CHRISTOPHER BEAVOR, an Individual, Appellant, *v.*
JOSHUA L. TOMSHECK, an Individual, Respondent.

No. 81964

November 10, 2022 519 P.3d 1260

Appeal from a district court order granting summary judgment in a legal malpractice action. Eighth Judicial District Court, Clark County; James Crockett, Judge.

Affirmed in part, reversed in part, and remanded.

E. Brent Bryson, P.C., and *E. Brent Bryson*, Las Vegas; *Cohen Johnson, LLC*, and *H. Stan Johnson* and *Ryan D. Johnson*, Las Vegas, for Appellant.

Olson, Cannon, Gormley & Stoberski and *Max E. Corrick, II*, Las Vegas, for Respondent.

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

OPINION

By the Court, Hardesty, J.:

In this appeal, we are asked to decide whether the proceeds from a legal malpractice claim may be assigned to an adversary in the same litigation that gave rise to the alleged legal malpractice. We have previously held that the assignment of a legal malpractice *claim* is prohibited as a matter of public policy. *See Tower Homes, LLC v. Heaton*, 132 Nev. 628, 635, 377 P.3d 118, 122 (2016); *Chaffee v. Smith*, 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982). Allowing a client who is damaged by his or her attorney to assign the malpractice claim to a third party threatens the integrity of the highly personal and confidential attorney-client relationship and creates an incentive for the client to file a malpractice claim against the attorney and sell it to the highest bidder, even if the claim lacks merit.

At issue in this case is the assignability of the *proceeds* from a legal malpractice action, rather than the action itself. We limit our consideration of this issue to the specific context presented in this case—the assignment of proceeds to an adverse party in the underlying litigation from which the alleged malpractice arose. Because such an assignment would allow parties to use legal malpractice claims as a bargaining chip in settlement negotiations, as occurred here, we conclude that public policy prohibits an assignment of proceeds from a legal malpractice claim to an adversary in the underlying litigation. For this reason, the district court properly

invalidated the assignment at issue. However, we also conclude that an invalid assignment does not, by itself, preclude an injured client from pursuing the legal malpractice claim where the assignment has been set aside. Thus, we affirm in part and reverse in part the district court's order granting summary judgment, and we remand this matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

This dispute began when Yacov Hefetz loaned $2.2 million to Toluca Lake Village, LLC, to fund the purchase of property. The loan was secured by appellant Christopher Beavor's personal residence in a guaranty agreement. Toluca Lake filed bankruptcy, and Beavor did not repay the $2.2 million loan. Hefetz sued Beavor for breaching the guaranty agreement. The jury returned a verdict in favor of Beavor.

After the verdict, Hefetz hired a new attorney, H. Stan Johnson, and filed a motion for a new trial. Beavor also hired a new attorney, respondent Joshua Tomsheck, who filed an opposition arguing only that Hefetz's motion for a new trial was untimely. The district court concluded that the motion was timely and granted a new trial because Beavor did not substantively oppose Hefetz's arguments. Beavor did not timely appeal this ruling. The lawsuit proceeded, and Tomsheck withdrew as Beavor's attorney. Later, Beavor sent a letter to Tomsheck informing him that he might file a legal malpractice claim based on Tomsheck's allegedly deficient performance. Beavor hired another attorney and filed a motion to dismiss Hefetz's complaint, which the district court granted. We reversed for reasons that do not affect the analysis in the instant appeal. *See Hefetz v. Beavor*, 133 Nev. 323, 331, 397 P.3d 472, 478 (2017).

On remand, Hefetz and Beavor reached a settlement agreement to dismiss the litigation. In addition to settlement payments in the amount of $300,000, Beavor agreed to prosecute his legal malpractice claim against Tomsheck and to "irrevocably assign[ ] any recovery or proceeds" from that claim to Hefetz. To effectuate the assignment, Beavor agreed that he would sign a conflict waiver to allow Johnson—Hefetz's attorney—to represent him regarding the legal malpractice claim. The parties agreed that Hefetz would pay Johnson to prosecute Beavor's claim. Beavor further agreed that he would provide Johnson with all documents relating to Tomsheck's representation and do nothing intentional to impair the value of any recovery. The agreement, however, provided that Beavor would retain the right to decide whether he would settle the litigation with Tomsheck. The agreement also required Beavor to execute a confession of judgment in favor of Hefetz in the amount of $2 million, which would be recorded should Beavor breach his obligations under the settlement agreement.

Beavor complied with the settlement agreement by suing Tomsheck for legal malpractice. Tomsheck moved for summary judgment on the ground that Beavor impermissibly assigned his claim to Hefetz. In opposition, Beavor argued that the assignment did not violate public policy because he still retained control of the lawsuit and assigned only the proceeds of the action to Hefetz. The district court concluded that the assignment was invalid because Beavor transferred control of the litigation to Hefetz and the assignment was to an adversary from the same litigation in which the malpractice arose. The district court also concluded that the assignment was framed as an assignment of proceeds to circumvent the public policy that would otherwise bar such an assignment. Finally, the district court concluded that Beavor could not reassert his claim against Tomsheck because the assignment was irrevocable. Thus, the district court granted summary judgment to Tomsheck. This appeal followed.

DISCUSSION

A summary judgment will be affirmed if this court's de novo review of the evidence—viewed in the light most favorable to the nonmovant—shows "that no genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005) (alteration in original) (internal quotation marks omitted).

Assigning the proceeds of a legal malpractice claim to an adversary from the same litigation that gave rise to the malpractice claim violates public policy

Beavor argues that the district court erred in granting summary judgment against him because our precedents allow parties to assign the proceeds from legal malpractice claims if the damaged client retains control of the litigation and was the party who pursued the malpractice claim. He contends that he controlled the litigation and previously pursued the claim, so the assignment of the proceeds was valid. Tomsheck argues that legal malpractice claims and the proceeds from such claims cannot be assigned to a former adversary from the same litigation that gave rise to the alleged malpractice. Thus, Tomsheck asserts that the district court properly invalidated the assignment.

Our precedents governing the assignment of legal malpractice claims detail the policy concerns associated with such an assignment. In *Chaffee v. Smith*, we held that "[a]s a matter of public policy, we cannot permit enforcement of a legal malpractice action which has been transferred by assignment . . . but which was never

pursued by the original client." 98 Nev. 222, 223-24, 645 P.2d 966, 966 (1982). We explained that "[t]he decision as to whether to bring a malpractice action against an attorney is one peculiarly vested in the client." *Id.* at 224, 645 P.2d at 966. Later, in *Tower Homes, LLC v. Heaton*, we held that an assignment of a legal malpractice claim violates public policy because the assignor no longer controls the claim. 132 Nev. 628, 635, 377 P.3d 118, 122 (2016). Relying on the California Court of Appeal's decision in *Goodley v. Wank & Wank, Inc.*, we explained that allowing the assignee of a legal malpractice claim to control the litigation against the assignor's attorney "embarrass[es] the attorney-client relationship and imperil[s] the sanctity of the highly confidential and fiduciary relationship existing between attorney and client." *Id.* at 635, 377 P.3d at 123 (quoting *Goodley v. Wank & Wank, Inc.*, 133 Cal. Rptr. 83, 87 (Ct. App. 1976)). The *Goodley* court reasoned that allowing the assignment of a legal malpractice claim effectively "convert[s] it to a commodity . . . [that is] transferred to economic bidders who have never had a professional relationship with the attorney and to whom the attorney has never owed a legal duty." 133 Cal. Rptr. at 87. This would allow legal malpractice claims to be exploited, presenting a plethora of "probabilities that could only debase the legal profession." *Id*. It is our duty to prevent a practice that could jeopardize or harm members of the legal profession or the public. For that reason, our precedents bar the assignment of a legal malpractice claim.

While this court has previously addressed assignments of legal malpractice *claims*, we have not considered whether the *proceeds* of such claims can be assigned. In other contexts, we have held that the assignment of the proceeds of a personal-injury claim, rather than the claim itself, is permissible because such an assignment permits the injured plaintiff to retain control of the litigation without interference from the assignee. *See Achrem v. Expressway Plaza Ltd. P'ship*, 112 Nev. 737, 741, 917 P.2d 447, 449 (1996); *see also Reynolds v. Tufenkjian*, 136 Nev. 145, 149, 461 P.3d 147, 151 (2020). Beavor invites us to allow a damaged client to assign the proceeds from a legal malpractice claim if the client retains control of the litigation. He asserts that, under this proposed rule, his assignment to Hefetz was permissible.

To resolve this case, we need not accept Beavor's invitation to answer the broader question of whether assigning the proceeds of a legal malpractice claim is prohibited in all instances, but instead confine our decision to assignments to an adverse party in the underlying litigation. We hold, like the Supreme Court of Connecticut in *Gurski v. Rosenblum & Filan, LLC*, "that neither a legal malpractice claim nor the proceeds from such a claim can be assigned to an adversary in the same litigation that gave rise to the alleged malpractice." 885 A.2d 163, 167 (Conn. 2005). As the *Gurski* court

determined, the assignment of a legal malpractice claim—or the proceeds of such a claim—to *the adversary* in the litigation that gave rise to the malpractice "creates the opportunity and incentive for collusion in stipulating to damages in exchange for an agreement not to execute on the judgment in the underlying litigation." *Id.* at 174; *see also, e.g.*, *Skipper v. ACE Prop. & Cas. Ins. Co.*, 775 S.E.2d 37, 38 (S.C. 2015) ("Were we to permit such assignments, plaintiffs and defendants would be incentivized to collude against the defendant's attorney."); *Kenco Enters. Nw., LLC v. Wiese*, 291 P.3d 261, 263 (Wash. Ct. App. 2013) (noting that the mere opportunity for collusion, regardless of whether collusion actually occurs, "converts legal malpractice into a commodity").

