a third party precludes him from establishing the Property as his residence.

Aguirre argues that the Property is his bona fide residence because he lived there and intended to continue residing there before his incarceration, and he intends to return to living there after his incarceration. He also asserts that his incarceration is a temporary absence that does not negate his residency. Aguirre contends that he did not claim a constructive occupancy and the district court erred in evaluating his homestead declaration as constructive occupancy. Further, Aguirre argues, temporarily renting out the Property does not preclude him from establishing his residency. Applying de novo review to the district court's conclusion that the Property did not qualify for a homestead exemption under NRS 115.010 based on Aguirre's residency status, *Torres v. Goodyear Tire & Rubber Co.*, 130 Nev. 22, 25, 317 P.3d 828, 830 (2014) (reviewing questions of statutory construction de novo); *see Spector v. Spector*, 226 So. 3d 256, 258-59 (Fla. Dist. Ct. App. 2017) (applying de novo review to

[2]We note that NRS 115.010(5) provides that a property protected by allodial title is not exempt from forfeiture. However, as the Sheriff conceded at oral argument, this provision does not render homesteads nonexempt from forfeiture. The Legislature, therefore, has not expressed a public policy against homestead protection from forfeiture.

the trial court's legal conclusions regarding the application of homestead protections), we agree with Aguirre.[3]

Under the statutory definition of "legal residence," the Property qualifies as Aguirre's residence at the time of his arrest. *See* NRS 10.155 (providing that a person's legal residence "is that place where the person has been physically present within the State"). Crucially, an individual's residence does not change because of a temporary absence. *See id.* ("Should any person absent himself or herself from the jurisdiction of his or her residence with the intention in good faith to return without delay and continue his or her residence, the time of such absence is not considered in determining the fact of residence.").

While this court has not previously addressed whether an individual's incarceration is a temporary absence for homestead purposes, courts in several other jurisdictions deem incarceration to be a temporary absence. *See, e.g.*, *In re Crabb*, No. 05-02594-H7, 2007 WL 7209436, at *1 (Bankr. S.D. Cal. June 21, 2007) (concluding that the "debtor's incarceration is a temporary absence from her homestead that will not defeat her exemption"); *Roemelmeyer v. Godinez*, 10 B.R. 70, 71 (Bankr. S.D. Fla. 1981) ("Imprisonment, which involves a forced absence from the home, does not effect an abandonment of homestead rights."); *Roberts v. Grisham*, 493 So. 2d 940, 942 (Miss. 1986) ("Under the law as it presently stands, absence occasioned by imprisonment—even a life sentence—does not defeat the claim of homestead."); *Holden v. Cribb*, 561 S.E.2d 634, 639 (S.C. Ct. App. 2002) (concluding that a debtor, "though incarcerated, is entitled to the protection of the homestead exemption"). As one such court reasoned, "we daresay [a debtor] has no intent to make the detention center his permanent residence," and "[t]o hold otherwise would thwart the underlying policy of the homestead

[3]Aguirre was released from custody during the pendency of this appeal and recorded another homestead declaration once he resumed physical residence at the Property. Aguirre filed a supplemental appendix containing this homestead declaration, which the Sheriff moved to strike. While we denied the Sheriff's motion to strike, we do not consider the supplemental homestead declaration, as it was not in the record before the district court. *See Mack v. Estate of Mack*, 125 Nev. 80, 91, 206 P.3d 98, 106 (2009) ("On appeal, a court can only consider those matters that are contained in the record made by the court below and the necessary inferences that can be drawn therefrom."). Moreover, we decline to address whether the second amended homestead declaration moots the temporary incarceration issue, as Aguirre did not cogently argue that the appeal is moot in light of the second amended homestead declaration. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider arguments that are not cogently argued or supported by relevant authority); *see also Burnham v. Coffinberry*, 76 P.3d 296, 301 (Wyo. 2003) (declining to consider respondent's argument that the appeal is moot in light of intervening events because he did "not present pertinent authority or cogent argument to convince [the court] that this appeal is moot").

exemption." *Holden*, 561 S.E.2d at 639. We find these authorities persuasive, and therefore, we hold that an individual's incarceration is a temporary absence for purposes of the homestead exemption. Because Aguirre's incarceration is a temporary absence, he satisfied the residency requirement of the homestead exemption. *See* NRS 115.020(2)(b); *see also In re Smith*, 22 B.R. 866, 867-68 (Bankr. E.D. Va. 1982) (concluding that an inmate resided at the property for homesteading purposes even though she was physically in jail when she recorded her homestead declaration); *see also In re Buick*, 237 B.R. 607, 610 (Bankr. W.D. Pa. 1999) (recognizing that an involuntary or compulsory absence from the homestead does not constitute a relinquishment of homestead rights).

The Sheriff's arguments to the contrary are unavailing. First, the Sheriff's reliance on *Nilsson* is misplaced. *Nilsson* addressed only whether constructive occupancy could satisfy the residency requirement for homestead purposes. 129 Nev. at 951, 315 P.3d at 969-70. There, the declarant argued that he retained "constructive occupancy" of the house for homestead purposes because he had previously lived in the house, and his ex-wife and children still lived there. *Id.* at 951, 315 P.3d at 969. We declined to adopt the constructive occupancy doctrine and concluded that the declarant did not record a valid homestead declaration because he did not actually reside at the property. *Id.* at 952-53, 315 P.3d at 970. However, *Nilsson* did not address the temporary absence doctrine, nor did its facts present an opportunity to do so, as there was no indication that the declarant's absence was involuntary or compulsory, s*ee Buick*, 237 B.R. at 610, or that the declarant intended to return to the household after a temporary absence, *see In re Pham*, 177 B.R. 914, 919 (Bankr. C.D. Cal. 1994) (explaining that a "temporary absence from the residence, for, e.g., vacation or hospitalization, would not destroy the characteristic of the residence as the principal dwelling").

Second, the Sheriff's reliance on the bankruptcy court's decision in *Ellis*, 2019 WL 11590521, is also misplaced. There, the declarant recorded a homestead declaration while imprisoned. *Id.* at *2. She contended "that she was legally prohibited from living at the [r]esidence as of the [p]etition [d]ate and should not be denied the benefit of the homestead protection afforded under Nevada law." *Id.* Citing *Nilsson*, the court sustained the trustee's objection to the declarant's homestead exemption claim, concluding that the declarant's argument was "the legal equivalent of asserting constructive occupancy of the [r]esidence that simply does not constitute bona fide residency." *Id.* at *4. However, *Ellis* did not discuss any of the persuasive caselaw establishing that incarceration is a temporary absence that does not preclude homestead protection, nor did it

provide any analysis as to why incarceration is equivalent to constructive occupancy.[4] *See id.* We therefore decline to follow *Ellis*.

Third, to the extent the Sheriff argues that Aguirre's subsequent act of leasing the Property to a third party precludes establishing the Property as his bona fide residence, we disagree.[5] An individual can obtain homestead protection for commercial property so long as the individual also resides at the property. *See Jackman*, 109 Nev. at 721, 857 P.2d at 10 (concluding that "a homestead may be claimed upon premises used partly for business and partly for a dwelling . . . provided it is and continues to be the bona fide residence of the family" (emphasis omitted)); *cf. Drake Interiors, LLC v. Thomas*, 433 S.W.3d 841, 848 (Tex. Ct. App. 2014) ("Nor does temporary renting of the homestead constitute an abandonment."). Because the Property remains Aguirre's bona fide residence while he is temporarily absent from it, his use of the Property for a commercial purpose does not preclude homestead protection, especially when the lease provides that the "Tenant and Owner agree that the residence is the primary residence and homestead of [Aguirre], and that it is expressly understood that [Aguirre] intends to occupy the residence as his homestead upon his release from incarceration."

Under NRS 115.020(2)(a) and (c), a single declarant must also state that he or she is a householder and that he or she intends to use and claim the property as a homestead. A householder is "one who keeps house" who is "in actual possession of the house" and the "occupier of a house." *Nilsson*, 129 Nev. at 951, 315 P.3d at 969 (quoting *Goldfield Mohawk Mining Co. v. Frances-Mohawk Mining & Leasing Co.*, 31 Nev. 348, 354, 102 P. 963, 965 (1909)). A declarant need only substantially comply with NRS 115.020. *See McGill*, 61 Nev. at 40, 116 P.2d at 583.

Aguirre's amended homestead declaration substantially complied with NRS 115.020. In it, Aguirre stated that he is a householder who intends to use and claim the Property as a homestead. Although he was incarcerated, his temporary absence from the Property does not affect his residency for homestead purposes, as discussed *supra*.

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[4]Moreover, the court characterized the objection as "much ado about nothing" because the debtor had been released from prison and resided at the residence, and thus, "nothing prevent[ed] the [d]ebtor from recording another homestead declaration accurately representing that she currently resides at the [r]esidence." *Ellis*, 2019 WL 11590521, at *3.

[5]To the extent the Sheriff argues Aguirre abandoned the homestead by leasing it, we disagree because merely leasing the Property to another during a temporary absence does not constitute abandonment. *See* NRS 115.040(2) ("The homestead property shall not be deemed to be abandoned without a declaration thereof in writing, signed and acknowledged by both spouses, or the single person claiming the homestead, and recorded in the same office and in the same manner as the declaration of claim to the homestead is required to be recorded.").

Accordingly, the homestead exemption protects the Property from forfeiture.[6]

The Sheriff's arguments do not show otherwise. To begin, as explained, renting the Property to another while Aguirre is temporarily absent does not preclude the homestead exception. *See Jackman*, 109 Nev. at 721, 857 P.2d at 10. Further, the Sheriff's reliance on several cases for the proposition that renting a property precludes receiving homestead protection is misplaced, as those cases are either factually distinguishable or contrary to Nevada law. For example, *In re Holt* is inapposite because there the debtors sought homestead protection on their residence, as well as a contiguous property which they rented to another individual. 357 B.R. 917, 924 (Bankr. M.D. Ga. 2006). The court denied homestead protection as to the contiguous property because Georgia law allowed a party to claim a homestead only over their dwelling, not any contiguous land. *Id.* That is not the case here, as Aguirre is claiming a homestead only over his residence. Regardless, unlike Georgia, Nevada's broad statutory definition of a "homestead" encompasses land contiguous to the homestead, *see* NRS 115.005(2)(a) (defining a homestead as "[a] quantity of land, together with the dwelling house thereon and its appurtenances"), especially when construed, as it must be, in favor of the homestead exemption and against forfeiture, *see Wilshire Ins. Co.*, 94 Nev. at 550, 582 P.2d at 375; *McGill*, 61 Nev. at 40, 116 P.2d at 583. Similarly, *In re Radtke*, 344 B.R. 690, 693 (Bankr. S.D. Fla. 2006), and *In re Bornstein*, 335 B.R. 462, 464-66 (Bankr. M.D. Fla. 2005), are inapposite because they held that a landowner cannot claim a homestead in a property used in a commercial capacity, whereas Nevada law is clear that a homestead can be claimed in a property used for commercial purposes so long as the property remains the bona fide residence of the declarant, *Jackman*, 109 Nev. at 721, 857 P.2d at 10.

Also unpersuasive is the Sheriff's argument that Aguirre's amended homestead declaration was untimely because final process became complete when the district court entered the judgment of forfeiture. First, Aguirre recorded his amended homestead declaration in May 2020, while the district court did not enter a judgment of forfeiture until December 31, 2020. Thus, the amended homestead declaration is not untimely, as it predated the forfeiture judgment. *Cf. Massey-Ferguson, Inc. v. Childress*, 89 Nev. 272, 272, 510 P.2d 1358, 1358 (1973) (concluding that a homestead exemption recorded three days prior to the sheriff's sale of the property was valid). Second, even had the judgment predated the amended

[6]Both parties agree that the Property is valued at $298,000, which falls within the protected homestead equity amount. *See* NRS 115.010(2) (providing that the homestead exemption "extends only to that amount of equity in the property held by the claimant which does not exceed $605,000 in value").

declaration, final process would not be complete because it may still be reversed on appeal. *See generally Sheriff, Carson City, Nev. v. A 1983 Datsun 280 ZX Sedan*, 106 Nev. 419, 421, 794 P.2d 346, 348 (1990) (concluding that this court has jurisdiction to hear appeals in forfeiture cases). Finally, as we have noted, "a [homestead] declaration may be filed at any time before the actual sale under execution."[7] *Nilsson*, 129 Nev. at 952 n.4, 315 P.3d at 970 n.4. Accordingly, we conclude that Aguirre's amended declaration was timely and established a valid homestead exemption that protects the Property from forfeiture.[8]

CONCLUSION

Public policy does not warrant creating a civil forfeiture exception to the homestead exemption. Further, incarcerated individuals may still be deemed residents for purposes of the homestead exemption under NRS 115.020. Aguirre's amended declaration established that he qualified as a bona fide resident of the Property because he lived there before his incarceration and intended to live there upon his release, and his incarceration was a temporary absence that did not negate his residency. Thus, Aguirre's amended declaration substantially complied with NRS 115.020, entitling him to the protection of the homestead exemption. Accordingly, we reverse the district court's judgment of forfeiture.

Silver and Pickering, JJ., concur.

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[7]While the Sheriff argued below that Aguirre's homestead declaration was ineffective because title vested in the Sheriff's office when the property was used to facilitate the commission or attempted commission of a felony, the Sheriff did not raise that argument on appeal. Thus, we do not consider it.

[8]In light of our disposition, we need not address Aguirre's remaining arguments.

DARIA HARPER, an Individual; and DANIEL WININGER, an Individual, Appellants, *v.* COPPERPOINT MUTUAL INSURANCE HOLDING COMPANY, an Arizona Corporation; COPPERPOINT GENERAL INSURANCE COMPANY, an Arizona Corporation; LAW OFFICES OF MARSHALL SILBERBERG, P.C., a California Corporation; KENNETH MARSHALL SILBERBERG, aka MARSHALL SILBERBERG, aka K. MARSHALL SILBERBERG, an Individual, Respondents.

No. 82158

May 5, 2022 509 P.3d 55

Appeal from a district court judgment, certified as final under NRCP 54(b), in an action for declaratory and injunctive relief. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Affirmed.

Blumberg Law Corporation and *John P. Blumberg*, Long Beach, California; *Maier Gutierrez & Associates* and *Jason R. Maier*, Las Vegas, for Appellants.

Hooks Meng & Clement and *Dalton L. Hooks, Jr.*, and *Sami N. Randolph*, Las Vegas, for Respondents Copperpoint Mutual Insurance Holding Company and Copperpoint General Insurance Company.

McBride Hall and *Robert C. McBride* and *Heather S. Hall*, Las Vegas; *Kjar, McKenna & Stockalper, LLP*, and *Robert L. McKenna, III, James J. Kjar*, and *Jon R. Schwalbach*, El Segundo, California, for Respondents Law Offices of Marshall Silberberg, P.C., and Kenneth Marshall Silberberg.

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

OPINION

By the Court, Herndon, J.:

This appeal implicates the scope of NRS 42.021, Nevada's codification of the collateral source rule as it pertains to medical malpractice lawsuits. Subsection 1 of that statute provides that "[i]n an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, the defendant may *introduce evidence* of any amount payable as a benefit

to the plaintiff as a result of the injury or death" from a collateral source, such as workers' compensation benefits. (Emphasis added.) In turn, subsection 2 provides that the payer of collateral benefits introduced pursuant to subsection 1 cannot "[r]ecover any amount against the plaintiff; or [b]e subrogated to the rights of the plaintiff against a defendant."

Here, we are asked to consider whether NRS 42.021(2)'s prohibition on a collateral source provider's right to recover extends to a medical malpractice case that was settled before proceeding to trial. We conclude that, based on NRS 42.021's plain language, the statute applies only to situations in which a medical malpractice defendant "introduce[s] evidence" of a plaintiff's collateral source benefits, which necessarily does not occur when a case is settled pretrial. Nor are we persuaded that any exceptions to our plain-language analysis are applicable. Accordingly, we affirm the district court's order denying appellant's request for a declaration that NRS 42.021 precluded respondent from recovering its workers' compensation payments from appellant's medical malpractice settlement proceeds.

FACTS AND PROCEDURAL HISTORY

In 2014, appellant Daria Harper sustained a work-related injury in Arizona.[1] Respondents Copperpoint Mutual Insurance Company and Copperpoint General Insurance Company (collectively Copperpoint) are Arizona-based workers' compensation insurers that provided coverage for Harper's injury, which included medical treatment. As part of that treatment, Harper underwent a procedure in Las Vegas in 2015 during which Harper suffered an additional severe injury resulting in quadriplegia, as well as severe pain, suffering, and emotional distress. In 2016, Harper filed a medical malpractice action in Nevada against the doctors and hospital who performed the Las Vegas procedure. Harper was represented by respondents Kenneth Marshall Silberberg and the Law Offices of Marshall Silberberg (Silberberg) in that action.

When Copperpoint became aware of Harper's medical malpractice action, it sent a letter to Silberberg stating that, under Arizona Revised Statute section 23-1023, Copperpoint was entitled to a lien against any recovery Harper might thereafter obtain in the action. Specifically, Copperpoint claimed that it was entitled under that statute to be reimbursed for the roughly $3 million that it had paid in workers' compensation-related benefits stemming from the initial

[1]Harper's husband is a plaintiff in the underlying action and is also named as an appellant in this appeal. However, his claims hinge on the viability of Harper's claims, so this opinion simply refers to appellants as "Harper."

work-related injury.[2] Silberberg sent a letter in response, explaining that Harper had already settled the medical malpractice action with the doctors and hospital for roughly $6 million and that under NRS 42.021(2), Copperpoint was prohibited from seeking reimbursement. Thereafter, Copperpoint sent Harper a letter notifying her that it was suspending her workers' compensation coverage until she reimbursed Copperpoint for the $3 million it had already paid her.

This prompted Harper to file the underlying action against both Copperpoint and Silberberg. As relevant here, Harper asserted claims for declaratory and injunctive relief, claiming that NRS 42.021(2) prohibited Copperpoint from asserting a lien against her settlement proceeds and seeking an injunction requiring Copperpoint to continue paying her workers' compensation benefits.[3]

After filing her complaint, Harper filed a motion for partial summary judgment, making a two-step argument that (1) NRS 42.021(2) prohibited Copperpoint from asserting a lien against her settlement proceeds, and (2) that statute, rather than conflicting Arizona law, was applicable to the underlying litigation. Contemporaneously, Copperpoint filed an NRCP 12(b)(5) motion to dismiss wherein it essentially argued the mirror image of Harper's arguments, namely, that (1) NRS 42.021(2) *does not* prohibit Copperpoint from asserting a lien against Harper's medical malpractice settlement proceeds, and (2) even if NRS 42.021 does prohibit Copperpoint from doing so, conflicting Arizona law governs the reimbursement issue. In addition, Copperpoint argued that the district court lacked subject matter jurisdiction because Arizona's workers' compensation sys-

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[2]Arizona Revised Statute section 23-1023 is similar to NRS 616C.215(5) in that both statutes entitle a workers' compensation provider to a lien against any monetary recovery a covered employee obtains against a third party. *Compare* NRS 616C.215(5), *with* Ariz. Rev. Stat. Ann. § 23-1023(D) (2014). Both Nevada and Arizona also have statutes pertaining specifically to medical malpractice actions wherein a defendant may introduce evidence of a plaintiff receiving third-party payments, including workers' compensation benefits. *Compare* NRS 42.021(1), *with* Ariz. Rev. Stat. Ann. § 12-565(A) (2021). However, whereas NRS 42.021(2) prohibits a third-party payer of benefits (such as a workers' compensation provider) from seeking reimbursement from the medical malpractice plaintiff in such instances, Arizona Revised Statute 12-565(C) prohibits seeking reimbursement "[u]nless otherwise expressly permitted to do so by statute." Here, the parties appear to agree that Arizona Revised Statute section 23-1023(D) qualifies as the "express[ ] permi[ssion]" referred to in section 12-565(C), such that Arizona law permits a workers' compensation provider to recover from a medical malpractice plaintiff when the defendant has introduced evidence of workers' compensation payments, whereas in Nevada, NRS 42.021(2) prohibits a workers' compensation provider from seeking such a recovery in those circumstances.

[3]In the event that NRS 42.021(2) did not prohibit Copperpoint from asserting a lien, Harper alternatively asserted a legal malpractice claim against Silberberg for its handling of the settlement in her previous medical malpractice action.

tem had exclusive jurisdiction over Harper's claims, which, in effect, were simply seeking continued workers' compensation benefits.

The district court denied Harper's motion for partial summary judgment and granted Copperpoint's NRCP 12(b)(5) motion. In so doing, the district court concluded that NRS 42.021's plain language applied only to actions where third-party payments were "introduce[d] [into] evidence" and did not apply to cases that settled before trial. In light of that conclusion, the district court did not definitively resolve whether NRS 42.021 should apply instead of conflicting Arizona law, nor did it resolve Copperpoint's argument that it lacked subject matter jurisdiction over the matter. Thereafter, the district court certified its order as final under NRCP 54(b), and Harper filed this appeal.[4]

DISCUSSION

Before considering the parties' arguments regarding NRS 42.021, we must first address Copperpoint's argument that the district court lacked subject matter jurisdiction over Harper's claims. We review both issues de novo. *See Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009) ("Subject matter jurisdiction is a question of law subject to de novo review."); *see also Williams v. United Parcel Servs.*, 129 Nev. 386, 391, 302 P.3d 1144, 1147 (2013) (recognizing that issues of statutory construction are reviewed de novo).

The district court had subject matter jurisdiction over Harper's claims for declaratory and injunctive relief

As a threshold matter on appeal, Copperpoint reiterates its argument that the district court lacked subject matter jurisdiction over Harper's declaratory and injunctive relief claims. Copperpoint appears to be contending that Harper's claims are, in essence, simply seeking continued workers' compensation benefits that must be pursued through Arizona's workers' compensation system. *Cf.* Ariz. Rev. Stat. Ann. § 23-1022(A) (1984) (providing that "[t]he right to recover compensation pursuant to . . . [Arizona's workers' compensation statutes] for injuries sustained by an employee . . . is the exclusive remedy against the . . . employer's workers' compensation insurance carrier"). For support, Copperpoint observes that Harper *has* filed a claim with Arizona's workers' compensation system that is now proceeding through *Arizona*'s appellate court system. In response, Harper contends that she is not actually seek-

[4]Despite the district court having not resolved Harper's claims against Silberberg, this court permitted Silberberg to file a brief because Harper's claims against Silberberg hinge on the success of Harper's appellate arguments. Although Silberberg is listed as a respondent and has filed an answering brief, Silberberg's arguments therein are aligned with Harper's arguments, and we need not address them separately in this opinion.

ing continued workers' compensation benefits (even though her injunctive relief claim requests precisely that), but that she instead is simply seeking a declaration that Copperpoint cannot assert a lien against her medical malpractice settlement proceeds under Nevada law. In short, Harper does not meaningfully address the significance of the Arizona litigation.

Nonetheless, having considered both parties' arguments, we conclude that the district court had subject matter jurisdiction over Harper's claims. While Harper's claims may incidentally be seeking continued *workers' compensation coverage*, the gravamen of her complaint seeks a judicial declaration that, under NRS 42.021, Copperpoint is prohibited from seeking reimbursement from her *medical malpractice* settlement proceeds. Characterized as such, Harper's complaint seeks a judicial interpretation of a Nevada statute that affects the parties' rights to proceeds from a medical malpractice action that was filed in Nevada and that stemmed from alleged malpractice that occurred in Nevada. Such a request for relief falls squarely within the district court's jurisdiction. *See* NRS 30.030 (providing that under Nevada's Uniform Declaratory Judgments Act, "[c]ourts of record within their respective jurisdictions shall have power to declare rights, status and other legal relations whether or not further relief is or could be claimed" and that "[t]he declaration may be either affirmative or negative in form and effect"); *Kress v. Corey*, 65 Nev. 1, 26, 189 P.2d 352, 364 (1948) (holding that the only prerequisites for a court to grant declaratory relief are that "(1) there must exist a justiciable controversy; that is to say, a controversy in which a claim of right is asserted against one who has an interest in contesting it; (2) the controversy must be between persons whose interests are adverse; (3) the party seeking declaratory relief must have a legal interest in the controversy, that is to say, a legally protectible interest; and (4) the issue involved in the controversy must be ripe for judicial determination"). Based on the foregoing, we determine that at the time Harper filed her complaint, a justiciable controversy existed between herself and Copperpoint that was ripe for judicial determination and as such was appropriately brought as a declaratory relief action. Accordingly, we conclude that the district court had subject matter jurisdiction over Harper's claims for declaratory and injunctive relief.

By its plain language, NRS 42.021 does not prohibit a collateral source provider from seeking reimbursement from medical malpractice proceeds when the medical malpractice action is settled before trial

We next consider whether NRS 42.021 applies to settlements in addition to trials. In relevant part, NRS 42.021 provides,

> 1. In an action for injury or death against a provider of health care based upon professional negligence, if the defendant so elects, *the defendant may introduce evidence of any amount payable as a benefit to the plaintiff* as a result of the injury or death *pursuant to* the United States Social Security Act, *any state* or federal income disability or *worker's compensation act* . . . . If the defendant elects to introduce such evidence, the plaintiff may introduce evidence of any amount that the plaintiff has paid or contributed to secure the plaintiff's right to any insurance benefits concerning which the defendant has introduced evidence.
>
> 2. *A source of collateral benefits* introduced pursuant to subsection 1 *may not*:
>
> (a) *Recover any amount against the plaintiff*; or
>
> (b) Be subrogated to the rights of the plaintiff against a defendant.

(Emphases added.)[5]

Both Harper and Copperpoint agree that subsection 1's reference to "introduce evidence," by its terms, applies to trials but not settlements. *Cf. Leven v. Frey*, 123 Nev. 399, 403, 168 P.3d 712, 715 (2007) ("Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language."). The parties disagree, however, whether subsection 2 should be construed to apply to settlements as well. Harper raises two arguments in favor of applying the statute to settlements: (1) construing it by its plain language would produce an absurd result; or (2) the statute should be construed consistent with the way the California Court of Appeal has construed California Civil Code section 3333.1, the statute upon which NRS 42.021 was based. We address each of Harper's arguments in turn.

Construing NRS 42.021 by its plain language would not produce an absurd result

As indicated, NRS 42.021(1) permits a defendant in a medical malpractice action to "introduce evidence" of third-party payments, which, by definition, limits the statute's applicability to trials. *See Introduce Into Evidence*, *Black's Law Dictionary* (11th ed. 2019)

[5]NRS 42.021 was enacted by Nevada's voters in 2004 as part of a statewide ballot initiative entitled "Keep Our Doctors in Nevada" (KODIN). *See* Secretary of State, 2004 Statewide Ballot Questions Summary, at 1, https://www.leg.state.nv.us/division/research/votenv/ballotquestions/2004.pdf. The primary purpose of KODIN and NRS 42.021 was to decrease the costs of medical malpractice insurance in order to keep doctors from leaving the practice of medicine in Nevada. *See* Secretary of State, Statewide Ballot Question No. 3, 15-16 (Argument in Support of Question No. 3 2004) (explaining that Question No. 3, if enacted, would decrease the cost of medical malpractice insurance).

("To have (a fact or object) admitted into the trial record . . . ."). Harper contends that applying NRS 42.021 by its plain language would produce absurd results and that this court should therefore go beyond the statute's plain language and apply it to settlements. *Cf. Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) (recognizing that this court interprets statutes by their plain meaning unless there is ambiguity, "the plain meaning would provide an absurd result," or the plain meaning "clearly was not intended" (internal quotation marks omitted)). In particular, the "absurdity" that Harper posits is that if NRS 42.021 does not apply to settlements,

> parties who wanted to settle a medical malpractice case and have the benefit of barring a workers' compensation lien, would have to enter into the charade of a two-phase settlement agreement that required them in phase one to begin a trial where evidence of the collateral source payments was introduce[d] into evidence, then immediately inform the district court of the settlement thereby ending the trial.

We are not persuaded by Harper's argument. In particular, and as this court has previously observed, the intent behind NRS 42.021(1) and (2) is that if a medical malpractice defendant chooses to introduce evidence that a plaintiff received a third-party payment, the jury will reduce the plaintiff's damages award by that same amount, thereby making it appropriate to prohibit the third-party payer from seeking reimbursement from that award. *See McCrosky v. Carson Tahoe Reg'l Med. Ctr.*, 133 Nev. 930, 936, 408 P.3d 149, 155 (2017) (explaining the intent of NRS 42.021(1) and (2) based on this court's reading of the explanations provided in the 2004 statewide ballot question); *see also* Secretary of State, Statewide Ballot Question No. 3, 15-16 (Argument in Support of Question No. 3 2004) (explaining that Question No. 3, if approved, "stops 'double-dipping' by informing juries if plaintiffs are receiving money from other sources for the same injury"); *id.* at 18 (Rebuttal to Argument Against Question No. 3) (explaining that Question No. 3, if approved, would permit a "jury [to] be told about [third-party] payments *and use that information in deciding what to award the plaintiff*" (emphasis added)). Accordingly, NRS 42.021(1) and (2) make sense in the context of a trial, but not necessarily in the context of a settlement wherein a plaintiff and a defendant (such as Harper and the medical malpractice defendants) entered into an agreement in which the third-party provider (such as Copperpoint) was not involved in the settlement negotiations.

Thus, although a plain-language construction of NRS 42.021 *could* result in the sham "trials" that Harper envisions, it logically, and more likely, would result in medical malpractice plaintiffs and

defendants accounting for the third-party payments in negotiating a settlement amount or, similarly, including the third-party payer in the settlement negotiations. The latter results are not absurd and, to the contrary, are in line with NRS 42.021's intent to prevent a plaintiff from "double-dipping."

Consequently, we are not persuaded that a plain-language construction of NRS 42.021 would produce an "absurd" result, which is a result "so gross as to shock the general moral or common sense." *Home Warranty Adm'r of Nev., Inc. v. State, Dep't of Bus. & Indus.*, 137 Nev. 43, 47, 481 P.3d 1242, 1247 (2021) (quoting *Crooks v. Harrelson*, 282 U.S. 55, 60 (1930)). Accordingly, we conclude that NRS 42.021(2)'s bar regarding a collateral benefit provider's ability to recover does not apply in medical malpractice cases that are settled before trial.