In addition to the potential of collusion, the assignability of a malpractice claim to an adversary carries the risk that the malpractice claim will be used to settle a client's case. As the Indiana Supreme Court warned in *Picadilly, Inc. v. Raikos*, such assignments "would become an important bargaining chip in the negotiation of settlements—particularly for clients without a deep pocket." 582 N.E.2d 338, 343 (Ind. 1991), *abrogated on other grounds by Liggett v. Young*, 877 N.E.2d 178 (Ind. 2007). If such assignments were permitted, adversaries could offer financially strapped parties a favorable settlement in exchange for their legal malpractice claims. *Id.* Not only could this undermine attorney-client relationships and confidences, but it implicates the same policy concerns discussed by the *Goodley* court—that a malpractice claim could be turned into a "commodity to be exploited," which would encourage unjustified lawsuits against attorneys, increase legal malpractice litigation, and ultimately debase the legal profession. 133 Cal. Rptr. at 87.

The concerns discussed above apply with equal force when only the *proceeds* of a legal malpractice claim are assigned to the adverse party in the underlying litigation. Regardless of whether the client assigns the malpractice claim itself or only the future proceeds from that claim to an adversary, the result is the same—the adversary will have an interest in any recovery from the legal malpractice claim. Thus, the same potential for turning a legal malpractice claim into a commodity or bargaining chip exists when only the proceeds of those claims are assigned, as this case illustrates. Here, as part of the settlement agreement between Beavor and Hefetz, Beavor had to prosecute his legal malpractice claim and transfer his recovery from that claim to Hefetz. Though Beavor did not assign the malpractice claim to Hefetz, he agreed to litigate his malpractice claim for the benefit of Hefetz, effectively using the legal malpractice claim as a bargaining chip. This is the exact danger *Picadilly* warned against. Because public policy prohibits the assignment of proceeds from a legal malpractice claim to the adversary in the underlying litigation,

we conclude that the district court correctly invalidated Beavor's assignment to Hefetz.[1]

Beavor retains the claim against Tomsheck even though the assignment of proceeds is invalid

Relying on cases from other jurisdictions, Beavor argues that even if the assignment of proceeds is invalid, he retains the right to assert his legal malpractice claim on his own behalf against Tomsheck. Tomsheck argues that we held in *Tower Homes* that a legal malpractice claim is extinguished following an invalid assignment. We disagree with Tomsheck's reading of *Tower Homes* and join with other jurisdictions that recognize that an injured client may pursue a legal malpractice claim following an invalid assignment of the proceeds of that claim.

In *Tower Homes*, the bankruptcy court entered an order authorizing the bankruptcy trustee to permit a group of creditors to pursue Tower Homes' malpractice claim against its former attorneys. 132 Nev. at 631-32, 377 P.3d at 120-21. The creditors controlled the litigation and would receive all financial benefits from the claim. *Id*. While recognizing that bankruptcy statutes permit bankruptcy creditors to bring debtor malpractice claims on behalf of the bankruptcy estate under certain conditions, this court determined that the creditors were not actually bringing a claim on behalf of the estate and thus the bankruptcy court's order constituted an impermissible assignment of a legal malpractice claim to them in violation of *Chaffee*, 98 Nev. at 223-24, 645 P.2d at 966. *Tower Homes*, 132 Nev. at 633-34, 377 P.3d at 121-22. The creditors argued that "the portion of the bankruptcy court order allowing [them] to retain any recovery should be ignored and the proceeds should revert back to the estate." *Id.* at 635 n.2, 377 P.3d at 123 n.2. However, we rejected that argument because the creditors "cited no authority to support a remedy that would result in rewriting the bankruptcy court's order severing [their] rights to the proceeds" from the invalid assignment. Thus, *Tower Homes* did not address whether the claim was extinguished, but only whether the creditors could pursue it.

In distinguishing *Tower Homes*, Beavor directs our attention to several persuasive authorities that lead to the relatively straightforward conclusion that Beavor should be able to assert his claim for legal malpractice notwithstanding the invalid assignment. *See generally Kommavongsa v. Haskell*, 67 P.3d 1068, 1070-72, 1083

[1]We assume without deciding that the assignment is properly characterized here as an assignment of proceeds rather than an assignment of the legal malpractice claim. In light of our conclusion, we need not determine whether Beavor retained control of the litigation such that he assigned only the proceeds of the malpractice claim.

(Wash. 2003) (allowing the injured client to pursue the legal malpractice claim following the invalid assignment of that claim); *see also Weston v. Dowty*, 414 N.W.2d 165, 167 (Mich. Ct. App. 1987) (explaining that an invalid assignment does not warrant dismissal of a legal malpractice claim); *Tate v. Goins, Underkofler, Crawford & Langdon*, 24 S.W.3d 627, 634 (Tex. Ct. App. 2000) ("[T]he plaintiff's right to bring his own cause of action for [legal] malpractice is not vitiated by [an] invalid assignment."). We therefore hold that a legal malpractice claim is vested in the client, and an invalid assignment, by itself, does not prevent an injured client from pursuing a legal malpractice claim where the assignment has been set aside. For that reason, we reverse the district court's grant of summary judgment on that issue and remand for further proceedings consistent with this opinion.[2]

CONCLUSION

We hold that neither a legal malpractice claim nor the proceeds from such a claim can be assigned to an adversary from the same litigation that gave rise to the alleged malpractice. Thus, we conclude that the district court correctly invalidated Beavor's assignment to Hefetz. However, we further hold that a legal malpractice claim is vested in the injured client and, generally, an invalid assignment of the claim or proceeds does not warrant dismissal of the legal malpractice claim. Accordingly, we reverse that portion of the district court's order granting summary judgment, and we remand this matter for further proceedings consistent with this opinion.

Stiglich and Herndon, JJ., concur.

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[2]Tomsheck also argues that the settlement agreement provided for an irrevocable assignment of the legal malpractice claim, thus precluding Beavor from pursuing the claim in his own name. Beavor maintains that the settlement agreement contains a severance clause, so any invalid portion of the claim still leaves the settlement agreement intact. We decline to interpret the settlement agreement because Tomsheck is not a party to it.

JOHN ILIESCU, JR., AND SONNIA ILIESCU, TRUSTEES OF THE JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST; JOHN ILIESCU, JR., AN INDIVIDUAL; AND SONNIA ILIESCU, AN INDIVIDUAL, APPELLANTS, *v.* THE REGIONAL TRANSPORTATION COMMISSION OF WASHOE COUNTY, RESPONDENT.

No. 83212-COA

JOHN ILIESCU, JR., AND SONNIA ILIESCU, TRUSTEES OF THE JOHN ILIESCU, JR. AND SONNIA ILIESCU 1992 FAMILY TRUST; JOHN ILIESCU, JR., AN INDIVIDUAL; AND SONNIA ILIESCU, AN INDIVIDUAL, APPELLANTS, *v.* THE REGIONAL TRANSPORTATION COMMISSION OF WASHOE COUNTY, RESPONDENT.

No. 83756-COA

November 17, 2022 522 P.3d 453

Consolidated appeals from district court orders granting summary judgment and awarding attorney fees and costs in a tort and contract action. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

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

Albright, Stoddard, Warnick & Albright and *D. Chris Albright*, Las Vegas, for Appellants.

Woodburn & Wedge and *Dane W. Anderson*, Reno, for Respondent.

Before the Court of Appeals, GIBBONS, C.J., TAO and BULLA, JJ.

OPINION

By the Court, GIBBONS, C.J.:

In this appeal, we address the grants of dismissal and summary judgment as to claims of improper actions by the Regional Transportation Commission of Washoe County that occurred during the completion of a construction project on appellants' property after condemnation proceedings. In so doing, we discuss actions in tort and contract law that remain underdeveloped in Nevada law. We conclude that the district court correctly dismissed appellants' claims for waste and injunctive relief, and correctly granted summary judgment on their contract-based claims. However, the district court erred in granting summary judgment on appellants' claims for trespass and declaratory relief. For the reasons articulated herein, we affirm in part, reverse in part, vacate in part, and remand.

FACTS AND PROCEDURAL HISTORY

Although this is not an appeal from a condemnation action, the facts underlying this appeal began with one. Respondent Regional Transportation Commission of Washoe County (RTC) filed a complaint in eminent domain seeking to acquire a permanent easement, a public utility easement, and a temporary construction easement on commercial property owned by the John Iliescu, Jr. and Sonnia Iliescu 1992 Family Trust. Appellants John Iliescu, Jr., and Sonnia Iliescu (collectively, the Iliescus) are trustees of the family trust. The RTC sought the easements in furtherance of its "4th Street/Prater Way Complete Street and [Bus Rapid Transit] Project" in Reno, which was intended to improve traffic flow along 4th Street and Prater Way. Specifically, the project included "undergrounding of existing overhead utilities within the [p]roject area, construction of curbs, gutters, pedestrian ramps and sidewalks, and installation of new lighting fixtures and landscaping within the [p]roject limits." Eventually, the parties stipulated to, and the district court ordered, the taking in exchange for a payment of $11,065 to the Iliescus as just compensation. The court also ordered that the permanent easement and the public utility easement were "perpetual easements" for access to and maintenance of the public utilities.