We decline to construe NRS 42.021 consistently with how the California Court of Appeal has construed its statutory analog

In the alternative to her absurd-results argument, Harper contends that NRS 42.021 should apply to settlements because the California Court of Appeal has construed California Civil Code section 3333.1, the statute upon which NRS 42.021 was based, to apply to settlements.[6] *Cf. State ex rel. Harvey v. Second Judicial Dist. Court*, 117 Nev. 754, 763, 32 P.3d 1263, 1269 (2001) ("[W]hen a statute is derived from a sister state, it is presumably adopted with the construction given it by the highest court of the sister state." (quoting *Clark v. Lubritz*, 113 Nev. 1089, 1096 n.6, 944 P.2d 861, 865 n.6 (1997))); *Ex parte Skaug*, 63 Nev. 101, 107-08, 164 P.2d 743, 746 (1945) (recognizing the same canon of statutory construction). In particular, Harper relies on *Graham v. Workers' Compensation Appeals Board*, 258 Cal. Rptr. 376 (Ct. App. 1989). The *Graham* court addressed the identical issue presented here: whether California Civil Code section 3333.1, despite its plain language applying only to trials, should also apply to settlements. *Id.* at 381. The *Graham* court concluded that "blind obedience" to the statute's plain language would defeat the Legislature's purpose of enacting section 3333.1, which was part of a larger bill intended to reduce the cost of medical malpractice insurance and, according to the *Graham* court, also to reduce the cost of medical malpractice litigation. *Id.* at 381-82. Given that the bill that included section 3333.1 was intended to reduce the cost of medical malpractice litigation, the *Graham* court held that applying section 3333.1 to settlements would further that purpose. *Id.* at 382.

Harper contends that because *Graham* was decided before NRS 42.021 was enacted by Nevada's voters in 2004, the voters *must*

[6]Copperpoint does not dispute that NRS 42.021 is substantively identical to California Civil Code section 3333.1.

have adopted NRS 42.021 with the construction that *Graham* gave California Civil Code section 3333.1. Despite Harper's contention, we nevertheless are not persuaded that we should apply our adopt-the-sister-state's-construction rule of statutory construction in this instance for three reasons. First, and most significantly, as we explained above, NRS 42.021's language is plain and unambiguous, meaning there is no language to actually "construe." *See Leven*, 123 Nev. at 403, 168 P.3d at 715 ("Generally, when a statute's language is plain and its meaning clear, the courts will apply that plain language."); *White v. Warden, Nev. State Prison*, 96 Nev. 634, 636, 614 P.2d 536, 537 (1980) ("[W]e recognize that the intent of the legislature [or, in this case, Nevada's voters] is the controlling factor and that, if the statutes under consideration are clear on their face, we cannot go beyond them in determining [the voters'] intent." (citing, inter alia, *State v. Beemer*, 51 Nev. 192, 199, 272 P. 656, 658 (1928))). Second, *Graham* is not a decision by California's highest court, and in the absence of supporting authority cited by Harper, we are reluctant to expand our adopt-the-sister-state's-construction rule to decisions of a state's intermediate courts.[7] *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (observing that it is a party's responsibility to support arguments with on-point authority). Finally, we believe that the *Graham* court's rationale for applying section 3333.1 to settlements is somewhat tenuous, in that it is questionable whether applying it as such would have any appreciable impact on decreasing the costs of medical malpractice insurance, which was the purpose behind Nevada's voters enacting NRS 42.021. *See* Secretary of State, Statewide Ballot Question No. 3, 15-16 (Argument in Support of Question No. 3 2004) (explaining that Question No. 3 would decrease the cost of medical malpractice insurance); *see also Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 31, 434 P.3d 287, 289 (2019) ("[W]here the statutory language does not speak to the issue before us, we will construe it according to that which reason and public policy would indicate the legislature [or, in this case, Nevada's voters] intended." (original alterations omitted)). Accordingly, we decline to apply NRS 42.021 in the same manner that the California Court of Appeal applied California Civil Code section 3333.1 in *Graham*.

[7]Harper also relies on the California Supreme Court's decision in *Barme v. Wood*, 689 P.2d 446 (Cal. 1984). She contends that *Barme* held that California Civil Code section 3333.1 applies even when there is no trial. This is not completely accurate, because although there had been no trial in *Barme*, the California Supreme Court simply addressed whether section 3333.1 violated due process or equal protection. *Id.* at 450-51 (holding that there was no violation). Thus, we conclude that *Barme* does not speak to whether California Civil Code section 3333.1 applies absent a trial.

CONCLUSION

We hold that the plain language of NRS 42.021(1) and (2) prohibits a payer of collateral source benefits from seeking reimbursement from a medical malpractice plaintiff only when the medical malpractice defendant "introduce[s] evidence" of those payments, which necessarily does not occur when a case is settled pretrial. Nor are we persuaded that any exceptions to our plain-language analysis are applicable or that we should adopt the California Court of Appeal's application of California's analogous statute. Accordingly, we affirm the judgment of the district court.

Hardesty and Stiglich, JJ., concur.

CHRISTOPHER SENA, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 79036

May 26, 2022 510 P.3d 731

Appeal from a judgment of conviction, pursuant to a jury verdict, of 1 count of conspiracy to commit sexual assault, 16 counts of lewdness with a child under the age of 14, 9 counts of sexual assault of a minor under 14 years of age, 19 counts of sexual assault of a minor under 16 years of age, 9 counts of incest, 8 counts of open or gross lewdness, 11 counts of sexual assault, 3 counts of preventing or dissuading a witness or victim from reporting a crime or commencing prosecution, 3 counts of child abuse, neglect or endangerment via sexual abuse, 5 counts of use of a minor in producing pornography, 7 counts of possession of visual presentation depicting the sexual conduct of a child, 2 counts of child abuse, neglect or endangerment via sexual exploitation, 1 count of use of a minor under the age of 14 in producing pornography, and 1 count of use of a minor under the age of 18 in producing pornography. Eighth Judicial District Court, Clark County; William D. Kephart, Judge.

Affirmed in part, vacated in part, and remanded.

Darin F. Imlay, Public Defender, and *David Lopez-Negrete* and *William M. Waters*, Chief Deputy Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Alexander Chen*, Chief Deputy District Attorney, and *Julia A. Barker*, Deputy District Attorney, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Herndon, J.:

Appellant Christopher Sena sexually and physically abused his own children and others for over a decade, sometimes with the help of his wife and ex-wife. He was convicted of 95 counts of various crimes related to these acts. In this opinion, we clarify our application of the statute of limitations to crimes involving the sexual abuse of children, and we conclude that the statute of limitations did not preclude any of the charges brought against Sena. The crimes associated with his daughter were not barred by the statute of limitations because they remained undiscovered under the law until she left the

home. Additionally, the other crimes were not barred by the statute of limitations because they were conducted in a secret manner, and his wife's and ex-wife's knowledge of the crimes did not constitute discovery since each of them were acting *in pari delicto* with Sena.

This matter also presents us with a novel issue regarding the correct unit of prosecution for the crime of incest. Because the incest statute's language is ambiguous regarding the unit of prosecution, and the legislative history, our previous decisions, and public policy do not adequately clarify that ambiguity, under the doctrine of lenity, we conclude the unit of prosecution is per victim, not per instance. Thus, we vacate six of the nine incest convictions. We also vacate two counts of possession of visual presentation depicting the sexual conduct of a child based on a unit-of-prosecution analysis because the State pleaded multiple possession charges as having occurred at the same time, and we vacate one count of child abuse or neglect via sexual abuse because it is redundant to another count. We address Sena's other challenges on appeal below, and none of them warrants reversal. We remand this case for further proceedings consistent with this opinion.

BACKGROUND

Sena met his first wife, Terrie, in 1987, and they had their first child, AS, in May 1990. They married shortly thereafter. They had their second child, TS, in December 1994. Sena and Terrie divorced in 1997. Sena married his second wife, Deborah, in 1998, and they had their first child, BS, in August 1998. Sena and Deborah eventually moved in together, so that they and AS, BS, and TS all lived under one roof. Around the same time, in 1998, Terrie had another child, RS, with another man. Around RS's birth and while Sena and Deborah were still married, Sena rekindled a sexual relationship with Terrie. In 1999, Terrie and RS moved into Sena and Deborah's home, where AS, TS, and BS were also still residing.

Beginning at least as far back as when Terrie moved into Sena and Deborah's home, when AS was 9 years old, Sena would physically abuse all four children residing in the house. He would throw household items at them, such as remote controls, rocks, a wrench, and shoes. Sena once threw a metal pipe at AS, hitting her in the back of the head, and after other people learned about the injury, he beat her with a wooden spoon. When AS was 14, Sena became angry with her and subsequently grabbed her by the hair, dragged her into the house, threw her on the floor, and pressed his foot down on her throat. Sena would slap BS and push him to the ground and in one instance threw RS against a table. In another instance, Sena pushed TS to the ground and pressed his foot on TS's chest.

In 2001, when AS was 11 years old, Sena began sexually abusing her as well. On the first occasion, he masturbated in front of

her, touched her chest and vagina over her clothes, directed her to undress and touched her vagina again, and anally penetrated her. After he assaulted her, Sena told AS he had "police friends," no one would believe her if she reported it, and she would be the one sent to jail because she was the one that had done something wrong. Thereafter, as AS testified, Sena subjected AS to sexual abuse almost every day and continued at least two times per month after AS turned 14. AS testified that while she did not want to sexually interact with Sena, she submitted to him because he was generally in a better mood afterward and would be less likely to physically abuse her brothers.

Sena continued to sexually abuse AS when she was in high school, with multiple sexual contacts occurring per month when she was 16-18 years old. When AS was 14, Sena orchestrated a sexual encounter between himself, Terrie, and AS. Around AS's 18th birthday, Sena orchestrated a sexual encounter between himself, AS, and Deborah. Sena continued to subject AS to unwarranted sexual encounters after she graduated from high school, though they became less frequent. AS did not move out of the house when she turned 18 because she did not want to leave her brothers with Sena and because she believed that he continued to be less abusive to them when she had sex with him. Sena also constantly monitored what AS was doing. He set up cameras around the house when AS was around 18 years old, and if she and her brothers were not in front of the cameras when he was not home, he would call and ask them where they were. AS testified that when she started working at a grocery store, Sena would know what she had done at work without even asking her.

Sena began sexually abusing TS when he was between 13 and 15 years old. In the first instance, while Sena watched and recorded the interaction, he directed Deborah and TS to wash each other's bodies, directed Deborah to perform fellatio on TS, and directed TS to vaginally penetrate Deborah, which TS unsuccessfully attempted to do. In another instance, when TS was 15 or 16, Sena orchestrated another sexual encounter between himself, TS, and Deborah. Sena filmed that assault. When TS was around 17 or 18 years old, he stopped living in the home full time.

When RS was 11 or 12, Sena sexually assaulted him on three instances. After the third instance, the sexual assaults stopped for a while but the physical abuse continued, including an instance where Sena repeatedly slapped RS until he made a statement that he felt loved in the house. The sexual assaults resumed when RS was between 12 and 14. During this time period, Sena orchestrated 2 sexual encounters between himself, RS, and RS's mother, Terrie.

When BS was 14, Sena threw him to the floor, pinned his arms down, and hit him repeatedly. Around that same time, Sena began sexually abusing BS. In one instance, Sena masturbated while

directing Terrie to perform fellatio on BS and directing her to insert BS's penis into her vagina. Sena threatened to kill BS if he told anyone. In another instance, at Sena's direction, BS vaginally penetrated Terrie and she performed fellatio on BS. When BS was 14 or 15, Sena also orchestrated a sexual encounter between himself, BS, and BS's mother, Deborah. Sena filmed this assault.

Sena's sexual proclivities were not limited to his own children. He committed lewd acts upon Terrie's niece, EC, on multiple occasions when she was 11 and 12 years old. He also filmed EC taking a shower in his home while Terrie performed fellatio on Sena. Additionally, Sena showed pornography to Terrie's other underage niece, TG, and filmed TG taking a shower in his home while Terrie again performed fellatio on Sena.

In 2014, when AS was 24 years old, BS revealed to her that Sena was making him have sex with Terrie and BS was suicidal because of it. Up until that point, AS had been unaware that Sena had been sexually assaulting her brothers too and, with this new information, realized that submitting to Sena had not actually protected them from being sexually assaulted. AS and BS gained the courage to flee Sena's home, they convinced Deborah to help them escape, and all three of them left. After a few months, they reported the crimes to the police, leading to Sena's arrest. During Sena's arrest, the police conducted a search of the home and found devices containing pornographic images, including images of BS, RS, TS, EC, and TG, as well as images of Terrie's sister MC when she was underage.

Sena was charged with 120 counts pertaining to his various acts of physical and sexual abuse. He unsuccessfully moved to dismiss counts 2-53 concerning AS, arguing they were barred by the statute of limitations. At Sena's trial, the district court directed the audience not to come and go during arguments or during witness testimony. Sena did not object to the court policy until the 8th day of trial and again on the 9th day of trial. Both times the district court overruled his objection, concluding that the courtroom was not closed. The jury convicted Sena of 95 counts, and he was sentenced to serve concurrent and consecutive prison terms totaling 327 years and 4 months to life in the aggregate.[1]

DISCUSSION

Sena challenges his convictions on multiple fronts. He first contends that numerous counts were barred by the statute of limitations. Second, he argues that there were multiple convictions for the same offense related to the counts of incest, possession of child pornography, and child abuse, neglect or endangerment related to the incident with Deborah and TS in the shower. Third, he challenges

[1]In exchange for an agreement to testify against Sena, Terrie and Deborah each pleaded guilty to one count of sexual assault with a sentence of 10 years to life in prison.

the sufficiency of the evidence supporting the conspiracy to commit sexual assault and the counts related to the videos of Terrie's nieces in the shower. Fourth, he contends that his convictions for open or gross lewdness violated the Double Jeopardy Clause because they were lesser-included offenses of child abuse, neglect or endangerment. Last, he argues that the district court violated his constitutional rights by partially closing the courtroom during the jury trial.

Statute of limitations

Sena asserts that many of the counts alleged against him were barred by the statute of limitations.[2] Sena was charged with crimes committed between 2001 and 2014. "[W]ith respect to limitation periods and tolling statutes, the statutes in effect at the time of the offense control." *Bailey v. State*, 120 Nev. 406, 407-08, 91 P.3d 596, 597 (2004) (quoting *State v. Quinn*, 117 Nev. 709, 712, 30 P.3d 1117, 1119 (2001)). From 2001 to 2014, the statute of limitations for sexual assault was 4 years after the offense. *See* 1997 Nev. Stat., ch. 248, § 2(1), at 891 (NRS 171.085(1)) (additionally amended in 2001, 2003, 2005, 2009, and 2013). The statute of limitations for most other felonies was 3 years. *See id.* § 2(2) (NRS 171.085(2)).

NRS 171.095, which governs when the statutes of limitations outlined in NRS 171.085 and NRS 171.090 can be tolled, was relevantly amended in 2001, 2005, 2011, and 2013. The 1999 version of NRS 171.095(1) states the following:

> (a) If a felony, gross misdemeanor or misdemeanor is committed in a secret manner, an indictment for the offense must be found, or an information or complaint filed, within the periods of limitation prescribed in NRS 171.085 and 171.090 after the discovery of the offense, unless a longer period is allowed by paragraph (b) . . . .
>
> (b) An indictment must be found, or an information or complaint filed, for any offense constituting sexual abuse of a child, as defined in NRS 432B.100, before the victim of the sexual abuse is:
>
> (1) Twenty-one years old if he discovers or reasonably should have discovered that he was a victim of the sexual abuse by the date on which he reaches that age; or
>
> (2) Twenty-eight years old if he does not discover and reasonably should not have discovered that he was a victim of the sexual abuse by the date on which he reaches 21 years of age.

[2]We note that when pursuing a statute of limitations defense at trial, the defendant can and should request a jury instruction on the issue and a special interrogatory as part of the jury verdict form so the jury can make a factual finding regarding the date of discovery. Doing so here would have at least partially avoided the issue now complained of.

1999 Nev. Stat., ch. 631, § 18(1), at 3525. In 2013, the statute was amended such that the age limit provided in NRS 171.095(1)(b)(1) was increased to 36 years old and the age limit in NRS 171.095(1)(b)(2) was increased to 43 years old. *See* 2013 Nev. Stat., ch. 69, § 3, at 247. This change has survived and is reflected in the current version of the statute.

This court has explained the "secret manner" provision in NRS 171.095 as follows:

> [A] crime is done in a secret manner, under NRS 171.095, when it is committed in a deliberately surreptitious manner that is intended to and does keep all but those committing the crime unaware that an offense has been committed. Therefore normally, if a crime of physical abuse, or a related crime, is committed against a victim who remains alive, it would not be committed in a secret manner under the statute. The victim is aware of the crime and has a responsibility to report it. However, given the inherently vulnerable nature of a child, we conclude that the crime of lewdness with a minor can be committed in a secret manner, even though a victim is involved.

Walstrom v. State, 104 Nev. 51, 56, 752 P.2d 225, 228 (1988),[3] *overruled on other grounds by Hubbard v. State*, 112 Nev. 946, 920 P.2d 991 (1996). This court rejected the broad proposition that "[c]rimes against persons, by their very nature, cannot be concealed" when it came to child sex crimes, "as it fails to take into account the vulnerability of children and apparently assigns to them full adult responsibility for immediately reporting crimes in which they are victims." *Id.* at 55, 752 P.2d at 228 (internal quotations omitted). We also noted that because of the repugnant nature of sex crimes against a child, the crime "is almost always intended to be kept secret." *Id.* at 57, 752 P.2d at 229. We further held that, as for the applicable standard of review, "[i]f substantial evidence supports a trier of fact's determination that a crime was committed in a secret manner, we will not disturb this finding on appeal." *Id.* at 56, 752 P.2d at 229.

In *State v. Quinn*, 117 Nev. at 715-16, 30 P.3d at 1121-22 (footnote omitted), the court concluded the following:

> [D]iscovery [for the purposes of NRS 171.095(1)(a)] occurs when any person—including the victim—other than the wrongdoer (or someone acting in pari delicto with the wrongdoer) has knowledge of the act and its criminal nature, unless the person with knowledge: (1) fails to report out of fear induced by threats made by the wrongdoer or by anyone acting in pari delicto with the wrongdoer; or (2) is a child-victim under eighteen years of

[3]Considering the 1985 version of NRS 171.095. *See* 1985 Nev. Stat., ch. 658, § 12, at 2167.

> age and fails to report for the reasons discussed in *Walstrom*. Under this rule, then, a crime can remain undiscovered even if multiple persons know about it so long as the silence is induced by the wrongdoer's threats.

The court further noted that this approach "realistically recognizes that a wrongdoer can perpetrate a secret crime by threatening anyone with knowledge to remain silent about a crime and prevents the wrongdoer from unfairly manipulating the statute of limitations to his advantage." *Id.* at 716, 30 P.3d at 1122.

Challenged counts addressed in the motion to dismiss (counts 2-53)

Sena adequately preserved the statute of limitations issue as to counts 2-53 because he moved to dismiss them before trial; therefore, he is entitled to de novo review for these counts. *See Mendoza-Lobos v. State*, 125 Nev. 634, 642, 218 P.3d 501, 506 (2009) (holding that questions of statutory interpretation are reviewed de novo). Because some of these counts may have occurred after AS was 18 years old, we will first address the counts that clearly occurred while AS was under 18 and then separately address the counts that may have occurred when she was 18 or older.

Counts 2-30, 45, and 52[4]

NRS 171.095(1)(a) states that if a covered crime "is committed in a secret manner," charges must be filed within the relevant periods of limitation "after the discovery of the offense, *unless a longer period is allowed by paragraph (b)*." (Emphasis added.) For the time period applicable to these charges, if the victim of a crime constituting child sexual abuse discovered or should have discovered that they were a crime victim prior to turning 21, the crime's statute of limitations was only tolled until that victim turned 21 years old. 1999 Nev. Stat., ch. 631, § 18(1), at 3525 (NRS 171.095(1)(b)(1)) (additionally amended in 2001 and 2005). If the victim did not and should not have discovered that they were a crime victim prior to turning 21, the tolling period was extended until the victim turned 28 years old. *Id.* (NRS 171.095(1)(b)(2)) (additionally amended in 2001 and 2005).

The district court applied NRS 171.095(1)(a)'s tolling provision to counts 2-52, concluding that because Sena conducted the crimes in a secret manner, the statute of limitations was tolled until AS discovered the crimes. The district court, however, erred because NRS 171.095(1)(a) clearly provides that it is applicable only if NRS 171.095(1)(b) does not provide a longer tolling period. Thus, the district court should have first considered whether NRS 171.095(1)(b) provided a longer tolling period before applying NRS 171.095(1)(a).

[4]The jury acquitted Sena of counts 5, 16, 17, 18, 30, and 45.

To determine whether a longer tolling period was applicable under NRS 171.095(1)(b), we must determine what constitutes a child sexual abuse victim's "discovery" of the crime. Although we specifically defined the meaning of "discovery" in NRS 171.095(1)(a) in *Quinn*, the meaning of "discovery" in NRS 171.095(1)(b) has yet to be directly defined by statute or by this court. We hold now that "discovery" as used in NRS 171.095(1)(b) has the same meaning as defined in *Quinn*. With this definition in mind, we hold that because AS's silence was induced by the threats Sena made against her and her brothers, AS did not legally discover the crimes against her until she was able to flee Sena's home in June 2014 at 24 years of age, which means that NRS 171.095(1)(a) would provide tolling until that point, then the relevant limitation period for each count would begin to run. For the sexual assault charges, this would be 4 years after AS's escape, meaning that the statute of limitations would expire in June 2018, and for all other counts this would be 3 years after AS's escape, thus meaning that the expiration date would be June 2017.

In comparison, NRS 171.095(1)(b)(2) would extend the statute of limitations period until AS's 28th birthday, May 22, 2018. Therefore, for the sexual assault counts, the district court did not err because NRS 171.095(1)(a) provided a limitation period that extended until June 2018, whereas NRS 171.095(1)(b)(2) would only provide a limitation period until May 22, 2018. For all other counts, NRS 171.095(1)(b)(2) provided the longer period because it provided a limitation period until May 22, 2018, whereas NRS 171.095(1)(a) only provided a limitation period that extended until June 2017. We thus conclude that NRS 171.095(1)(b) was the applicable section for all counts other than the sexual assault counts, and the district court erred in concluding that NRS 171.095(1)(a) applied to these counts. That said, this error did not affect the ultimately correct conclusion that these counts were filed within the applicable statutes of limitations, as these counts were first filed in 2014, well before the limitation period expired. *See Picetti v. State*, 124 Nev. 782, 790 & n.14, 192 P.3d 704, 709 & n.14 (2008) (holding that if the district court reaches the right result, even if for the wrong reason, the result will be upheld by the appellate court).[5]

[5]Sena argues that the district court erred by concluding that the statute of limitations could be tolled past AS's 18th birthday under NRS 171.095(1)(a), citing *Houtz v. State*, 111 Nev. 457, 461, 893 P.2d 355, 357-58 (1995), as supportive authority, but *Houtz* is not analogous to this case. Although we conclude that NRS 171.095(1)(b) is applicable to some charges, not NRS 171.095(1)(a), we still take this opportunity to make clear that this argument has no merit for multiple reasons. First, the crime in *Houtz* was committed prior to the enactment of the second part of the statute, which allowed for automatic tolling of child sexual abuse crimes, and so therefore only the secret manner tolling provision was in existence and had the possibility to apply. 111 Nev. at 461, 893 P.2d at 357. NRS 171.095(2), the precursor to today's NRS 171.095(1)(b), was enacted in 1985 and provided that the statute of limitations for a child sexual abuse crime could be tolled until the child was 18 under certain circumstances.

Counts 31-44 and 46-51[6]

The district court applied NRS 171.095(1)(a) to these charges as well. We first conclude that the fact that Deborah participated in some of these crimes and thus had knowledge of them did not render the crimes "discovered" because Deborah was acting *in pari delicto* with Sena.[7] Furthermore, to the extent that these charges occurred prior to AS's 18th birthday on May 22, 2008, they constitute sexual abuse of a child and the same analysis as we provided for counts 2-30, 45, and 52 applies. Thus, for the sexual assault charges that occurred prior to May 22, 2008, the district court did not err. For all other counts that occurred prior to May 22, 2008, the district court did err; however, as with counts 2-30, 45, and 52, we nonetheless uphold these convictions because this error did not affect the correct conclusion that counts 31-44 and 46-51 were all filed within the applicable statutes of limitations. *Picetti*, 124 Nev. at 790 & n.14, 192 P.3d at 709 & n.14.[8]

To the extent that these crimes were committed on or after AS's 18th birthday, we conclude that these counts would not qualify for tolling under NRS 171.095(1)(b) because they would not constitute sexual abuse of a child. Thus, if this were the case, these charges were eligible for tolling only under NRS 171.095(1)(a). AS was too scared of Sena to be able to disclose his crimes to anyone, and thus,

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See 1985 Nev. Stat., ch. 658, § 12, at 2167-68 (NRS 171.095(2)). In *Houtz*, the court held that allowing the child sexual abuse crime to toll under the secret manner provision until the victim was 18 years old was consistent with the since-enacted NRS 171.095(2) provision. 111 Nev. at 462, 893 P.2d at 358 ("Although the addition to NRS 171.095(2) in 1985 is not controlling in this case as previously explained, it is consistent with our conclusion."). Because the automatic tolling periods for child sexual abuse cases has since been drastically expanded, and also all of the crimes in this case occurred long after the 1985 amendment was made, there are multiple factors that decrease *Houtz*'s value as precedent.

Moreover, the facts in *Houtz* are also distinguishable. In *Houtz*, the victim ceased interaction with the perpetrator around age 14 and failed to report until he was 25. *Id.* at 458, 893 P.2d at 355-56. In this case, Sena constantly threatened AS and the other children up until his arrest. To require a victim to report, even in the face of threats instilling fear, runs directly counter to the purpose of NRS 171.095(1)(a) and would be a nonsensical result.

[6]The jury acquitted Sena of counts 34, 38, 39, 40, 43, and 44.

[7]Sena makes arguments about Deborah's knowledge regarding only counts 46-51; he does not make arguments about Terrie or her knowledge of the crimes committed against AS. However, we conclude that Terrie was acting *in pari delicto* with Sena as well, so the same analysis would apply to her.

[8]We note that the limit included in NRS 171.095(1)(b)(1) was raised from 21 to 36 years old in 2013. However, by 2013, AS was an adult, so any crimes committed against her to which the 2013 amendment to NRS 171.095 would apply would not be eligible for tolling under NRS 171.095(1)(b), as they would not constitute sexual abuse of a child. Thus, we need not consider the change of the age limit in our analysis.

she did not legally discover his crimes until she fled the home. This was catalyzed by her brother's disclosure of his own sexual abuse and resulting suicidality, which shattered her long-standing belief that sexually submitting herself to her father shielded her brothers. Up until that point, which did not occur until 2014, AS was completely intimidated by and fearful of Sena's threats. Thus, to the extent these crimes occurred on or after AS's 18th birthday, we conclude that the district court correctly found that these crimes were tolled under NRS 171.095(1)(a) because they were committed in a secret manner and AS's discovery was thwarted until she fled Sena's house in June 2014.

Count 53

Count 53, which concerned Sena dissuading AS from reporting, commencing criminal prosecution, or causing Sena's arrest, is not covered by NRS 171.095(1)(b) because it is not an offense constituting sexual abuse of a child. However, this crime was committed in a secret manner, such that it was covered by NRS 171.095(1)(a). Therefore, we conclude that the district court did not err in finding that the secret manner provision applied, and the statute of limitations for count 53 was tolled until AS escaped in June 2014.

Challenged counts not addressed in motion to dismiss (counts 1, 55, 57, 59, 69, 77, 99, 103, 105, 115, 117, and 118)[9]

Because Sena never asserted arguments below regarding the statute of limitations for these charges, he has forfeited the issue as to these counts and is entitled to only a plain error review. NRS 178.602 ("Plain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court.").[10]

[9]Sena makes similar arguments here as he does regarding the counts pertaining to AS, contending that NRS 171.095(1)(a) cannot toll a crime's statute of limitations past the victim's 18th birthday. For the same reasons as previously stated, we conclude that this argument is also without merit regarding these counts.

[10]Sena asks this court to consider sua sponte whether his trial counsel was ineffective in failing to properly raise his statute of limitations defenses because his appellate counsel cannot raise the issue, as trial and appellate counsel work in the same office, thus creating a conflict of interest. This court generally does not consider ineffective-assistance-of-counsel claims on direct appeal when the district court has not held an evidentiary hearing on the issue, unless such a hearing would be needless. *Archanian v. State*, 122 Nev. 1019, 1036, 145 P.3d 1008, 1020-21 (2006). Because the standard for ineffectiveness of counsel is high and this court has concluded an evidentiary hearing is needless only when the ineffectiveness is blatantly obvious, such as when counsel makes sarcastic comments encouraging the jury to convict his client, *see Mazzan v. State*, 100 Nev. 74, 77-80, 675 P.2d 409, 411-13 (1984), we conclude that we need not sua sponte consider this issue.

Victims' knowledge of the crimes alleged in counts 1, 55, 57, 77, 99, 103, and 105 did not constitute discovery, nor did Terrie and Deborah's knowledge

Sena asserts the statute of limitations barred count 1 (conspiracy to commit sexual assault), count 55 (child abuse, neglect or endangerment for the bathing incident with TS and Deborah in the shower), count 57 (child abuse, neglect or endangerment for the sex incident with TS and Deborah in the shower), count 77 (use of a minor in producing pornography for filming Deborah having sex with BS), count 99 (use of a minor in producing pornography for filming Terrie performing sexual acts on RS), count 103 (use of a minor in producing pornography for filming Terrie performing fellatio on RS), and count 105 (child abuse, neglect or endangerment for showing RS pornography) because AS, TS, BS, and RS knew about the crimes and Deborah or Terrie participated in or had knowledge of them. Thus, Sena argues, these crimes were discovered at the time they occurred, and the statute of limitations had therefore expired by the time charges had been filed.