Ten months after the district court's order in the condemnation proceedings, the Iliescus filed a complaint alleging 12 causes of action against the RTC. According to the Iliescus, during the previous project and despite their objections, the RTC and its contractors drove over and parked their vehicles (including 20-ton work trucks) on the Iliescus' "Remaining Property"—a parking lot on the parcel not subject to condemnation. The Iliescus alleged that the RTC's conduct precluded them at times from using any portion of the "Remaining Property," caused physical damage to the parking lot, and caused both John and Sonnia to suffer severe and ongoing "psychological and emotional anguish, pain and distress, with physical manifestations."

The RTC filed a first motion to dismiss 8 of the complaint's 12 causes of action. During litigation, the parties stipulated that the Iliescus no longer wished to pursue damages for emotional distress or personal injury. The district court therefore dismissed their claim for intentional and/or negligent infliction of emotional distress.

The Iliescus filed an amended complaint alleging 11 causes of action.[1] Thereafter, the RTC filed a supplemental motion to dismiss as to six of the causes of action. The district court granted the RTC's motion to dismiss as to the Iliescus' claims for injunctive relief,

[1]The causes of action included breach of contract, breach of the covenant of good faith and fair dealing (contract claim), breach of fiduciary duty, waste, conversion, trespass, civil conspiracy, negligence, tortious breach of the covenant of good faith and fair dealing, injunctive relief, and declaratory relief.

breach of fiduciary duty, waste, conversion, and tortious breach of the covenant of good faith and fair dealing. The court denied the motion to dismiss as to the Iliescus' civil conspiracy claim.

The RTC eventually moved for summary judgment as to the Iliescus' remaining claims, which included breach of contract, breach of the implied covenant of good faith and fair dealing, trespass, civil conspiracy, negligence, and declaratory relief. The Iliescus opposed the motion and supported their opposition with various exhibits that had previously been filed in the case. The district court ultimately granted the RTC's motion for summary judgment, ruling that the Iliescus had failed to present any admissible evidence in support of their claims.[2] It subsequently granted the RTC's motion for attorney fees, ruling that although the Iliescus appeared to have good faith bases for bringing their claims, "their counsel failed to produce discovery or dismiss the action if discovery would be impossible due to hardship."[3] The district court awarded the RTC $61,057.07 in attorney fees under NRS 18.010(2)(b) and $3,647.35 in costs as the prevailing party under NRS 18.020. The Iliescus now raise multiple issues on appeal. We address each in turn.

The district court did not err in dismissing the Iliescus' claim for waste

The Iliescus argue the district court erred in dismissing their claim for waste and ruling that the RTC was not a guardian or tenant as to their "Remaining Property" (the parking lot) for the purposes of satisfying NRS 40.150.[4] They argue the RTC "had been granted entry rights onto certain portions of [their] [p]roperty" and therefore was a tenant of the property and could commit waste by damaging the surface of the lot with its heavy equipment. The RTC counters that the Iliescus' complaint never alleged that the RTC was a tenant as to their parking lot. It argues that, indeed, the complaint made clear that the RTC and its contractors used the parking lot despite having no right to do so and over the Iliescus' frequent objections.

A defendant's motion to dismiss "under NRCP 12(b)(5) is subject to a rigorous standard of review on appeal." *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008)

[2]On appeal, the Iliescus only challenge the district court's rulings discussed herein.

[3]We acknowledge that the Iliescus could have done more to vigorously prosecute their claims before the district court. During the proceedings below, the RTC requested multiple times that the court dismiss the Iliescus' case for lack of prosecution. As pertinent to this appeal, the district court denied each of those requests.

[4]"If a guardian, tenant for life or years, joint tenant or tenant in common of real property commit waste thereon, any person aggrieved by the waste may bring an action against the guardian or tenant who committed the waste, in which action there may be judgment for treble damages." NRS 40.150.

(internal quotation marks omitted). In reviewing dismissal under NRCP 12(b)(5), we recognize all factual allegations in the plaintiffs' complaint as true and draw all inferences in their favor. *Id.* at 228, 181 P.3d at 672. A claim should be dismissed under NRCP 12(b)(5) only if it appears beyond a doubt that the plaintiffs could prove no set of facts, which, if true, would entitle them to relief. *Id.* Because Nevada is a "notice-pleading" jurisdiction, a complaint need only set forth sufficient facts to demonstrate the necessary elements of a claim for relief so that the defending party has "adequate notice of the nature of the claim and relief sought." *W. States Constr., Inc. v. Michoff*, 108 Nev. 931, 936, 840 P.2d 1220, 1223 (1992); *see also Droge v. AAAA Two Star Towing, Inc.*, 136 Nev. 291, 308-09, 468 P.3d 862, 878-79 (Ct. App. 2020) (discussing Nevada's liberal notice-pleading standard).

Nevada law provides for a cause of action against a guardian or tenant of real property who "commit[s] waste *thereon*." NRS 40.150 (emphasis added). "Waste is generally considered a tort defined as the destruction, alteration, misuse, or neglect of property by one in rightful possession to the detriment of another's interest in the same property." 8 Michael Allan Wolf, *Powell on Real Property* § 56.01 (2021). A cause of action for waste requires the defendant to be in or have been in lawful possession of the property on which the alleged waste occurred. *See Stephenson v. Nat'l Bank of Winter Haven*, 109 So. 424, 425-26 (Fla. 1926) ("[W]aste is an abuse or destructive use of the property by one in rightful possession."); *Hamilton v. Mercantile Bank of Cedar Rapids*, 621 N.W.2d 401, 409 (Iowa 2001) ("A claim for waste is an action at law brought by a remainderman against a tenant in lawful possession of land . . . ."); *Mich. Oil Co. v. Nat. Res. Comm'n*, 276 N.W.2d 141, 147 (Mich. 1979) ("[T]he ordinary use of the term 'waste' does not refer only to waste of oil and gas, but includes any spoilation or destruction of the land, including flora and fauna, by one lawfully in possession, to the prejudice of the estate or interest of another."); *Meyer v. Hansen*, 373 N.W.2d 392, 395 (N.D. 1985) ("Waste may be defined as an unreasonable or improper use, abuse, mismanagement, or omission of duty touching real estate by one rightfully in possession, which results in a substantial injury."). Not surprisingly, then, each type of tenancy mentioned in NRS 40.150 includes an interest in real property. *See* NRS 40.150 (stating that a waste action can be maintained against a "tenant for life or years, joint tenant or tenant in common of real property").

Here, the Iliescus alleged that, in completing its project, the RTC damaged their parking lot, which was on "that portion of [their] [p]roperty not subject to the condemnation, and not involved in whatsoever nature in the [p]roject." The Iliescus further alleged that they frequently objected to this "unauthorized and illegal use"

of their parking lot. The Iliescus did not argue below, nor do they argue on appeal, that the RTC had a legal right to use their parking lot. Rather, both below and on appeal, they argue that the RTC was a tenant only as to the property that was condemned.

Assuming the RTC was a tenant over the Iliescus' condemned property, under NRS 40.150, the RTC could only have committed waste "thereon"—on the condemned property, not on the Iliescus' parking lot. And the Iliescus have not alleged that the RTC committed waste as to the condemned portion of their property. Therefore, even taking every inference in the Iliescus' favor, *see Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, the district court did not err by dismissing their waste claim.

The district court did not err in dismissing the Iliescus' separate cause of action for injunctive relief

The Iliescus argue the district court erred in dismissing their separate cause of action for injunctive relief because "[i]t is entirely possible and even plausible that the RTC" may again "overstep [its] boundaries in accessing and damaging the remaining portions of [their] property" during some future repairs to the RTC's permanent easements.[5] As a threshold matter, injunctive relief is a remedy, not a separate cause of action. *See State Farm Mut. Auto. Ins. Co. v. Jafbros Inc.*, 109 Nev. 926, 928, 860 P.2d 176, 178 (1993) (explaining that a violated right is a prerequisite to granting injunctive relief and an injunction is not appropriate "to restrain an act which does not give rise to a cause of action" (internal quotation marks omitted)); *Knutson v. Vill. of Lakemoor*, 932 F.3d 572, 576 n.4 (7th Cir. 2019) ("With respect to injunctive relief, that is a remedy, not a cause of action, and thus should not be pleaded as a separate count."); *Klay v. United Healthgrp., Inc.*, 376 F.3d 1092, 1100 (11th Cir. 2004) (explaining that "traditional injunctions are predicated upon [a] cause of action"); *Shell Oil Co. v. Richter*, 125 P.2d 930, 932 (Cal. Dist. Ct. App. 1942) (explaining that injunctive relief is a remedy, not a cause of action, and thus, a cause of action must be asserted against the party before injunctive relief may be requested against that party); *Terlecki v. Stewart*, 754 N.W.2d 899, 912 (Mich. Ct. App. 2008) ("It is well settled that an injunction is an equitable remedy, not an independent cause of action."). Therefore, to the extent that the Iliescus pleaded injunctive relief as an independent cause of action, the district court did not err in dismissing that claim. *See Knutson*, 932 F.3d at 576 n.4.