AS, TS, BS, and RS all testified that Sena would often threaten them and they would go along with whatever Sena told them to do because they were afraid of him. Sena was often violent toward the children, and they witnessed violence perpetrated against their siblings. Sena also started abusing each child when the child was young. Regardless of the nature of the crime, Sena created a living environment for AS, TS, BS, and RS that was so threatening they were cowed into silence about the crimes that had been committed against them. This meets the first prong of the *Quinn* analysis, which states that the person with knowledge of the crime must "fail[ ] to report out of fear induced by threats made by the wrongdoer." 117 Nev. at 715, 30 P.3d at 1122.

Furthermore, when Terrie and Deborah were participating in these crimes, they were acting in conspiracy with Sena, and thus their knowledge did not constitute discovery. *Id.* at 715, 30 P.3d at 1121-22 (recognizing that a person acting *in pari delicto* with the wrongdoer cannot discover the crime for the purposes of NRS 171.095(1)(a)). Therefore, these crimes were not discovered at the time they occurred, and the statute of limitations for each of these counts was therefore tolled. The charges associated with these crimes were filed well before the applicable limitation periods expired. Sena has therefore failed to demonstrate plain error.

Counts 59, 69, 115, and 118

Sena challenges count 59 (use of a minor in producing pornography for filming Deborah and TS having sex), count 69 (use of a minor in producing pornography for filming Deborah and TS having sex on another occasion), count 115 (use of a minor under the age

of 14 in producing pornography for filming EC nude in the shower), and count 118 (use of a minor under the age of 18 in producing pornography for filming TG in the shower) as being precluded by the statute of limitations. Because TS, EC, and TG each did not know they were being filmed, they could not have had knowledge that would in turn deem each crime discovered. Moreover, for the same reasons stated above, any knowledge Deborah or Terrie had of these crimes did not render them discovered. As such, the statute of limitations for each of these counts was tolled and the counts were filed well within the relevant statutes of limitations. Thus, Sena failed to demonstrate plain error.

Count 117

Sena challenges count 117 (child abuse, neglect or endangerment for showing TG pornography) on statute of limitations grounds. According to *Quinn*, discovery does not occur when the person with knowledge "is a child-victim under eighteen years of age and fails to report for the reasons discussed in *Walstrom*." *Quinn*, 117 Nev. at 715, 30 P.3d at 1122. *Walstrom* recognizes that child sex abuse crimes involve emotional and psychological manipulation of a child that can in turn implicitly discourage disclosure. 104 Nev. at 55, 752 P.2d at 228. These factors were at play in TG's circumstances because Sena showed her the images when she was young—between 11 and 13—and according to TG, he told her "this [is] normal, this is natural. Like, don't be embarrassed[,] . . . it [is] okay," normalizing his deviant behavior.

Thus, count 117 was tolled until TG turned 18 on January 9, 2015, and thereafter the 3-year statute of limitations began to run. The third amended criminal complaint was filed December 15, 2015, well within the 3-year statute of limitations. *See* 2003 Nev. Stat. Spec. Sess., ch. 10, § 4, at 273 (NRS 171.085(2)) (additionally amended in 2005 and 2009) (providing that statute of limitations is 3 years after the commission of the offense, except when tolled by NRS 171.095).[11] Sena thus failed to demonstrate plain error with regard to whether count 117 was filed within the relevant statute of limitations.

[11]Sena argues that the allegations behind count 117 are distinguishable from the facts in *Walstrom* because TG was not subjected to a lewd act and TG was not under 5 years old, and so therefore the policy rationales cited in *Walstrom* should not apply. But *Walstrom* can apply to any sexual crime against any child, even if the child is not under the age of 5. 104 Nev. at 56, 752 P.2d at 228. Further, although the *Walstrom* court did note that "[s]ome research indicates that a substantial number of child abuse victims may be under the age of five," *id.* at 55-56, 752 P.2d at 228, the exact age of the victim was ultimately not relevant to the case's outcome; what was important was that the victim was a child, *id.* at 56, 752 P.2d at 228 (noting that "[g]iven the limited emotional, intellectual, psychological, and physical development of children," children cannot be held to the same level of reporting responsibilities as adults). Finally,

Alleged multiple convictions for the same offense

Incest charges

Sena contends that six of his incest convictions must be vacated because he can only be convicted of one count of incest for each victim, instead of being convicted of numerous counts of incest for each sexual interaction with a victim. Sena was convicted of six counts of incest related to his sexual encounters with AS, two counts of incest related to assisting/causing Deborah to commit fornication or adultery with BS, and one count of incest related to assisting/causing Terrie to commit fornication or adultery with RS.

NRS 201.180 provides that it is a felony for "[p]ersons being within the degree of consanguinity within which marriages are declared by law to be incestuous and void who intermarry with each other or who commit fornication or adultery." "[D]etermining the appropriate unit of prosecution presents an issue of statutory interpretation and substantive law." *Castaneda v. State*, 132 Nev. 434, 437, 373 P.3d 108, 110 (2016) (quoting *Jackson v. State*, 128 Nev. 598, 612, 291 P.3d 1274, 1283 (2012) (internal quotations omitted)). Because it involves statutory interpretation, our review is de novo and begins with the statutory text. *Id.*

When a statute is clear on its face, it is unambiguous, and the court may not go beyond it to determine legislative intent. *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "An ambiguity arises where the statutory language lends itself to two or more reasonable interpretations." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). When a statute is ambiguous, this court looks to factors "including related statutes, relevant legislative history, . . . prior judicial interpretations of related or comparable statutes by this or other courts," reason, and public policy. *Castaneda*, 132 Nev. at 439, 373 P.3d at 111; *Lucero*, 127 Nev. at 95-96, 249 P.3d at 1228. If "other statutory interpretation methods, including the plain language, legislative history, reason, and public policy, have failed to resolve a penal statute's ambiguity," the statute must be liberally interpreted in the accused's favor. *Lucero*, 127 Nev. at 99, 249 P.3d at 1230.

A plain reading of the statute does not reveal the appropriate unit of prosecution for incest because nothing in the statute on its face indicates whether it should apply on a per-relationship basis or on a per-act basis, and a reasonable person could interpret the statute either way. There are two ways in which a person may violate NRS 201.180: (1) by marrying a relative within a certain degree of

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while the *Walstrom* court was concerned with the specific crime of lewdness with a minor, the rule in *Walstrom* applies to any child sexual abuse crime that could be tolled by NRS 171.095(1)(a), not just lewdness with a minor. *See Quinn*, 117 Nev. at 715, 30 P.3d at 1121 (recognizing that *Walstrom* generally applies to "child sexual abuse crimes").

consanguinity, NRS 201.180(1), or (2) by committing fornication or adultery with a relative within a certain degree of consanguinity, NRS 201.180(2). We start our analysis with the acknowledgment that it would be incorrect for a violation under NRS 201.180(1) to have a different unit of prosecution than NRS 201.180(2). Because no incestuous intermarriage occurred in this case, only NRS 201.180(2) applies. We consider NRS 201.180(1) for guidance as to how to interpret NRS 201.180(2) in this case.

If one were to violate the statute through intermarriage, NRS 201.180(1), the logical unit of prosecution would be one charge per marriage. One could reasonably construe from this that the unit of prosecution for NRS 201.180(1) corresponds to the one *relationship* between people who married. However, one could also reasonably conclude that the unit of prosecution corresponds to the one *act* of getting married. Thus, it follows that it would also be reasonable to conclude that each *act* of fornication or adultery would serve as a basis for a separate count of incest. Accordingly, we conclude the statute's language is ambiguous regarding the correct unit of prosecution.

While we would normally turn to legislative history to guide us, after examination of the legislative history available, it appears that the language of the law defining incest in Nevada has remained consistent since 1861, even before Nevada obtained statehood. We thus conclude that legislative history does not aid us here and we turn next to prior judicial interpretations.

In *State v. Seymour*, the defendant was convicted of one count of incest for a pattern of behavior in which he and his first cousin, to whom he was not married, had sexual intercourse "about twice a week" over a period of months. 57 Nev. 35, 38, 57 P.2d 390, 391 (1936). According to the court's descriptions of the cousins' relationship, it appeared to be a consensual romantic relationship. *See id.* at 38-39, 57 P.2d at 391.

In *Douglas v. State*, the defendant forced his daughter to have sex with him twice, once when she was a minor and another time as an adult. 130 Nev. 285, 286, 327 P.3d 492, 493 (2014). Douglas was charged with and convicted of sexual assault of a minor under 14 years of age, sexual assault, and two counts of incest. *Id.* While both incest convictions were allowed to stand, it must be noted that the appropriate unit of prosecution was not at issue in *Douglas*. *Id*. at 285, 327 P.3d at 492.

In *Guitron v. State*, a case decided by the Nevada Court of Appeals, the defendant was convicted of one count of incest, among other charges, after his minor daughter became pregnant and it was revealed that he was the father. 131 Nev. 215, 220, 350 P.3d 93, 96-97 (Ct. App. 2015). The defendant argued that he and the underage victim had sex on only one occasion. *Id.* at 220, 350 P.3d at 96.

In response, "[t]he State [presented] evidence [that] Guitron had groomed the victim and engaged in sexual conduct with her on multiple occasions, even when the victim resisted his advances." *Id.*

As is shown by *Seymour*, *Douglas*, and *Guitron*, none of the existing caselaw specifically defines the proper unit of prosecution for NRS 201.180, and mixed approaches were applied. In *Seymour*, where the participants were having sexual intercourse at least twice a week for a period of months, there was only one count of incest, thus indicating that the State either charged the crime on a per-relationship basis or chose a simpler prosecution where it only needed to prove one instance of incest, rather than multiple instances. *Douglas*, which was an incest case between a father and daughter with at least two encounters, included two counts of incest. *Guitron*, in contrast, only included one count of incest; but, because the State and defendant offered conflicting stories on how many encounters occurred, it is impossible to know whether this was intended as on a per-relationship or per-encounter basis.

Because prior judicial interpretations do not aid our consideration of the proper unit of prosecution, we must turn to public policy rationales. Some rationales behind the incest law are based on genetic concerns in resulting children, protecting traditional notions of family, and religious conformity. *See* 42 C.J.S. *Incest* § 4 (2017); *see also* 1 Homer H. Clark, Jr., *The Law of Domestic Relations in the United States* § 2.9, at 152 (2d ed. 1987). Charging violations of NRS 201.180 based on the relationship, rather than each sexual interaction, would protect the notions the statute aims to protect. However, incest laws are, in part, also aimed at protecting child victims from sexual abuse. And while Sena asserts that each act is deterred by other criminal statutes that penalize sex crimes against children, thus obviating the need for incest to be charged on a per-act basis, he is only partially correct. For crimes that pertain to children who are below the age of consent, it is true that the statutory sexual assault laws would apply to each act with a child incapable of consent. However, in a situation where a child over the age of consent consents to sexual interactions with an older relative, that would be outside the purview of statutory sexual assault laws, and thus each instance would not be punished. In that instance, charging incest on a per-act basis would afford additional protection to the victim that charging on a per-relationship basis would not be able to provide. Thus, we conclude that even public policy considerations do not clarify the correct unit of prosecution for the crime of incest.

In conclusion, because there is a dearth of legislative history that speaks to the question, the caselaw that has applied NRS 201.180 reflects a variety of approaches, and public policy arguments do not provide clear guidance on how to interpret the statute, we hold that the rule of lenity requires us to construe the ambiguous stat-

ute in the accused's favor. *See Lucero*, 127 Nev. at 99, 249 P.3d at 1230; *Firestone v. State*, 120 Nev. 13, 16, 83 P.3d 279, 281 (2004) ("Criminal statutes must be strictly construed and resolved in favor of the defendant." (internal quotations omitted)). As a result, we use the rule of lenity and liberally interpret the statute in the defendant's favor, thus concluding that only three counts of incest, one for each victim, were appropriate. *Lucero*, 127 Nev. at 99, 249 P.3d at 1230. Therefore, we conclude that counts 27, 32, 37, 42, and 47 (pertaining to AS), and count 75 (pertaining to BS) must be vacated.

Possession of child pornography charges

Sena challenges his convictions for possession of child pornography as multiple convictions for the same offense. Because Sena specifically admitted guilt in his closing argument as to counts 78, 100, 104, 119, and 120, and therefore conceded them, he has waived the ability to challenge those convictions and we only need to consider whether counts 60 and 116 are redundant. Because this issue presents a question of statutory interpretation, our review is de novo. *Castaneda*, 132 Nev. at 437, 373 P.3d at 110.

Under NRS 200.730, it is unlawful to knowingly and willfully possess "any film, photograph or other visual presentation depicting a person under the age of 16 years as the subject of a sexual portrayal." In *Castaneda*, this court addressed the proper unit of prosecution under NRS 200.730, concluding that the statute's use of the word "any" was ambiguous, and thus, under the doctrine of lenity, "Castaneda's simultaneous possession at one time and place of 15 images depicting child pornography constituted a single violation of NRS 200.730." 132 Nev. at 438, 444, 373 P.3d at 111, 115. In *Shue v. State*, 133 Nev. 798, 804, 407 P.3d 332, 337 (2017), this court applied the unit-of-prosecution analysis from *Castaneda* and concluded that the district court erred in allowing for the crime to be charged on a per-image basis rather than a per-possession basis, when the State failed to present evidence of distinct acts of possession. Specifically, there was no evidence as to whether the videos were independently transferred to the computer or transferred all together, and instead, the State relied on the fact that the videos were recorded on different days. *Id*.

Here, the charging document alleged that Sena possessed all the images on the same date: September 18, 2014. This alone undercuts the State's argument for multiple acts of possession. One of the State's main theories at trial was that these videos were made and possessed at different points in time, but the State failed to reflect this theory in the charges themselves. Additionally, similarly to *Shue*, the argument that each video was created on a different day and thus warranted a separate count fails because it does not establish distinct acts of possession without additional evidence. Lastly,

the police recovered all the images in one place at one time, which works against the State's theory.[12] On this basis, we conclude that counts 60 and 116 must be vacated, as they are redundant of the other charged possession of child pornography counts for which guilt was specifically conceded at trial, namely counts 78, 100, 104, 119, and 120.

Child abuse, neglect or endangerment via sexual abuse charges

Sena challenges count 57 (child abuse, neglect or endangerment related to Deborah and TS having sex in the shower) as redundant to count 55 (child abuse, neglect or endangerment related to Deborah and TS bathing each other in the shower). Because Sena did not assert this argument at the district court level, he is entitled to only a plain error review. *See* NRS 178.602. This court reviews de novo a redundancy challenge that raises a question of law pertaining to statutory construction. *Ebeling v. State*, 120 Nev. 401, 404, 91 P.3d 599, 601 (2004).

A person is guilty of abuse, neglect or endangerment of a child if the person "willfully causes a child who is less than 18 years of age to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect or to be placed in a situation where the child may suffer physical pain or mental suffering as the result of abuse or neglect." NRS 200.508(1).[13] Generally, if the child is under the age of 14 and suffers substantial bodily or mental harm as a "result of sexual abuse or exploitation," the person is guilty of a category A felony. NRS 200.508(1)(a)(1); NRS 200.508(2)(a)(1).