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[5]The Iliescus also argue that the RTC could have been enjoined to restore their property to the state it was in before the RTC allegedly damaged it. However, they did not make this argument below, and we decline to consider it on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal").

However, "the question whether a litigant has a 'cause of action' is analytically distinct *and prior to* the question of what relief, if any, a litigant may be entitled to receive." *Davis v. Passman*, 442 U.S. 228, 239 (1979) (emphasis added); *see also State Farm*, 109 Nev. at 928, 860 P.2d at 178 ("It is axiomatic that a court cannot provide a remedy unless it has found a wrong."). Therefore, even though we affirm the dismissal of the independent cause of action, as discussed below, we reverse the grant of summary judgment on the Iliescus' trespass claim. Therefore, on remand, they may seek permanent injunctive relief as a remedy for that claim, should they prevail on it.

The district court did not err in granting the RTC's motion for summary judgment as to the Iliescus' contract-based claims

The Iliescus argue the district court erred in granting summary judgment in favor of the RTC as to their breach-of-contract claim because the parties had entered into a contract by way of a stipulation in the prior condemnation proceedings. They argue that, at the very least, their evidence that a stipulation existed should have precluded summary judgment. The RTC counters that the prior stipulation was not relevant to any alleged use of or damage to the Iliescus' parking lot. It further argues that summary judgment was proper because the Iliescus failed to provide any evidence of causation or actual damages in support of their breach-of-contract claim.

We review a district court's order granting summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is proper if the pleadings and all other evidence on file demonstrate that there exists no genuine dispute of material fact "and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted); *see also* NRCP 56(a). "A factual dispute is genuine when the evidence is such that a rational trier of fact could return a verdict for the nonmoving party." *Wood*, 121 Nev. at 731, 121 P.3d at 1031. In rendering a decision on a motion for summary judgment, all evidence "must be viewed in a light most favorable to the nonmoving party." *Id.* at 729, 121 P.3d at 1029. The party moving for summary judgment must meet its initial burden of production to show there exists no genuine dispute of material fact. *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602, 172 P.3d 131, 134 (2007). The nonmoving party must then "transcend the pleadings and, by affidavit or other admissible evidence, introduce specific facts that show a genuine [dispute] of material fact." *Id.* at 603, 172 P.3d at 134.

To prevail on a claim for breach of contract, the plaintiff must establish (1) the existence of a valid contract, (2) that the plaintiff performed, (3) that the defendant breached, and (4) that the breach caused the plaintiff damages. *Saini v. Int'l Game Tech.*, 434 F. Supp. 2d 913, 919-20 (D. Nev. 2006); *Reichert v. Gen. Ins. Co. of Am.*, 442 P.2d 377, 381 (Cal. 1968). Relating to damages, a plaintiff

must prove both (1) a causal connection between the defendant's breach and the damages asserted, and (2) the amount of those damages. *See Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, 105 Nev. 855, 857, 784 P.2d 954, 955 (1989) ("The party seeking damages has the burden of proving both the fact of damages and the amount thereof."); *Saks Fifth Ave., Inc. v. James, Ltd.*, 630 S.E.2d 304, 311 (Va. 2006) ("A plaintiff thus must prove two primary factors relating to damages. First, a plaintiff must show a causal connection between the defendant's wrongful conduct and the damages asserted. Second, a plaintiff must prove the amount of those damages by using a proper method and factual foundation for calculating damages." (internal citations omitted)).[6] The burden of proving the amount of damages "need not be met with mathematical exactitude, but there must be an evidentiary basis for determining a reasonably accurate amount of damages." *Mort Wallin*, 105 Nev. at 857, 784 P.2d at 955.

Here, the Iliescus alleged that, during the prior condemnation proceedings, they entered into a valid agreement by which the RTC was entitled to complete its project in exchange for compensating the Iliescus for the condemnation. They further alleged that the way in which the RTC carried out the project constituted a breach of the parties' agreement. The Iliescus supported these allegations with a portion of an order from the condemnation proceedings that ordered the parties to "cooperate so as to minimize interference between construction of the [p]roject and [the Iliescus'] use of the remaining land . . . on APN 008-244-15." That order also made multiple references to a stipulation to which the parties had agreed. The Iliescus further provided a detailed quote for services, from Desert Engineering, to repair the parking lot for $84,550.

Below, the RTC met its initial summary judgment burden by pointing out that there was an absence of evidence to support the Iliescus' breach-of-contract claim as to damages. *See Cuzze*, 123 Nev. at 602-03, 172 P.3d at 134 (explaining that where the nonmoving party would bear the burden of persuasion at trial, the party moving for summary judgment can satisfy its burden of production

[6]*See also Omaha Pub. Power Dist. v. Darin & Armstrong, Inc.*, 288 N.W.2d 467, 474 (Neb. 1980) ("It is a basic concept that in any damage action for breach of contract the claimant must prove that the breach of contract complained of was the proximate cause of the alleged damages."); *Florafax Int'l, Inc. v. GTE Mkt. Res., Inc.*, 933 P.2d 282, 296 (Okla. 1997) ("In order for damages to be recoverable for breach of contract they must be clearly ascertainable . . . and it must be made to appear they are the natural and proximate consequence of the breach and not speculative and contingent."); *Logan v. Mirror Printing Co. of Altoona*, 600 A.2d 225, 226 (Pa. Super. Ct. 1991) ("In order to recover for damages pursuant to a breach of contract, the plaintiff must show a causal connection between the breach and the loss."); *Abraxas Petroleum Corp. v. Hornburg*, 20 S.W.3d 741, 758 (Tex. App. 2000) ("The absence of [a] causal connection between the alleged breach [of contract] and the alleged damages will preclude recovery.").

by "pointing out . . . that there is an absence of evidence to support the nonmoving party's case" (omission and internal quotation marks omitted)). Thus, the burden shifted to the Iliescus to "transcend the pleadings" and demonstrate there was a genuine dispute of material fact as to damages. *Id.* at 603, 172 P.3d at 134.

In response, the Iliescus provided photographs purporting to show the state of the parking lot prior to the RTC's project. They also provided photographs allegedly depicting the RTC's workers during the completion of the project, with their vehicles parked on the Iliescus' parking lot in the background. However, although the Desert Engineering quote may have served to demonstrate a dispute as to the amount of their damages, the Iliescus failed to present any evidence demonstrating a causal connection between the RTC's alleged breach of contract and the damage to the parking lot. They failed to provide photographs depicting the parking lot after the RTC completed its project; deposition testimony stating that the RTC's breach had caused the damage; expert testimony regarding causation, scope of repair, diminishment in value, and damages;[7] or any other evidence related to causation, only argument.

Additionally, although the Iliescus provided evidence that the parties had entered into a contract previously,[8] it is unclear how a breach of that contract could have caused damage to the parking lot. Even assuming the RTC had agreed, as the prior district court ordered, to "cooperate so as to minimize interference between construction of the [p]roject and [the Iliescus'] use of [their] remaining land," the Iliescus have not explained how a breach of that agreement could have caused physical damage to their parking lot.[9] Accordingly, the Iliescus did not demonstrate that there existed evidence of causation, an essential element of a breach-of-contract claim, therefore failing to create a genuine dispute as to damages.

The Iliescus further summarily argue the district court erred in granting summary judgment against them as to their claim for breach of the implied covenant of good faith and fair dealing. "Where the terms of a contract are literally complied with but one party to the contract deliberately countervenes the intention and spirit of the contract, that party can incur liability for breach of the implied cov-

[7]The district court determined that expert evidence was needed on these matters. The Illiescus do not argue that the district court erred in this determination, so this issue is waived. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

[8]"A written stipulation is a species of contract." *DeChambeau v. Balkenbush*, 134 Nev. 625, 628, 431 P.3d 359, 361 (Ct. App. 2018) (quoting *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011)).

[9]We note that, in their stipulation to dismiss their personal injury claims, the Iliescus agreed that they would only pursue compensatory damages in this case as to physical damage to their parking lot—presumably waiving any right to recover compensatory damages for any interference with their use of their land.

enant of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922-23 (1991). However, here, the Iliescus have not developed any argument or provided any relevant authority as to why the district court erred in granting summary judgment as to this claim. Therefore, we need not consider it. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (explaining that this court need not consider an appellant's argument that is not cogently argued or lacks the support of relevant authority). In light of the foregoing, the district court did not err in granting summary judgment in favor of the RTC as to the Iliescus' contract-based claims.

The district court erred in granting summary judgment in favor of the RTC as to the Iliescus' trespass claim and their request for declaratory relief

Finally, the Iliescus argue the district court erred in granting summary judgment in the RTC's favor as to their trespass claim. Nevada has long recognized trespass as an action for injury to a plaintiff's possession of land. *See Rivers v. Burbank*, 13 Nev. 398, 408 (1878). To maintain a trespass action, the plaintiff must demonstrate that the defendant invaded a property right. *Lied v. Clark County*, 94 Nev. 275, 279, 579 P.2d 171, 173-74 (1978). Where the evidence supports a trespass, an award of nominal damages is not improper. *Parkinson v. Winniman*, 75 Nev. 405, 408, 344 P.2d 677, 678 (1959); *see also Droge*, 136 Nev. at 312 n.17, 468 P.3d at 880 n.17 (stating that the plaintiffs could pursue nominal damages as to their trespass claim). And "an injunction is an appropriate remedy for the threat of continuing trespass." *S.O.C., Inc. v. Mirage Casino-Hotel*, 117 Nev. 403, 416, 23 P.3d 243, 251 (2001).