Rimer v. State held that child abuse and neglect was a continuing offense because of its "cumulative nature." 131 Nev. 307, 319, 351 P.3d 697, 707 (2015). "Given the nature of this offense, it is apparent

[12]To the extent the State argues that because the digital cameras and gray camcorder seized from Sena's home did not have large enough memories to store multiple videos, Sena must have transferred pornography from those devices to the flash drive, this is a mischaracterization of the record. The detective who analyzed the cameras testified that when he examined the devices, the digital camera "did not have any big storage capability, it didn't have an SD card," and the camcorder "did not have an SD card or anything that can be saved to that either," and so therefore the devices in effect did not have any memory in them so there was nothing to analyze. The detective never testified that these cameras did not have, and never had, the capability to hold multiple videos at once. It is also unclear from the testimony whether these cameras had SD cards in them at one time that simply had been removed before the cameras were seized by police. Regardless, the detective's testimony does not clearly establish that these cameras were capable of only holding one video at a time such that each video had to be independently recorded and then transferred before recording the next one.

[13]Because charging documents state that count 55 and count 57 occurred between December 2, 2008, and December 1, 2010, we consider the version of NRS 200.508(1) that was in effect during that time. *See* 2003 Nev. Stat., ch. 2, § 23 at 22. NRS 200.508 was subsequently amended in 2015.

that the child-abuse-and-neglect statute may be violated through a single act but is more commonly violated through the cumulative effect of many acts over a period of time." *Id.* at 320, 351 P.3d at 707. "[T]he Legislature intended for child-abuse-and-neglect violations, when based upon the cumulative effect of many acts over a period of time, to be treated as continuing offenses for purposes of the statute of limitations." *Id.*

Because NRS 200.508 is a continuing offense, it was only appropriate to charge one count of abuse, neglect or endangerment via sexual abuse for the incidents with Deborah and TS in the shower. The existing law states that the crime continues until the abuse stops. Therefore, we conclude that we must vacate count 57 because it is redundant of count 55.

Sufficiency of the evidence

Sena challenges the sufficiency of the evidence supporting the conspiracy to commit sexual assault count and the counts related to filming Terrie's nieces while they showered. In reviewing for sufficiency of the evidence, the appellate court must decide "whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Jackson v. Virginia*, 443 U.S. 307, 319 (1979); *see also Origel-Candido v. State*, 114 Nev. 378, 381, 956 P.2d 1378, 1380 (1998). "In a criminal case, a verdict supported by substantial evidence will not be disturbed by a reviewing court." *McNair v. State*, 108 Nev. 53, 56, 825 P.2d 571, 573 (1992).

There was sufficient evidence to support count 1, conspiracy to commit sexual assault

Sena argues that there was insufficient evidence to support count 1, conspiracy to commit sexual assault. "Nevada law defines a conspiracy as an agreement between two or more persons for an unlawful purpose." *Nunnery v. Eighth Judicial Dist. Court*, 124 Nev. 477, 480, 186 P.3d 886, 888 (2008) (internal quotations omitted). "A person who knowingly does any act to further the object of a conspiracy, or otherwise participates therein, is criminally liable as a conspirator . . . ." *Doyle v. State*, 112 Nev. 879, 894, 921 P.2d 901, 911 (1996) (internal quotations omitted), *overruled on other grounds by Kaczmarek v. State*, 120 Nev. 314, 333, 91 P.3d 16, 29 (2004). Further, "[e]ven though a crime has been committed, the conspiracy does not necessarily end, but it continues until its aim has been achieved." *State v. Wilcox*, 105 Nev. 434, 435, 776 P.2d 549, 549 (1989) (internal quotations omitted). "[A] conspiracy conviction may be supported by 'a coordinated series of acts,' in furtherance of the underlying offense, 'sufficient to infer the existence of an agree-

ment.'" *Doyle*, 112 Nev. at 894, 921 P.2d at 911 (quoting *Gaitor v. State*, 106 Nev. 785, 790 n.1, 801 P.2d 1372, 1376 n.1 (1990), *overruled on other grounds by Barone v. State*, 109 Nev. 1168, 1171, 866 P.2d 291, 293 (1993)). "Direct evidence is not required to establish a conspiracy, but circumstantial evidence may be relied upon. This rule is sanctioned for the obvious reason that experience has demonstrated that as a general proposition a conspiracy can only be established by circumstantial evidence." *Sheriff v. Lang*, 104 Nev. 539, 543, 763 P.2d 56, 59 (1988) (internal quotations omitted).

We conclude that Deborah's and Terrie's repeated participation in the crimes over a period of years in connection with multiple children; Terrie's statements to police that she enjoyed partaking in the sexual abuse; Deborah's testimony that she continued to participate and did not report the crimes due to fear of prison time, diminishment of reputation, and loss of Sena's affection; and video evidence of Deborah and Terrie each individually discussing with Sena sex acts that they wished to perform upon one of the Sena children immediately before abusing the child, when considered together, is substantial evidence to support the conclusion that there was indeed an agreement between Sena, Deborah, and Terrie. We further conclude that Sena's argument that any conspiracy that may have existed ended after the first assault also has no merit. Conspiracy is a continuing crime. *Wilcox*, 105 Nev. at 436, 776 P.2d at 550. There was sufficient evidence to support that Sena, Deborah, and Terrie acted together in a conspiracy to repeatedly abuse their own children until 2014, when the crimes were finally reported to police.

There was sufficient evidence to support counts 115 and 118

Sena argues that there was insufficient evidence to support convictions for counts 115 and 118, which concerned the videos he took of EC and TG in the shower.[14] Part of his argument includes the contention that the "sexual portrayal" language in NRS 200.710(2), which uses the definition provided in NRS 200.700(4), is unconstitutional.

NRS 200.710 provides the following:

> 1. A person who knowingly uses, encourages, entices or permits a minor to simulate or engage in or assist others to simulate or engage in sexual conduct to produce a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750.
>
> 2. A person who knowingly uses, encourages, entices, coerces or permits a minor to be the subject of a sexual por-

[14]Sena also challenged the sufficiency of the evidence to support counts 116 and 119. However, he conceded guilt on count 119 at trial, and we vacate 116 because it was redundant. Therefore, we do not discuss these counts in this section.

> trayal in a performance is guilty of a category A felony and shall be punished as provided in NRS 200.750, regardless of whether the minor is aware that the sexual portrayal is part of a performance.

NRS 200.700(4) defines "sexual portrayal" as "the depiction of a person in a manner which appeals to the prurient interest in sex and which does not have serious literary, artistic, political or scientific value."[15]

NRS 200.700(4)'s definition of "sexual portrayal," and the use of "sexual portrayal" in NRS 200.710(2), are constitutional

Sena first argues that the definition of "sexual portrayal" in NRS 200.700(4) is unconstitutional because NRS 200.700(4) and NRS 200.710(2) are facially invalid. Sena asks us to revisit our decision in *Shue*, 133 Nev. 798, 407 P.3d 332, in light of *United States v. Stevens*, 559 U.S. 460, 470 (2010).

In *Shue*, this court held that "the phrase, 'which does not have serious literary, artistic, political or scientific value,' sufficiently narrows the statute's application to avoid the proscription of innocuous photos of minors." 133 Nev. at 806, 407 P.3d at 339 (quoting NRS 200.700(4)). "The prevention of sexual exploitation and abuse of children constitutes a government objective of surpassing importance," and the Court has "sustained legislation aimed at protecting the physical and emotional well-being of youth even when the laws have operated in the sensitive area of constitutionally protected rights." *New York v. Ferber*, 458 U.S. 747, 757 (1982); *see Shue*, 133 Nev. at 807, 407 P.3d at 339.

In *Stevens*, 559 U.S. at 470-72, the United States Supreme Court held that a federal statute criminalizing the commercial creation, sale, or possession of depictions of animal cruelty was substantially overbroad and, thus, the statute was facially invalid under the First Amendment protection of speech. Recalling *Ferber* and the child pornography statutes addressed therein, the Court noted that "[t]he market for child pornography was intrinsically related to the underlying abuse, and was therefore an integral part of the production of such materials, an activity illegal throughout the Nation" and furthermore that "[i]t rarely has been suggested that the constitutional freedom for speech and press extends its immunity to speech or writing used as an integral part of conduct in violation of a valid criminal statute." *Id.* at 471 (alteration in original) (internal quotations omitted). Because "depictions of animal cruelty" was not a "historically unprotected" category, the Court refused to recognize

[15]Both NRS 200.710 and NRS 200.700 were last amended in 1995, prior to when any of the crimes of which Sena has been convicted occurred. Therefore, no interceding amendments occurred that we need to address.

it as a category of speech outside First Amendment protection. *Id.* at 471-72.

The core point made in *Shue* was that the type of conduct that the appellant was engaged in did not require the First Amendment's protection, because protecting children from being subjected to sexually abusive behavior was "a government objective of surpassing importance." *Ferber*, 458 U.S. at 757; *Shue*, 133 Nev. at 806-07, 407 P.3d at 339. The Supreme Court distinguished "depictions of animal cruelty" from child pornography, *Stevens*, 559 U.S. at 471-72, which the court had previously recognized in *Ferber* was a category of speech that was not entitled to the First Amendment's protections because child pornography was "intrinsically related" to the underlying sexual abuse of children, *Ferber*, 458 U.S. at 759. *Stevens* did not invalidate the holding in *Ferber*, nor is it incongruous with the holding in *Shue*; rather, *Stevens* only distinguished "depictions of animal cruelty" from child pornography when contemplating whether each category was protected by the First Amendment. Thus, this court has already considered the issue of whether NRS 200.700(4) and NRS 200.710(2) are facially invalid in *Shue* and decided that they were both constitutional.[16] *Stevens* does not compel this court to reconsider the issue.

There was sufficient evidence of a "sexual portrayal"

We first reiterate that this issue presents a factual question, which we give the jury great deference to decide, and if there is sufficient evidence, the trial court's verdict will not be disturbed. *McNair*, 108 Nev. at 56, 825 P.2d at 573. With that said, we conclude that there was sufficient evidence that each exhibit depicted a "sexual portrayal." Sena filmed the girls from a voyeuristic point of view, focused on the girls' genitals, had Terrie perform fellatio on him while he filmed the girls, and recorded a male voice, alleged to be Sena, breathing heavily and moaning during both videos, all of which would clearly allow a reasonable juror to find that Sena received sexual gratification from filming the girls. None of the exhibits at issue contain apparent serious literary, artistic, political, or scientific value. Additionally, the conduct in this case was virtually identical to the conduct that occurred in *Shue* that this court concluded was a sexual portrayal: surreptitious filming of a child while the child, unaware, was performing typical activities in the

[16]In light of our decision not to overrule *Shue*, and because we already determined in that matter that the definition of "sexual portrayal" is not overbroad, 133 Nev. at 804-07, 407 P.3d at 337-39, we reject Sena's identical argument that the statute is overbroad.

Further because Sena's conduct is virtually identical to Shue's conduct (filming children in the bathroom performing bathroom activities while they were unaware) and this court rejected Shue's argument that NRS 200.700(4) was vague on its face or as applied, Sena's identical argument that the statute is unconstitutional due to vagueness lacks merit.

bathroom. *Shue*, 133 Nev. at 807, 407 P.3d at 339. Thus, the evidence in the videos demonstrates the depictions of the girls appealed to Sena's prurient interest in sex.[17] Accordingly, we conclude there was sufficient evidence to support convictions for counts 115 and 118. Further, because there was sufficient evidence to support Sena's convictions under the "sexual portrayal" portion of NRS 200.710(2), we need not consider Sena's arguments regarding whether there was sufficient evidence to demonstrate "sexual conduct."

Double jeopardy

Sena challenges three of his convictions for open or gross lewdness (counts 56, 58, and 82) as violating the Double Jeopardy Clause because they punish the same conduct as three of the child abuse, neglect or endangerment via sexual abuse convictions (counts 55, 57, and 81).[18] Sena claims that open or gross lewdness is a lesser-included offense of child abuse, neglect or endangerment. Because Sena did not challenge these counts on double jeopardy grounds before the district court, he is entitled to only a plain error review on appeal. *LaChance v. State*, 130 Nev. 263, 272-73, 321 P.3d 919, 926 (2014).

The Double Jeopardy Clause protects against "multiple punishments for the same offense." *Jackson*, 128 Nev. at 604, 291 P.3d at 1278. To determine whether two statutes punish the same offense or whether there are two offenses for double jeopardy purposes, a court must "inquire[ ] whether each offense contains an element not contained in the other; if not, they are the same [offense] and double jeopardy bars additional punishment and successive prosecution." *Id.* (internal quotations omitted). Indeed, "if the elements of one offense are entirely included within the elements of a second offense, the first offense is a lesser included offense and the Double Jeopardy Clause prohibits a conviction for both offenses." *Barton v. State*, 117 Nev. 686, 692, 30 P.3d 1103, 1107 (2001), *overruled on other grounds by Rosas v. State*, 122 Nev. 1258, 147 P.3d 1101 (2006). "[T]o determine whether an offense is necessarily included in the offense charged, the test is whether the offense charged cannot

[17]It is not clear from our review of the record whether the still images (exhibits 79 and 81) taken from the videos were extracted by the State for the purposes of exhibition at trial or were generated by Sena himself. If they were generated by Sena, we provide the following analysis: for the images, although there obviously was no zoom-in on the girls' genitals and Terrie is not depicted in either picture, we conclude that Sena cannot avoid the fact that the pictures are stills taken from videos that clearly were filmed for the sole purpose of Sena's sexual gratification. And because Sena carefully selected frames that depict each girl in the nude from the front with her hands above her head and her breasts and/or pubic area clearly visible to the camera, that in itself indicates a focus on the girls' genitalia.

[18]We vacate count 57 because it is redundant of count 55, so we do not address it here.

be committed without committing the lesser offense." *Lisby v. State*, 82 Nev. 183, 187, 414 P.2d 592, 594 (1966).

Open or gross lewdness requires the defendant to have committed an obscene, indecent, or sexually unchaste act that is glaringly noticeable or obviously objectionable and not in a secret manner, including in a manner intended to be offensive to the victim. *Berry v. State*, 125 Nev. 265, 280-82, 212 P.3d 1085, 1095-97 (2009) (discussing the elements of open or gross lewdness), *overruled on other grounds by State v. Castaneda*, 126 Nev. 478, 245 P.3d 550 (2010). As discussed above, a defendant is guilty of child abuse, neglect or endangerment via sexual abuse when the defendant causes a child to suffer unjustifiable physical pain or mental suffering as a result of abuse or neglect, which includes sexual abuse and sexual exploitation under circumstances that harm or threaten to harm the child's health or welfare. NRS 200.508.

Because Sena could have committed child abuse, neglect or endangerment via sexual abuse without committing open or gross lewdness, the open or gross lewdness offense is not a lesser-included offense. Thus, because each crime requires proving an element that is not included in the other, plain error did not occur.

Alleged courtroom "closure"

Lastly, Sena challenges the district court's direction to the gallery that no one was to come and go during witness testimony or during argument. Sena objected to the court's admonition to the spectators as constituting an improper closure of the courtroom. Because he waited until the 8th day of trial to object to this court admonition, he is entitled only to plain error review. *United States v. Olano*, 507 U.S. 725, 733 (1993) (providing that if the defendant fails to timely object to an alleged courtroom closure and thus does not preserve the error for appellate review, the error is forfeited and the defendant is entitled only to plain error review); *see also* NRS 178.602.