To prevail on a claim for trespass, the Iliescus would need to prove that the RTC's conduct constituted an invasion of a property right. *See Lied*, 94 Nev. at 279, 579 P.2d at 173-74. Here, the Iliescus alleged the RTC and its contractors parked vehicles on their parking lot "on virtually every workday during the term of the [p]roject." These vehicles allegedly included the workers' personal vehicles ("pick-up trucks, SUV's[,] and automobiles") along with work trucks weighing approximately 20 tons. According to the Iliescus, this conduct occurred without their consent and despite their "frequent objections" to it. The Iliescus supported these allegations with photographs depicting the vehicles parked on the portion of their property not subject to condemnation (the "[r]emaining [p]roperty" or parking lot). The Iliescus also provided photographs appearing to depict workers working on the RTC's project, with trucks parked in the parking lot in the background. In addition, John testified at his deposition without objection that he assumed the trucks were associated with the RTC because the workers who drove them were not associated with him or Sonnia and "were doing RTC work."

Similarly, at her deposition, Sonnia testified that the trucks and equipment parked on the Iliescus' property belonged to "construction people working on the RTC project."

Considering the foregoing, the Iliescus introduced specific facts, using admissible evidence,[10] that demonstrated a genuine dispute of material fact as to their trespass claim. *See Cuzze*, 123 Nev. at 603, 172 P.3d at 134. The RTC does not dispute that the Iliescus owned the property where the easements and parking lot are located, nor does it assert that it had permission or paid rent or some form of remuneration to use the parking lot. The Iliescus' photographs and deposition testimony are evidence such that a rational trier of fact could find that the RTC trespassed on the Iliescus' property and return a verdict in the Iliescus' favor.[11] *See Wood*, 121 Nev. at 731, 121 P.3d at 1031.

Below, the district court granted summary judgment as to the Iliescus' trespass claim by ruling that they had waived their right to pursue nominal damages—in stipulating to pursue only compensatory damages relating to their parking lot and punitive damages—and had then failed to present evidence as to compensatory damages or punitive damages.[12] In so doing, the district court effectively imposed an element of actual damages onto the trespass claim—an element that has not previously been required to sustain a trespass action in Nevada.[13] *See Lied*, 94 Nev. at 279, 579 P.2d at 173-74; *Parkinson*, 75 Nev. at 408, 344 P.2d at 678; *see also*

[10]A court may consider all evidence on file when ruling on a motion for summary judgment. *Wood*, 121 Nev. at 729, 121 P.3d at 1029; *see also* NRCP 56(c)(3). The RTC avers that the Iliescus failed to present any admissible evidence for their claims during the proceedings below, apparently only because the Iliescus "submitted no declarations or deposition testimony" in their opposition to the RTC's motion for summary judgment. The RTC does not cogently argue why any failure on the Iliescus' part to submit declarations or deposition testimony in opposition to the RTC's summary judgment motion would be fatal to their claims where there existed substantial evidence elsewhere in the court file that was presented for the court to consider regarding trespass, nor does it provide relevant authority in support of that argument. Therefore, we need not consider it. *See Edwards*, 122 Nev. at 330 n.38, 130 P.3d at 1288 n.38.

[11]Although we reverse summary judgment on the trespass claim, we note that the damages available to the Iliescus on this claim may be limited, as the district court has already determined that expert testimony is required to prove certain damages, and that the Iliescus failed to timely identify an expert as required pursuant to NRCP 16.1.

[12]We note that the Iliescus have not pursued the dismissal of their claim for punitive damages on appeal, and therefore, we need not address the propriety of the district court's dismissal of the same. *See Greenlaw v. United States*, 554 U.S. 237, 243 (2008) ("[I]n both civil and criminal cases, in the first instance and on appeal, we follow the principle of party presentation. That is, we rely on the parties to frame the issues for decisions and assign to courts the role of neutral arbiter of matters the parties present.").

[13]The RTC does not argue on appeal that a plaintiff must prove damages as an element of *trespass* and therefore we do not further address this issue. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (providing that issues not raised on appeal are deemed waived).

Restatement (Second) of Torts § 158 (Am. Law Inst. 1965) ("One is subject to liability to another for trespass, *irrespective of whether [he or she] thereby causes harm to any legally protected interest of the other*, if [he or she] intentionally (a) enters land in the possession of the other, or causes a thing or a third person to do so, or (b) remains on the land, or (c) fails to remove from the land a thing which he is under a duty to remove." (emphasis added)).

Further, in lieu of compensatory damages, nominal damages may still be awarded. Nominal damages are "awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory . . . damages." *Uzuegbunam v. Preczewski*, 592 U.S. 279, 290 (2021). Indeed, as the United States Supreme Court recently recognized in *Uzuegbunam*, "the prevailing rule, 'well established' at common law, was 'that a party whose rights are invaded can *always* recover nominal damages without furnishing any evidence of actual damages.'" *Id*. at 289 (emphasis added) (internal citations omitted). Consistent with this approach, the Nevada appellate courts have long recognized that nominal damages are a proper remedy for trespass, in cases where actual damages cannot be proven. *See Parkinson*, 75 Nev. at 408, 344 P.2d at 678; *Droge*, 136 Nev. at 312 n.17, 468 P.3d at 880 n.17; *see also Uzuegbunam*, 592 U.S. at 286 (discussing the importance of nominal damages to claims for trespass).

Given the relationship between nominal and compensatory damages, and the purpose behind an award of nominal damages, we conclude that, by preserving their claim to compensatory damages, the Iliescus also preserved nominal damages, as these damages are available to remedy a trespass where compensatory damages are unavailable or unproven. Thus, the district court erred in determining that the Iliescus waived their right to recover nominal damages for trespass.[14] Further, proving damages is particularly unnecessary in this case because the RTC had been granted perpetual easements on the Iliescus' property and the Iliescus were seeking injunctive relief, an appropriate remedy for the threat of continuing trespass.[15] *See S.O.C., Inc.*, 117 Nev. at 416, 23 P.3d at 251.

[14]The parties disagree as to whether the Iliescus, by stipulation or otherwise, waived their right to pursue nominal damages in this case because nominal damages were not specifically preserved in the stipulation. However, neither was a claim for nominal damages specifically waived. Further, the parties did not stipulate to dismissal of the Iliescus' trespass claim, nor any damages specifically related to that claim. As explained above, the Iliescus preserved their claim to nominal damages by preserving their claim to compensatory damages and because nominal damages are inherently available for certain types of claims such as trespass.

[15]As explained above, while the district court correctly dismissed the Iliescus' separate cause of action for injunctive relief, they are nevertheless permitted to seek injunctive relief as a remedy.

Accordingly, the district court erred in granting summary judgment in favor of the RTC as to the Iliescus' trespass claim, and thus we reverse the grant of summary judgment on this claim and remand for further proceedings. To the extent that the district court's order granting summary judgment in favor of the RTC as to the Iliescus' request for declaratory relief was predicated on its ruling relating to their trespass claim, that ruling is likewise reversed and remanded for further proceedings.

CONCLUSION

The district court did not err in dismissing the Iliescus' waste claim because the RTC had no possessory interest as to the Iliescus' parking lot. The court also did not err in dismissing their injunctive relief claim to the extent that it was pleaded as a cause of action. Additionally, the court did not err in granting summary judgment in favor of the RTC as to the Iliescus' contract-based claims.

The district court, however, erred in granting summary judgment as to the Iliescus' trespass and declaratory relief claims. Because we reverse the district court's order granting summary judgment in favor of the RTC as to these claims, the RTC might not be the prevailing party and the district court's order awarding it attorney fees and costs may no longer be appropriate under NRS 18.010(2)(b) and NRS 18.020. That order, therefore, is necessarily vacated. *See Cain v. Price*, 134 Nev. 193, 198, 415 P.3d 25, 30 (2018) (explaining that where a district court's order granting summary judgment is reversed, it is no longer appropriate to consider the respondents the prevailing party, and an award of attorney fees is inappropriate). Consistent with this opinion, we reverse and remand for further proceedings as to the Iliescus' trespass and declaratory relief claims, and if necessary, to determine if injunctive relief is appropriate.[16]

Tao and Bulla, JJ., concur.

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

ROWEN A. SEIBEL; MOTI PARTNERS, LLC; MOTI PARTNERS 16, LLC; LLTQ ENTERPRISES, LLC; LLTQ ENTERPRISES 16, LLC; TPOV ENTERPRISES, LLC; TPOV 16 ENTERPRISES, LLC; FERG, LLC; FERG 16, LLC; R SQUARED GLOBAL SOLUTIONS, LLC; DNT ACQUISITION, LLC; GR BURGR, LLC; AND CRAIG GREEN, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE TIMOTHY C. WILLIAMS, DISTRICT JUDGE, RESPONDENTS, AND DESERT PALACE, INC.; PARIS LAS VEGAS OPERATING COMPANY, LLC; PHWLV, LLC; AND BOARDWALK REGENCY CORPORATION, REAL PARTIES IN INTEREST.

No. 83723

November 23, 2022 520 P.3d 350

Petition for extraordinary writ relief challenging a district court order compelling the disclosure of privileged documents under the crime-fraud exception to the attorney-client privilege.

Petition denied.

Bailey Kennedy and *Joshua P. Gilmore, John R. Bailey, Dennis L. Kennedy*, and *Paul C. Williams*, Las Vegas, for Petitioners.

Pisanelli Bice PLLC and *Jordan T. Smith, James J. Pisanelli, Debra L. Spinelli*, and *M. Magali Mercera*, Las Vegas, for Real Parties in Interest.

Before the Supreme Court, HARDESTY, STIGLICH, and HERNDON, JJ.

OPINION

By the Court, HARDESTY, J.:

We elect to hear this petition to address a matter of first impression before this court regarding the procedures and burden of proof required to establish the crime-fraud exception to the attorney-client privilege. Because the district court did not err in ordering an in camera review of the privileged communications at issue here, and because it did not abuse its discretion in ultimately ordering the disclosure of those communications, we deny this petition for extraordinary relief.

FACTS AND PROCEDURAL HISTORY

Petitioner Rowen Seibel, through his limited liability companies, entered into development agreements with Caesars to operate

restaurants for various Caesars properties.[1] When Caesars discovered that Seibel had been convicted of tax fraud, it terminated the agreements, citing a term that appeared in all the parties' contracts that allowed Caesars to terminate if its relationship with Seibel could jeopardize Caesars' gaming licenses. Seibel sued one of the Caesars properties, Planet Hollywood in Las Vegas, for breach of contract and related claims. Seibel claimed that he had cured any potential risk by creating an irrevocable family trust and assigning his contractual rights and interests under the development agreements to newly formed business entities owned and managed by independent trustees. He asserted that he was neither a trustee nor a beneficiary of the trust and was no longer affiliated with the business entities that were assigned the development agreements. Planet Hollywood counterclaimed that Seibel had fraudulently attempted to hide his unsuitability to conduct business with a gaming licensee, causing it damages. Other Caesars properties later sued Seibel, seeking declaratory relief and damages, and these actions were consolidated.

During litigation, Caesars obtained through discovery a copy of a prenuptial agreement between Seibel and his wife, which had been executed contemporaneously to Seibel's trust and allowed Seibel to benefit from the trust. Caesars concluded that Seibel had used legal counsel to create both the trust and the prenuptial agreement so that he could secretly retain the benefits of the development agreements while tricking Caesars into thinking that he had dissociated from them. On this suspicion, Caesars moved to compel discovery of over 100 documents from Seibel's attorney-client privilege log under Nevada's crime-fraud exception. The district court granted this motion in two orders. The first granted in camera review of the documents after determining that Caesars had met its burden of showing that Seibel was engaged in an attempt to deceive Caesars when he sought the advice of legal counsel for the creation of his trust and prenuptial agreement. The second order granted the motion to compel disclosure of all the documents after finding, through in camera review, that the documents were sufficiently related to and made in furtherance of Seibel's attempted fraudulent scheme.

Seibel petitions this court for a writ of prohibition or mandamus preventing the district court from compelling disclosure of the documents and ordering the district court to find the documents undiscoverable. Seibel argues primarily that the district court erred in finding that Caesars had met its initial burden of demonstrating

[1]Petitioners Seibel, his affiliated entities, and Craig Green are collectively referred to as "Seibel" in this opinion. Real parties in interest are four properties operated by Caesars Entertainment, Inc., and are collectively referred to as "Caesars" in this opinion.

that Seibel was engaged in a fraudulent scheme when he sought legal advice regarding his trust and prenuptial agreement, and that the district court erred in further concluding that all of Seibel's privileged communications regarding the trust and prenuptial agreement were sufficiently related to and made in furtherance of that fraud.

DISCUSSION

Writ relief

Extraordinary writ relief is available only where there is no "plain, speedy and adequate remedy in the ordinary course of law." NRS 34.330. Although writ relief is generally not available to review discovery orders, this court will consider writ petitions challenging orders that compel the disclosure of privileged information because in such cases "a later appeal would not remedy any improper disclosure of the information." *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 374, 399 P.3d 334, 341 (2017).

Writ relief is also appropriate to clarify an important issue of law, such as the parameters of a privilege. *See Canarelli v. Eighth Judicial Dist. Court*, 136 Nev. 247, 250-51, 464 P.3d 114, 119 (2020) (entertaining a petition for writ of prohibition to clarify whether Nevada recognizes the petitioner's asserted exception to the attorney-client privilege). We elect to entertain this petition, treating it as one for prohibition, because Seibel challenges a discovery order compelling disclosure of privileged information, and prohibition, not mandamus, is the "appropriate remedy to correct an order that compels disclosure of privileged information." *Las Vegas Dev. Assocs., LLC v. Eighth Judicial Dist. Court*, 130 Nev. 334, 338, 325 P.3d 1259, 1262 (2014).

Standard of review

We review the district court's legal determinations regarding the crime-fraud exception de novo. *See Humboldt Gen. Hosp. v. Sixth Judicial Dist. Court*, 132 Nev. 544, 547, 376 P.3d 167, 170 (2016) (reviewing legal questions de novo on petition for writ of mandamus). "Discovery matters are within the district court's sound discretion," and factual findings "are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence." *Canarelli*, 136 Nev. at 251, 464 P.3d at 119 (internal quotation marks omitted).

Application of Nevada's crime-fraud exception to the attorney-client privilege

Nevada's attorney-client privilege and crime-fraud exception are statutory. Under NRS 49.095, the attorney-client privilege grants clients "a privilege to refuse to disclose, and to prevent any other

person from disclosing, confidential communications" between the client (or representative) and his or her lawyer (or representative), and between the client's lawyer and the lawyer's representative. But per NRS 49.115(1), Nevada's crime-fraud exception allows documents otherwise privileged under NRS 49.095 to be disclosed when "the services of the lawyer were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud."

Neither NRS 49.095 nor NRS 49.115(1) establishes the procedure or burden of proof that courts are to use when determining whether the crime-fraud exception should apply, however, and this court has not clarified those issues before. Both statutes "are taken without substantive change from" Rule 5-03 of the Preliminary Draft of Proposed Rules of Evidence for the United States District Courts and Magistrates, submitted by the Advisory Committee on Rules of Evidence, reprinted in 46 F.R.D. 161, 249-51 (1969), which is widely considered federal common law.[2] Therefore, this court finds federal caselaw interpreting the federal common-law attorney-client privilege and crime-fraud exception persuasive in interpreting NRS 49.095 and NRS 49.115(1). *See, e.g.*, *In re 2015-2016 Jefferson Cty. Grand Jury*, 410 P.3d 53, 59 (Colo. 2018) (following *United States v. Zolin*, 491 U.S. 554, 562-63 (1989), and *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981), when interpreting Colorado's attorney-client privilege and crime-fraud exception); *People v. Radojcic*, 998 N.E.2d 1212, 1221-23 (Ill. 2013) (same).

Federal courts "have recognized the attorney-client privilege under federal law as 'the oldest of the privileges for confidential communications known to the common law.'" *Zolin*, 491 U.S. at 562 (quoting *Upjohn*, 449 U.S. at 389). The privilege exists to ensure that clients can freely and confidentially communicate with their legal counsel, which is central "to the proper functioning of our adversary system of justice." *Id*. However, "[s]ince the privilege has the effect of withholding relevant information from the fact-finder, it applies only where necessary to achieve its purpose" and is therefore subject to limited exceptions such as the crime-fraud exception. *Id*. at 562-63 (internal quotation marks omitted); *see also* NRS 49.115(1).

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[2]NRS 49.095 (subcomm.'s cmt.); NRS 49.115 (subcomm.'s cmt.). Specifically, Rule 503 of the Draft Federal Rules of Evidence or "Supreme Court Standard 503" is widely regarded as the common-law crime-fraud exception's enumeration. 3 Mark S. Brodin et al., *Weinstein's Federal Evidence* §§ 503-1, 503.01-10 (2d ed. 2022); *accord United States v. Spector*, 793 F.2d 932, 938 (8th Cir. 1986) ("Although Congress did not adopt [Supreme Court Standard 503], courts have relied upon it as an accurate definition of the federal common law of attorney-client privilege . . . ."). And federal common law, such as Supreme Court Standard 503, is binding over claims of privilege in the federal context under the Federal Rules of Evidence. Fed. R. Evid. 501 (stating that "[t]he common law . . . governs a claim of privilege," unless federal law provides otherwise).

In determining whether the crime-fraud exception should apply, the United States Court of Appeals for the Ninth Circuit utilizes a two-part test, which reflects the prevailing approach among federal circuits. *E.g.*, *United States v. Boender*, 649 F.3d 650, 655-56 (7th Cir. 2011); *In re Richard Roe, Inc.*, 168 F.3d 69, 71 (2d Cir. 1999). Under this approach, a party seeking to invoke "the crime-fraud exception must satisfy a two-part test":

> First, the party must show that "the client was engaged in or planning a criminal or fraudulent scheme when it sought the advice of counsel to further the scheme." Second, it must demonstrate that the attorney-client communications for which production is sought are "sufficiently related to" and were made "*in furtherance of* [the] intended, or present, continuing illegality."