The First and Sixth Amendments guarantee a right to a federal public trial, and the Fourteenth Amendment makes such rights applicable to trials at the state level as well. *Presley v. Georgia*, 558 U.S. 209, 211-12 (2010). "Trial courts are obligated to take every reasonable measure to accommodate public attendance at criminal trials." *Id.* at 215. In the event that a court wants to close the courtroom to public attendance, the court must follow certain steps specified in *Waller v. Georgia*, 467 U.S. 39, 48 (1984), and adopted by this court in *Feazell v. State*, 111 Nev. 1446, 1449, 906 P.2d 727, 729 (1995).

On the other hand, "the atmosphere essential to the preservation of a fair trial—the most fundamental of all freedoms—must be maintained at all costs." *Estes v. Texas*, 381 U.S. 532, 540 (1965). Some courts have recognized that this mandate can allow for certain standing orders that regulate the actions of certain members of

the public. *See, e.g.*, *Seymour v. United States*, 373 F.2d 629, 630, 632 (5th Cir. 1967) (holding that a standing order prohibiting taking "photographs in connection with any judicial proceeding on or from the same floor of the building on which courtrooms are located" was constitutional).

In Nevada, a "judge shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence: (a) [t]o make the interrogation and presentation effective for the ascertainment of the truth; (b) [t]o avoid needless consumption of time; and (c) [t]o protect witnesses from undue harassment or embarrassment." NRS 50.115(1). Additionally, the judiciary has the "inherent authority to administrate its own procedures and to manage its own affairs, meaning that the judiciary may make rules and carry out other incidental powers when reasonable and necessary for the administration of justice." *Halverson v. Hardcastle*, 123 Nev. 245, 261, 163 P.3d 428, 440 (2007) (emphasis and internal quotations omitted). "For instance, a court has inherent power to protect the dignity and decency of its proceedings and to enforce its decrees, and thus it may issue contempt orders and sanction or dismiss an action for litigation abuses." *Id.* "This court has repeatedly and consistently held that the courts of this state have the power to make their own procedural rules." *State v. Second Judicial Dist. Court (Marshall)*, 116 Nev. 953, 959, 11 P.3d 1209, 1212 (2000).

The content of the testimony in this case was extremely sensitive, detailing decades-long abuse that the victims had endured at the hands of their own family members. Witnesses testifying to such matters come to court with certain hesitancies and anxieties that might only be exacerbated by frequent comings and goings in and out of the courtroom by observers during the course of the examination. Therefore, regulating when people came and went from the courtroom "protect[ed] the dignity and decency of [the court's] proceedings." *Halverson*, 123 Nev. at 261, 163 P.3d at 440. The court never excluded people from or "closed" the courtroom; members of the public were always allowed to watch the proceedings and simply had to adhere to specific entrance and exit times. Thus, the district court properly exercised its discretion in governing its own courtroom, and there was no structural error warranting reversal.[19]

CONCLUSION

While Sena challenges almost all of his convictions on multiple grounds, most of those challenges are meritless. The State filed all challenged charges within the appropriate applicable statutes

[19]We do, however, emphasize that we discourage any court closure and emphasize that in the event of any court closure, the district court must follow the steps as outlined in *Waller* and *Feazell*. Moreover, any restriction on court access should be accompanied by the district court making a clear record as to the basis of its decision.

of limitations. There was sufficient evidence to convict Sena of conspiracy to commit sexual assault and to support the criminal convictions related to Sena's filming of Terrie's nieces while they were in the shower. Additionally, Sena's convictions did not violate the tenets of double jeopardy, and the district court did not close the courtroom during the jury trial.

We do conclude, however, that some of Sena's convictions must be vacated. Because the proper unit of prosecution for incest is one charge per victim, Sena was improperly charged with nine counts of incest, when he should only have been charged with three counts. Additionally, counts 60 and 116 are redundant of other charged possession of child pornography counts and should thus be vacated, as the State charged Sena with possessing the child pornography on the same day and on the same device without asserting distinct instances of possession. Lastly, Sena was improperly charged with two counts of child abuse, neglect or endangerment via sexual abuse when he should have only been charged with one count, as it is a continuing crime.

We thus affirm the judgment of conviction for all of the challenged counts except counts 27, 32, 37, 42, 47, 57, 60, 75, and 116, which are hereby vacated, and we remand this matter to the district court for further proceedings consistent with this opinion.

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

SATICOY BAY, LLC, SERIES 34 INNISBROOK, Appellant, *v.* THORNBURG MORTGAGE SECURITIES TRUST 2007-3; FRANK TIMPA; MADELAINE TIMPA; TIMPA TRUST; RED ROCK FINANCIAL SERVICES, LLC; SPANISH TRAIL MASTER ASSOCIATION; REPUBLIC SERVICES; and LAS VEGAS VALLEY WATER DISTRICT, Respondents.

No. 80111

May 26, 2022 510 P.3d 139

Appeal from a district court final judgment in an action to quiet title and distribute interpleaded funds. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Affirmed.

[Rehearing denied July 1, 2022]

Roger P. Croteau & Associates, Ltd., and *Roger P. Croteau*, Las Vegas, for Appellant Saticoy Bay, LLC, Series 34 Innisbrook.

Kravitz Schnitzer Johnson Watson & Zeppenfeld, Chtd., and *Gary E. Schnitzer*, Las Vegas; *Troutman Pepper LLP* and *Aaron D. Lancaster*, Atlanta, Georgia, for Respondent Thornburg Mortgage Securities Trust 2007-3.

Gregory J. Walch, Las Vegas, for Respondent Las Vegas Valley Water District.

Koch & Scow LLC and *David R. Koch* and *Steven B. Scow*, Henderson, for Respondent Red Rock Financial Services, LLC.

Leach Kern Gruchow Anderson Song and *Sean L. Anderson* and *Ryan D. Hastings*, Las Vegas, for Respondent Spanish Trail Master Association.

Avalon Legal Group LLC and *Bryan Naddafi* and *Elena Nutenko*, Las Vegas; *The Law Office of Travis Akin* and *Travis D. Akin*, Las Vegas, for Respondents Frank Timpa, Madelaine Timpa, and Timpa Trust.

Williams Starbuck and *Drew J. Starbuck* and *Donald H. Williams*, Las Vegas, for Respondent Republic Services.

Hanks Law Group and *Karen L. Hanks* and *Chantel M. Schimming*, Las Vegas, for Amicus Curiae SFR Investments Pool 1, LLC.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

The Great Recession of 2008 brought with it a wave of foreclosures. This case stems from a quiet title action involving one of those foreclosed properties located in a homeowner's association (HOA) community and sold by the HOA to a subsequent purchaser at a foreclosure sale. In the alternative to seeking quiet title, the subsequent purchaser asserted a misrepresentation claim against the HOA and its agent based upon their failure to disclose and publicly record that the servicer of the original loan for the property had tendered the superpriority portion of the HOA's lien prior to the sale.

After concluding that this court has jurisdiction over this appeal, we hold that the subsequent purchaser failed to sufficiently allege that the HOA or its agent misrepresented information regarding a tender. In addition, to the extent that the misrepresentation claim was premised on a failure to proactively record that a tender had been made, we hold that the claim failed as a matter of law because there was no statutory duty for an HOA to record a tender of the superpriority portion of the lien on the property before 2015, when the Legislature amended NRS 116.31164(2) to so provide. Next, we determine that the district court did not err by awarding the property's previous owner the excess proceeds from the sale and awarding the HOA agent the attorney fees and costs it incurred in connection with the sale. Finally, we conclude that the district court did not abuse its discretion by denying the subsequent purchaser's motion for reconsideration and its motion to amend its complaint. Therefore, we affirm the district court's judgment in full.

BACKGROUND

In 2006, respondent Timpa Trust obtained a loan from Countrywide Home Loans, Inc., to purchase a property within an HOA, respondent Spanish Trail Master Association, for roughly $3.8 million. The loan was secured by a deed of trust on the property.[1] Mortgage Electronic Registration Systems, Inc., was the initial deed of trust beneficiary and assigned the deed of trust to respondent Thornburg Mortgage Securities Trust 2007-3 in 2010. Bank of America, N.A. (BANA) was the servicer of the loan. Timpa Trust stopped making payments on the loan in 2008. Around the same time, Timpa Trust also stopped paying the monthly assessment to Spanish Trail. As a result, Spanish Trail—through its agent, respondent Red Rock Financial Services—recorded a notice of delinquent assessment lien against Timpa Trust's property and later a notice of default and election to sell. The notice asserted the sale would

[1]Frank and Madelaine Timpa, both of whom are now deceased, conveyed the property to Timpa Trust shortly after purchasing it.

"be made without covenant or warranty, express or implied regarding . . . title or possession, encumbrance, obligations to satisfy any secured or unsecured liens." Before the foreclosure sale, BANA tendered the superpriority portion of Spanish Trail's lien, but Red Rock rejected the tender. Appellant Saticoy Bay, LLC, Series 34 Innisbrook, purchased the property at the foreclosure sale for roughly $1.2 million in November 2014.[2]

Saticoy Bay thereafter filed the underlying quiet title action against Thornburg and alternatively asserted a misrepresentation claim against Spanish Trail and Red Rock for failing to disclose BANA's superpriority tender. Thornburg in turn asserted claims against Saticoy Bay, Spanish Trail, Timpa Trust, and Red Rock, requesting a declaration that its deed of trust survived the foreclosure sale. Red Rock sought to interplead the funds from the foreclosure sale that exceeded the HOA lien on the property (excess proceeds). Saticoy Bay, Thornburg, and Spanish Trail each sought summary judgment, and the district court denied these competing motions by oral order.[3] Prior to the district court's entry of a written order, Thornburg moved for reconsideration. The district court converted Thornburg's motion for reconsideration into a motion for summary judgment. The court then granted summary judgment in favor of Thornburg, holding that Saticoy Bay's interest was subject to Thornburg's deed of trust in light of BANA's superpriority tender. The district court also sua sponte dismissed with prejudice Saticoy Bay's misrepresentation claim against Spanish Trail and Red Rock.

Timpa Trust subsequently filed a motion for summary judgment to recover the excess proceeds pursuant to NRS 116.31164. Red Rock also made a claim to the excess proceeds and sought the attorney fees and costs that it incurred in connection with holding the foreclosure sale, which Timpa Trust did not challenge. Saticoy Bay disagreed, arguing that the funds should be distributed to Thornburg and applied to the outstanding loan balance. Thornburg did not respond to Timpa Trust's motion. The district court granted summary judgment for Timpa Trust, awarding Timpa Trust the excess proceeds less an award to Red Rock of roughly $29,000 in attorney fees and costs.

Saticoy Bay thereafter moved for reconsideration. In addition, Saticoy Bay argued that the district court should have awarded the excess proceeds to Thornburg. Saticoy Bay further contended that the district court should refuse to award Timpa Trust the excess pro-

[2]Saticoy Bay observes that the high purchase price (relative to that of other foreclosure properties) was due to the sale being held shortly after this court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), which held that an HOA's foreclosure of the superpriority portion of its lien could extinguish the first deed of trust.

[3]Red Rock joined Spanish Trail's countermotion for summary judgment.

ceeds out of equity concerns to avoid a "windfall" to Timpa Trust. Saticoy Bay argued that a footnote in this court's decision in *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 435 P.3d 1217 (2019), provided Saticoy Bay the right to request that the sale of the property be set aside. Saticoy Bay also moved to file a Fourth Amended Complaint to request that the foreclosure sale be unwound. The district court denied Saticoy Bay's motions for reconsideration and to amend its complaint. This appeal followed.

DISCUSSION

Saticoy Bay's appeal is timely

As a preliminary matter, Spanish Trail and Red Rock contend that Saticoy Bay's challenge to the district court's summary judgment order wherein it dismissed Saticoy Bay's misrepresentation claim is untimely because the notice of appeal challenging that decision was filed more than 30 days after notice of entry of the order was filed. Saticoy Bay responds that its challenge to that order was timely because the order was not a final judgment, as it did not resolve which parties would receive the excess proceeds from the foreclosure sale.

A final judgment "disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp.*, 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). NRAP 4(a)(1) requires that an aggrieved party file a notice of appeal within 30 days after notice of a judgment's entry is served, which is a prerequisite for this court to obtain jurisdiction over the appeal. *See Healy v. Volkswagenwerk Aktiengesellschaft*, 103 Nev. 329, 331, 741 P.2d 432, 433 (1987) (recognizing that an "untimely notice [of appeal] fail[s] to invoke this court's jurisdiction").

We conclude that Saticoy Bay's appeal is timely. While the district court determined in its first summary judgment order that Thornburg's deed of trust survived the foreclosure sale, it did not resolve which parties were entitled to the excess proceeds from the sale, which was an issue that was pending. *See Lee*, 116 Nev. at 426, 996 P.2d at 417 (observing that a final judgment "disposes of *all* the issues presented in the case" (emphasis added)); *see also Consol. Generator-Nev., Inc. v. Cummins Engine Co.*, 114 Nev. 1304, 1312, 971 P.2d 1251, 1256 (1998) (explaining that an interlocutory order may properly be challenged in the context of an appeal from a final judgment). This issue was resolved when the district court later entered summary judgment awarding the excess proceeds to Timpa Trust and Red Rock. Lastly, Spanish Trail concedes that Saticoy Bay's appeal of the excess proceeds order is timely. Therefore, because this court has jurisdiction, we turn to the substance of Saticoy Bay's appeal of the district court's summary

judgment rejecting its misrepresentation claim against Spanish Trail and Red Rock. *See Lee*, 116 Nev. at 426, 996 P.2d at 417; *Consol. Generator-Nev.*, 114 Nev. at 1312, 971 P.2d at 1256.[4]

The district court did not err by dismissing Saticoy Bay's misrepresentation claim against Red Rock and Spanish Trail

Saticoy Bay challenges the district court's dismissal of its misrepresentation claim on two primary grounds. First, Saticoy Bay contends that if it had been permitted to pursue this claim, it could have produced evidence that it inquired into whether a tender had been made and that, in response, either Red Rock or Spanish Trail misrepresented that a tender *had not* been made. Second, Saticoy Bay argues that Spanish Trail had a statutory duty to proactively record BANA's tender. We determine that both of Saticoy Bay's arguments fail and therefore affirm the district court's dismissal of its misrepresentation claim.

Saticoy Bay failed to allege that it inquired into whether tender had been made

Saticoy Bay contends that the district court erred by dismissing its misrepresentation claim because Spanish Trail's and Red Rock's failure to disclose that BANA proffered tender upon Saticoy Bay's inquiry amounted to intentional misrepresentation. Saticoy Bay also contends that the district court denied it the opportunity to present evidence that it had inquired into whether tender had been made. We review the district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

To sufficiently state a claim for intentional misrepresentation, the plaintiff must allege, among other elements, "a false representation that is made with either knowledge or belief that it is false or without a sufficient foundation." *Nelson v. Heer*, 123 Nev. 217, 225, 163 P.3d 420, 427 (2007). A party makes a false representation when it suppresses or omits "a material fact which [the] party is bound in good faith to disclose . . . ." *Nelson*, 123 Nev. at 225, 163 P.3d at 426 (internal quotation marks omitted).

In its summary judgment order, the district court dismissed Saticoy Bay's misrepresentation claim against Spanish Trail and Red Rock without explanation. Nonetheless, we conclude that the district court's dismissal was proper. First, Saticoy Bay fails to point to anywhere in the record wherein it alleged that it asked Spanish Trail or Red Rock whether tender had been made. Notably, its Third

[4]Spanish Trail maintains that Saticoy Bay essentially abandoned its misrepresentation claim by signing the proposed summary judgment order. However, Spanish Trail does not support its claim with salient authority or cogent argument on this point, so we do not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006).