In re Napster, Inc. Copyright Litig., 479 F.3d 1078, 1090 (9th Cir. 2007) (alteration in original) (citation omitted) (quoting *In re Grand Jury Proceedings*, 87 F.3d 377, 381, 382-83 (9th Cir. 1996) (internal quotation marks omitted)), *abrogated in part on other grounds by Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100 (2009).

We find these authorities persuasive, and we thus adopt the two-part test utilized by the Ninth Circuit for determining whether the crime-fraud exception should apply. As the *Napster* court concluded, in civil matters, the moving party bears the burden of proving both prongs of the test by a preponderance of the evidence for the crime-fraud exception to apply. *Id*. at 1094-95.

In some circumstances, the district court may determine that in camera review of the privileged documents is necessary before deciding whether the crime-fraud exception applies. In such instances, the district court must first require the moving party to show "'a factual basis adequate to support a good faith belief by a reasonable person,' that *in camera* review of the materials may reveal evidence to establish the claim that the crime-fraud exception applies." *Zolin*, 491 U.S. at 572 (citation omitted) (quoting *Caldwell v. Dist. Court*, 644 P.2d 26, 33 (Colo. 1982)). Generally, "[o]nce that showing is made, the decision whether to engage in *in camera* review rests in the sound discretion of the district court." *Id*. But when the privileged communications are documents, the district court must do an in camera review. *In re Grand Jury Investigation*, 810 F.3d 1110, 1114 (9th Cir. 2016). During its in camera review, the district court must determine to which documents specifically the second step applies. *Id*. Particularly,

> [w]hile in camera review is not necessary during step one . . . , a district court must examine the individual documents themselves to determine that the specific attorney-client communications for which production is sought are sufficiently related to and were made in furtherance of the intended, or present, continuing illegality.

Id. (internal quotation marks omitted) (following *In re Antitrust Grand Jury*, 805 F.2d 155, 168-69 (6th Cir. 1986)).

The district court did not err in granting in camera review of Seibel's privileged documents

As to step one in the analysis, the district court found that Caesars had established by a preponderance of the evidence that Seibel was engaged in or planning a criminal or fraudulent scheme when he sought the advice of legal counsel in the drafting of the prenuptial agreement. The district court based its findings on the prenuptial agreement, the trust, and other evidence before it. While Seibel takes issue with the district court's factual findings, we defer to those findings, as they are supported by substantial evidence in the record and are not clearly erroneous. *See Canarelli*, 136 Nev. at 251, 464 P.3d at 119 (noting that factual findings "are given deference and will not be set aside unless they are clearly erroneous or not supported by substantial evidence"). Accordingly, the district court properly proceeded to step two, conducting an in camera review to determine if the documents were "sufficiently related to and were made in furtherance of the intended, or present, continuing illegality." *In re Grand Jury Investigation*, 810 F.3d at 1114 (internal quotation marks omitted).

The district court did not abuse its discretion in ordering the disclosure of Seibel's privileged communications after conducting an in camera review

After conducting an in camera review, the district court found that the crime-fraud exception applied to all of Seibel's privileged documents. Seibel argues that the district court's order was overbroad in disclosing every document. We disagree. While Seibel argues that the district court erred in only quoting from three documents in its order granting Caesars' motion to compel, he does not specifically argue which of the privileged documents were improperly disclosed or why. *Walker v. Second Judicial Dist. Court*, 136 Nev. 678, 680, 476 P.3d 1194, 1196-97 (2020) (explaining that the burden is on the party seeking extraordinary writ relief to establish that such relief is warranted). Further, we are aware of no legal authority that requires district courts to make specifically enumerated factual findings regarding each document or communication reviewed in camera.

Rather, after reviewing the privileged documents in camera ourselves, we conclude that the district court did not act outside of its jurisdiction in finding that the documents were sufficiently related to and made in furtherance of Seibel's ongoing scheme. We therefore conclude that the district court properly granted disclosure of the privileged documents after conducting an in camera review under

Nevada's crime-fraud exception to the attorney-client privilege. *Canarelli*, 136 Nev. at 251, 464 P.3d at 119 ("Discovery matters are within the district court's sound discretion . . . ." (internal quotation marks omitted)). As the district court acted within its jurisdiction, we deny writ relief.[3]

CONCLUSION

Having determined that the district court properly granted an in camera review of Seibel's privileged communications, and that it did not err in conducting that in camera review, we conclude that Seibel has failed to demonstrate that extraordinary relief is warranted in the form of a petition for a writ of prohibition. We further deny Seibel's petition to the extent that it asks for judicial reassignment.[4]

Stiglich and Herndon, JJ., concur.

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[3]We also deny Seibel's petition to the extent that it asks this court to order the sequestration of the district court's minute order that contains quotations from three of the privileged documents, as Caesars' motion to compel was properly granted with respect to every document.

[4]While this court may order reassignment of a judge under certain circumstances, we determine that such circumstances are not present here. *See FCHI, LLC v. Rodriguez*, 130 Nev. 425, 435, 335 P.3d 183, 190 (2014) (reassigning a judge who formed conclusion on the merits based on improperly admitted evidence); *Leven v. Wheatherstone Condo. Corp.*, 106 Nev. 307, 310, 791 P.2d 450, 451 (1990) (reassigning a judge who made numerous errors suggesting favoritism). Further, this court lifts the stay of the proceedings in the district court that was granted in part on November 10, 2021.

HAMZA ZALYAUL, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 83334

November 23, 2022 520 P.3d 345

Appeal from a judgment of conviction, pursuant to a guilty plea, of attempted sexual assault. Eighth Judicial District Court, Clark County; Tara D. Clark Newberry, Judge.

Vacated.

[Rehearing denied December 29, 2022]

[En banc reconsideration denied March 3, 2023]

Nevada Defense Group and *Damian Robert Sheets, Baylie A. Hellman, Kelsey L. Bernstein*, and *Alexis E. Minichini*, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Robert A. Stephens*, Chief Deputy District Attorney, and *John T. Afshar*, Deputy District Attorney, Clark County, for Respondent.

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

OPINION

By the Court, Hardesty, J.:

In this appeal, we consider whether the district court has subject matter jurisdiction over criminal charges filed against a 21-year-old adult for delinquent acts committed as a 14-year-old. We conclude that, based on the juvenile justice statutory scheme in NRS Chapter 62B, the district court does not have subject matter jurisdiction over such charges. The juvenile courts have exclusive original jurisdiction over children under 21 years of age who are alleged to have committed a delinquent act. NRS 62B.335(1)(a) allows the juvenile court to transfer to the district court for criminal proceedings cases against adults 21 or older who committed certain delinquent acts when the person was "at least 16 years of age but less than 18 years of age." But otherwise, the juvenile court loses jurisdiction once a child turns 21, and the district court lacks jurisdiction over any charges of delinquent acts, absent certain exceptions not applicable here.[1] Therefore, when a child under the age of 16 commits a

[1]This case does not concern, for example, certification of a child for criminal proceedings as an adult under NRS 62B.390 and NRS 62B.400.

delinquent act but is not charged until after turning 21, no court has jurisdiction to hear the case.

Here, after he turned 21, appellant Hamza Zalyaul was charged with committing delinquent acts as a 14-year-old. We conclude that the judgment of conviction rendered by the district court is void for lack of subject matter jurisdiction.

FACTS AND PROCEDURAL HISTORY

Zalyaul allegedly sexually assaulted a family friend, S.D., in Las Vegas several times between June 2013 and September 2013, when S.D. was 11 years old and Zalyaul was 14 years old. S.D. reported the abuse to police in September 2013; however, no action was taken because Zalyaul and his family had relocated to Morocco. No further steps were taken until 2019, when it was discovered through an unrelated investigation that Zalyaul had been living in Las Vegas since 2016. The investigation of the 2013 acts was reopened in February 2019. Zalyaul turned 21 in September 2019.

In October 2019, Zalyaul was charged by criminal complaint with six counts of sexual assault with a minor under 14 years of age stemming from the alleged 2013 acts—a category A felony if committed by an adult. NRS 200.366. Zalyaul entered into a plea agreement in the district court, in which he agreed to plead guilty to attempted sexual assault and waive his right to appeal, and the State agreed to recommend probation. The district court accepted the plea, entered a judgment of conviction, and sentenced Zalyaul to 48 to 120 months in prison. Zalyaul now appeals from the judgment of conviction, primarily arguing that the district court lacked subject matter jurisdiction over his criminal case.

DISCUSSION

As a preliminary matter, the State contends that Zalyaul waived any jurisdictional challenge by pleading guilty and waiving his right to appeal.[2] We reiterate that subject matter jurisdiction cannot be waived, even if a plea agreement waives the right to appeal or specifically waives jurisdictional challenges. *See, e.g.*, *Colwell v. State*, 118 Nev. 807, 812, 59 P.3d 463, 467 (2002) ("[S]ubject-matter jurisdiction is not waivable, and a court's lack of such jurisdiction can be raised for the first time on appeal.").

"Subject matter jurisdiction is the court's authority to render a judgment in a particular category of case." *Landreth v. Malik*, 127 Nev. 175, 183, 251 P.3d 163, 168 (2011) (internal quotation marks

[2]The State also contends that this court does not have jurisdiction to consider this appeal. We conclude this argument lacks merit, as Zalyaul is appealing his judgment of conviction from his guilty plea. *See* NRS 177.015(4) (stating that a defendant may appeal from a guilty plea "upon reasonable constitutional, jurisdictional, or other grounds that challenge the legality of the proceedings").

omitted). "[I]f the district court lacks subject matter jurisdiction, the judgment is rendered void." *Id.* at 179, 251 P.3d at 166. Subject matter jurisdiction is a question of law, which we review de novo. *Ogawa v. Ogawa*, 125 Nev. 660, 667, 221 P.3d 699, 704 (2009).