Amended Complaint (which was Saticoy Bay's operative complaint at the time the district court dismissed the misrepresentation claim) contained no allegations that it had inquired into whether a superpriority tender had been made. Second, the absence of a direct assertion from Saticoy Bay stating affirmatively that it had inquired is telling. Iyad Haddad, the manager of Saticoy Bay's trustee, submitted an affidavit in conjunction with Saticoy Bay's motion for summary judgment against Thornburg stating, "[p]rior to and at the time of the foreclosure sale, there was nothing in the public record to put me on notice of any claims or notices that any portion of the lien had been paid." Additionally, Haddad noted that "[a]t no time prior to the foreclosure sale did I receive any information from the HOA or the foreclosure agent about the property or the foreclosure sale." Thus, Saticoy Bay's own affiant did not expressly assert that he had inquired into whether tender had been made, much less that Spanish Trail or Red Rock falsely represented that a tender *had not* been made.

Consequently, Saticoy Bay failed to demonstrate that either entity made a false representation or material omission.[5] *Cf. Nelson*, 123 Nev. at 225, 163 P.3d at 427. Therefore, although the district court did not provide a reason for dismissing Saticoy Bay's misrepresentation claim, we nevertheless affirm the dismissal of that claim. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (recognizing that this court may affirm the district court on any ground supported by the record, even if not relied upon by the district court); *Wood*, 121 Nev. at 729, 121 P.3d at 1029 (concluding that summary judgment is appropriate when the pleadings and all other evidence in the record demonstrate that there is no genuine issue of material fact).

Additionally, Saticoy Bay's contention that it did not have an opportunity to present evidence that it inquired into whether tender had been made fails. After the district court dismissed Saticoy Bay's misrepresentation claim in its Third Amended Complaint, Saticoy Bay sought leave to file a Fourth Amended Complaint. Even in its proposed complaint, however, Saticoy Bay failed to allege that it inquired into whether a superpriority tender had been made. Saticoy Bay could have made such an allegation and presented any such evidence at that time or in conjunction with its motion for reconsideration but did not avail itself of the opportunity to do so. Accordingly, to the extent that Saticoy Bay asked the district court

[5]Because we conclude that Saticoy Bay failed to demonstrate the first element of its misrepresentation claim (i.e., that Spanish Trail and Red Rock made a false representation), we need not analyze the other elements of the claim. *See Bulbman, Inc. v. Nev. Bell*, 108 Nev. 105, 111, 825 P.2d 588, 592 (1992) (observing that "[w]here an essential element of a claim for relief is absent, the facts, disputed or otherwise, as to other elements are rendered immaterial and summary judgment is proper").

for an opportunity to present evidence that it inquired into whether a tender had been made, we conclude that Saticoy Bay was afforded a sufficient opportunity.

There was no statutory duty to disclose that tender had been made prior to 2015

Saticoy Bay also argues that, regardless of whether it inquired into whether a tender was made, dismissal of its misrepresentation claim was improper because Spanish Trail had a statutory duty to proactively disclose that tender had been made. We determine that this argument is without merit.

In 2015, the Legislature enacted NRS 116.31164(2), which provides that when a tender has been made, the HOA is generally prohibited from conducting a foreclosure sale unless the tender is first publicly recorded. 2015 Nev. Stat., ch. 266, § 5, at 1340-41 (amending NRS 116.31164).[6] Since that time, in a series of unpublished orders, this court has roundly rejected the notion that an HOA had a duty to disclose whether tender of the superpriority portion of the lien had been made prior to the amendment of NRS 116.31164 in 2015. *See, e.g.*, *Saticoy Bay, LLC, Series 3237 Perching Bird v. Aliante Master Ass'n*, No. 80760, 2021 WL 620978, at *1 (Nev. Feb. 16, 2021) (Order of Affirmance); *Saticoy Bay, LLC, Series 3984 Meadow Foxtail Dr. v. Sunrise Ridge Master Ass'n*, No. 80204, 2021 WL 150737, at *1 (Nev. Jan. 15, 2021) (Order of Affirmance); *Saticoy Bay, LLC, Series 5413 Bristol Bend Ct. v. Nev. Ass'n Servs., Inc.*, No. 78433, 2020 WL 6882781, at *1 (Nev. Nov. 23, 2020) (Order of Affirmance).

We take this opportunity to reaffirm our legal holding. To the extent that Saticoy Bay's misrepresentation claim was based upon a failure to record that a tender had been made (or offered), the claim fails as a matter of law because an HOA had no statutory duty prior to 2015 to disclose a tender by recordation. The foreclosure sale here occurred in 2014, and therefore neither Red Rock nor Spanish Trail had any statutory duty to record that BANA tendered the superpriority portion of the lien. *Compare* NRS 116.31164(2) (2015) (requiring an HOA to disclose if tender of the superpriority portion of the lien has been made), *with* NRS 116.31164 (2013) (not requiring any such disclosure).

Therefore, because Spanish Trail did not have a statutory duty to record BANA's tender, we conclude that the district court did not err

[6]NRS 116.31164(2) reads in full:

> If the holder of the security interest described in paragraph (b) of subsection 2 of NRS 116.3116 satisfies the amount of the association's lien that is prior to its security interest not later than 5 days before the date of sale, the sale may not occur unless a record of such satisfaction is recorded in the office of the county recorder of the county in which the unit is located not later than 2 days before the date of sale.

by granting summary judgment on Saticoy Bay's misrepresentation claim against Red Rock and Spanish Trail.[7]

The district court did not err by awarding Timpa Trust and Red Rock the excess proceeds

Saticoy Bay next argues that the district court erred by awarding Timpa Trust the excess proceeds from the foreclosure sale instead of distributing them to Thornburg because this would provide an "unjust windfall" to Timpa Trust. We review the district court's interpretation of NRS 116.31164(8)(b), the statute governing the distribution of excess proceeds from a foreclosure sale, de novo. *See Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014).

NRS 116.31164(8)(b) provides a distribution sequence for the excess proceeds from an HOA foreclosure sale.[8] In relevant part, the statute provides as follows:

> 8. After the sale, the person conducting the sale shall:
>
> . . .
>
> (b) Apply the proceeds of the sale for the following purposes in the following order:
>
> (1) The reasonable expenses of sale;
>
> (2) The reasonable expenses of securing possession before sale, holding, maintaining, and preparing the unit for sale, including payment of taxes and other governmental charges, premiums on hazard and liability insurance, and, to the extent provided for by the declaration, reasonable attorney's fees and other legal expenses incurred by the association;
>
> (3) Satisfaction of the association's lien;
>
> (4) Satisfaction in the order of priority of any subordinate claim of record; and
>
> (5) Remittance of any excess to the unit's owner.

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[7]Amicus curiae SFR Investments Pool 1, LLC, argues that this court should overturn *Bank of America, N.A. v. SFR Investments Pool 1, LLC*, 134 Nev. 604, 427 P.3d 113 (2018) (holding that tendering the superpriority portion of an HOA's lien cures the default as to that portion of the HOA's lien by operation of law and that an ensuing HOA foreclosure sale does not extinguish a first deed of trust). We decline the invitation to do so because, among other reasons, amici may not present novel issues not argued by the parties. *See Select Portfolio Servicing, Inc. v. Dunmire*, No. 77251, 2020 WL 466816, at *2 n.4 (Nev. Jan. 27, 2020) (Order of Affirmance) (declining to consider new issues raised by amicus); *see also Martin v. Peoples Mut. Sav. & Loan Ass'n*, 319 N.W.2d 220, 230 (Iowa 1982) ("Reviewable issues must be presented in the parties' briefs, not an amicus brief."); *Noble Manor Co. v. Pierce County*, 943 P.2d 1378, 1380 n.1 (Wash. 1997) ("Appellate courts will not usually decide an issue raised only by amicus.").

[8]The Nevada Legislature again amended NRS 116.31164, effective October 1, 2021. *See* 2021 Nev. Stat., ch. 549, § 1.9, at 3747-49. The statute was not materially amended with respect to this matter, and we cite to the current version of the statute.

Here, the district court properly applied NRS 116.31164(8)(b). The court correctly awarded Red Rock a portion of the excess proceeds in attorney fees and costs pursuant to subsection (8)(b)(2), accurately observed that Thornburg did not have a "subordinate" interest in the property for purposes of subsection (8)(b)(4) in light of its superpriority tender, and provided the rest of the proceeds to Timpa Trust as the former homeowner of the property pursuant to subsection (8)(b)(5).[9] Far from providing an "unjust windfall" to Timpa Trust as Saticoy Bay alleges, the district court's excess proceeds order strictly followed the letter of the law. Simply put, there is no statutory provision that supports Saticoy Bay's contention to the contrary. We therefore affirm the district court's summary judgment order regarding the excess proceeds of the foreclosure sale.

The district court did not abuse its discretion by denying Saticoy Bay's motion for reconsideration

Saticoy Bay contends that the district court erred by declining to reconsider its request to unwind the foreclosure sale in light of *Bank of America, N.A. v. Thomas Jessup, LLC Series VII*, 135 Nev. 42, 43 n.5, 435 P.3d 1217, 1218 n.5 (2019) (*Jessup I*). Specifically, Saticoy Bay asserts that footnote 5 in *Jessup I* stands for the proposition that parties are required to state their preference as to whether the sale of the property should be set aside or whether the deed of trust remains as an encumbrance on the property after a foreclosure sale.[10]

This court generally reviews a district court's order denying a motion for reconsideration for an abuse of discretion. *AA Primo*

[9]Saticoy Bay contends that this award was improper because, in its view, subsection (8)(b)(2) authorizes an award of attorney fees only when those fees are incurred in connection with preparing for and holding the foreclosure sale and not in connection with subsequent litigation regarding the sale's effect, as was the case here. While this is a plausible reading of subsection (8)(b)(2), we decline to address Saticoy Bay's argument because, as reflected in the district court's order, Saticoy Bay did not object to Red Rock's fee request. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (observing that this court generally declines to consider arguments raised for the first time on appeal). Although Saticoy Bay suggested that it "inherently" challenged Red Rock's request by virtue of challenging the overall distribution of excess proceeds, we disagree. *See Schuck v. Signature Flight Support of Nev., Inc.*, 126 Nev. 434, 438, 245 P.3d 542, 545 (2010) ("[A] district court is not obligated to wade through and search the entire record for some specific facts which might support the nonmoving party's claim.").

[10]In footnote 5, this court wrote that

> [a]s the Bank's deed of trust was not extinguished, we need not address the viability of the Bank's claims against [the HOA and its agent]. Similarly, we need not address the Bank's remaining arguments in support of its deed of trust remaining intact, as neither the Bank nor the Purchaser have expressed whether they would prefer to have the sale set aside or have the Purchaser take title to the property subject to the first deed of trust.

Builders, LLC v. Washington, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). Reconsideration may be appropriate where a party introduces substantially different evidence or the court's decision is clearly erroneous. *Masonry & Tile Contractors Ass'n of S. Nev. v. Jolley, Urga & Wirth, Ltd.*, 113 Nev. 737, 741, 941 P.2d 486, 489 (1997).

We conclude that the district court's order is not clearly erroneous for two reasons. First, *Jessup I* is not controlling law: the court vacated *Jessup I*, and thus that decision lacks precedential effect. *Bank of Am., N.A. v. Thomas Jessup, LLC Series VII*, No. 73785, 2020 WL 2306320 (Nev. May 7, 2020) (Order Affirming in Part, Reversing in Part, and Remanding) (*Jessup II*); *see also L.A. News Serv. v. Tullo*, 973 F.2d 791, 794 n.4 (9th Cir. 1992) (determining that a vacated opinion lacks precedential value); Michael D. Moberly, *This Is Unprecedented: Examining the Impact of Vacated State Appellate Court Opinions*, 13 J. App. Prac. & Process 231, 231-32 (2012) (noting that several state and federal appellate courts have held that vacated judicial opinions have no precedential value). Second, even if *Jessup I* were good law, footnote 5 is not on point: this court merely noted therein that "we need not address" whether the bank's deed of trust remained intact. 135 Nev. at 43 n.5, 435 P.3d at 1218 n.5. This court did not suggest, let alone require, as Saticoy Bay contends, that parties state their preference as to whether the sale of the property should be set aside or whether the deed of trust should remain as an encumbrance after a foreclosure sale. Therefore, Saticoy Bay has not shown the district court abused its discretion in denying reconsideration.

The district court did not abuse its discretion by denying Saticoy Bay's motion to amend its complaint

Saticoy Bay also contends that the district court erred by denying Saticoy Bay's request for leave to make a post-judgment amendment to its complaint to (1) allege that under the principles of equitable subrogation, the excess proceeds should be awarded to Thornburg or to itself, and (2) set forth a claim of unjust enrichment against Spanish Trail and Red Rock.[11]

This court reviews an order denying a motion for leave to amend a pleading pursuant to NRCP 15 for an abuse of discretion. *Kantor v. Kantor*, 116 Nev. 886, 891, 8 P.3d 825, 828 (2000). As we held in *Greene v. Eighth Judicial District Court*, "a district court lacks jurisdiction to allow amendment of a complaint, once final judgment is entered, unless that judgment is first set aside or vacated pursuant to the Nevada Rules of Civil Procedure." 115 Nev. 391, 396, 990 P.2d 184, 187 (1999). NRCP 15(b)(2) creates a narrow exception

[11]Saticoy Bay also sought leave to amend its complaint to assert a claim that *Jessup I* requires that the foreclosure sale be unwound. That claim would have been futile for the reasons just mentioned.

to *Greene*, permitting a post-judgment amendment to conform the pleadings to the evidence and state an issue that has been tried by the consent of the parties.

We conclude that the district court did not abuse its discretion because it neither made a clearly erroneous factual determination nor disregarded controlling law. *See MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 88, 367 P.3d 1286, 1292 (2016) ("An abuse of discretion can occur when the district court bases its decision on a clearly erroneous factual determination or it disregards controlling law."). Saticoy Bay concedes that it did not plead an equitable subrogation claim in its complaint, and such a claim was never considered by the district court. Nor was this issue tried by the consent of the parties. Thus, Saticoy Bay's motion to amend does not fall within the exception outlined in NRCP 15(b)(2). Accordingly, we conclude that the district court did not abuse its discretion in denying Saticoy Bay's motion to amend its complaint.[12]

CONCLUSION

HOAs had no statutory duty to record whether tender of the superpriority portion of their lien on a property was made until 2015, when the Legislature amended NRS 116.31164 to impose such a duty. Given the lack of such a statutory duty and Saticoy Bay's failure to demonstrate a genuine issue of material fact with respect to any alleged false representation or material omission, we determine that the district court's summary judgment on Saticoy Bay's misrepresentation claim against Spanish Trail and Red Rock was proper. We also affirm the district court's summary judgment regarding distribution of the excess proceeds of the foreclosure sale, as well as the district court's denial of Saticoy Bay's motion for reconsideration and motion to amend.

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

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[12]Saticoy Bay also requests that the award of attorney fees to Red Rock be reversed if the foreclosure sale is unwound. Because we affirm the district court's denial of Saticoy Bay's request to unwind the foreclosure sale, we deny this request.