Zalyaul argues that the juvenile court had exclusive jurisdiction over his alleged delinquent acts pursuant to NRS 62B.330 but was divested of jurisdiction once he turned 21. And because the district court lacks jurisdiction over any delinquent acts committed by juveniles, with certain inapplicable exceptions, Zalyaul contends, he could not be criminally charged for those delinquent acts in district court. The State agrees that the juvenile court did not have jurisdiction over the charges against Zalyaul because he was not apprehended until after 21 years of age and thus was not a child within the meaning of the juvenile justice statutes. The State further contends that because the juvenile court did not have jurisdiction, the district court must have had jurisdiction, as some court must have jurisdiction over Zalyaul, and jurisdiction was thus proper with the district court.

NRS 62B.330(1) grants the juvenile courts "*exclusive original jurisdiction* over a child . . . who is alleged or adjudicated to have committed a delinquent act." (Emphasis added.) A "delinquent act" includes, as relevant here, "an act designated a criminal offense pursuant to the laws of the State of Nevada," NRS 62B.330(2)(c), unless the act is deemed not to be delinquent under NRS 62B.330(3) (listing specific "acts . . . deemed not to be a delinquent act" and therefore not within the juvenile court's jurisdiction). And a "child" is defined, in part, as "[a] person *who is less than 21 years of age* and subject to the jurisdiction of the juvenile court for an unlawful act that was committed before the person reached 18 years of age." NRS 62A.030(1)(b) (emphasis added).

It is undisputed that if Zalyaul was charged before he turned 21, he would have fallen squarely within the juvenile court's jurisdiction because the acts alleged to have been committed when he was 14 years old are designated as criminal offenses (sexual assault under NRS 200.366) and are delinquent acts not otherwise excluded from the juvenile court's jurisdiction. However, because the criminal complaint was not filed until Zalyaul was 21 years old, he is no longer a "child" over which the juvenile court has exclusive jurisdiction under NRS 62B.330.

Juvenile courts also have limited jurisdiction over certain adults charged with delinquent acts. Pursuant to NRS 62B.335(1), if the delinquent act "would have been a category A or B felony if committed by an adult" but was committed by a person between the ages of 16 and 18, and the person is identified by law enforcement before reaching 21 years of age but is not apprehended until after reaching 21 years of age, the juvenile court has jurisdiction to conduct a hearing. In such cases, the juvenile court must decide whether to dismiss

the charges or transfer the case "for proper criminal proceedings to any court that would have jurisdiction over the delinquent act if the delinquent act were committed by an adult." NRS 62B.335(4). However, because Zalyaul was charged with committing the delinquent acts when he was 14, not when he "was at least 16 years of age but less than 18 years of age," he does not fall within the juvenile court's limited jurisdiction under NRS 62B.335(1).

Notwithstanding the juvenile courts' exclusive jurisdiction over delinquent acts, the State contends that if a juvenile has not been charged with delinquent acts by the time he or she turns 21, then those acts automatically transform into criminal offenses that may be prosecuted in the district court. We reject this contention for several reasons.

First, such an argument is belied by the statutory scheme because it would completely eviscerate the need for NRS 62B.335. *In re Estate of Thomas*, 116 Nev. 492, 495, 998 P.2d 560, 562 (2000) ("[C]ourts should avoid construing statutes so that any provision or clause is rendered meaningless."). Additionally, NRS 62B.370(1) requires the district court to "transfer a case and record to the juvenile court if, during the pendency of a proceeding involving a criminal offense, it is ascertained that the person who is charged with the offense was less than 18 years of age when the person allegedly committed the offense." The only exception to this rule is "if the proceeding involves a criminal offense: (a) [e]xcluded from the original jurisdiction of the juvenile court pursuant to NRS 62B.330; or (b) [t]ransferred to the court pursuant to NRS 62B.335." NRS 62B.370(2). Thus, because the district court is required to transfer a case to the juvenile court where a child committed a delinquent act, the plain language of the statute demonstrates that a district court does not have jurisdiction over the delinquent act.

Moreover, when looking at what constitutes a delinquent act, we conclude that the Legislature intended for it to mean something other than a criminal act. *See* NRS 62B.335(1)(b) ("[t]he delinquent act *would have been* a category A or B felony if committed by an adult" (emphasis added)); *see also* NRS 62B.335(4)(b) (stating that the juvenile court may "[t]ransfer the case for proper criminal proceedings to any court *that would have jurisdiction over the delinquent act if the delinquent act were committed by an adult*" (emphasis added)). Accordingly, the fact that the district court has jurisdiction over criminal cases does not automatically confer on the district court jurisdiction over delinquent acts once the alleged perpetrator turns 21. A proceeding under the juvenile justice statutes "[i]s not criminal in nature." NRS 62D.010(1)(a); *see also* NRS 62E.010(1) ("A child who is adjudicated [delinquent] is not a criminal and any adjudication is not a conviction . . . ."). Therefore, while the State's contention that some court must have jurisdiction is true for criminal acts, the same is not true for delinquent acts. *Battiato*

v. Sheriff, Clark Cty., 95 Nev. 361, 362, 594 P.2d 1152, 1153 (1979) (noting that district courts "have original jurisdiction of all *criminal cases* except as otherwise provided by law" (emphasis added)); *State v. Barren*, 128 Nev. 337, 340, 279 P.3d 182, 184 (2012) (stating that "some court always has jurisdiction over a *criminal defendant*" (emphasis added)).

Finally, the policy behind juvenile courts also supports the interpretation that district courts do not have jurisdiction over delinquent acts. "The Juvenile Court is theoretically engaged in determining the needs of the child and of society rather than adjudicating criminal conduct. The objectives are to provide measures of guidance and rehabilitation for the child and protection for society, not to fix criminal responsibility, guilt and punishment." *Kent v. United States*, 383 U.S. 541, 554 (1966). Thus, it is not inconceivable that "the [L]egislature would prioritize this policy for juvenile offenders who have matured into adulthood—in hopes they would leave behind their delinquent past." *State v. Neukam*, 189 N.E.3d 152, 155 (Ind. 2022).

When introducing Senate Bill (S.B.) 235 (which later became NRS 62B.335), Deputy District Attorney Jo Lee Wickes explained that the purpose of S.B. 235 was to remedy a current gap in jurisdiction over a person who is more than 21 years of age but who committed delinquent acts as a juvenile. Hearing on S.B. 235 Before the Assemb. Judiciary Comm., 75th Leg., at 17 (Nev., Apr. 22, 2009) (statement of Jo Lee Wickes, Deputy District Attorney, Juvenile Division, Washoe County District Attorney's Office). Specifically, she stated:

> Currently under Nevada law there is a gap in the statutes: if a juvenile under the age of 18 commits a very serious felony—this bill is designed to address class A and B felonies, things such as sexual assault, battery with a deadly weapon, and robbery with a deadly weapon—and they are not apprehended or identified as the alleged perpetrator until after they are 21 years of age, there is currently no jurisdiction by any court in the State of Nevada to pursue any delinquent or criminal sanctions against that person. This is a gap in the legislation of our state. Senate Bill 235 is designed to fill that gap.

Id. Accordingly, the statutory scheme and legislative history demonstrate that the Legislature considered that the district court would lack jurisdiction over delinquent acts and specifically opted only to provide jurisdiction in district court over adults who are alleged to have committed certain delinquent acts when they were 16 to 18 years old. Further rebutting the State's claim, the Legislature logically would not have enacted NRS 62B.335 if the district court already had automatic jurisdiction. Absent express conferral, the likeliest explanation is not that the Legislature intended for district

courts to have jurisdiction, but rather that it intended for them to lack jurisdiction. *Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 708 (2009) ("[W]here the Legislature has, for example, explicitly applied a rule to one type of proceeding, this court will presume it deliberately excluded the rule's application to other types of proceedings.").

Because a delinquent act is not a criminal act and the Legislature has provided exclusive jurisdiction over delinquent acts to the juvenile courts, we conclude that jurisdiction over delinquent acts is not proper with the district court unless the case is transferred by the juvenile court to the district court for criminal proceedings pursuant to its statutory authority.

CONCLUSION

We conclude that juvenile courts have exclusive jurisdiction over delinquent acts. Because Zalyaul committed a delinquent act when he was 14 years of age and NRS 62B.335(1)(a) does not provide for any court's jurisdiction over adults aged 21 or older who committed delinquent acts when they were under 16 years of age, the district court lacked jurisdiction. Accordingly, we vacate the district court's judgment of conviction for lack of subject matter jurisdiction.[3]

Stiglich and Herndon, JJ., concur.

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[3]Our disposition of this issue renders it unnecessary to address Zalyaul's other assignments of error.

CLARK NMSD, LLC, DBA THE SANCTUARY, APPELLANT, *v.* JENNIFER M. GOLDSTEIN, AN INDIVIDUAL, RESPONDENT.

No. 84623

November 23, 2022 520 P.3d 356

Motion to dismiss appeal from a district court order denying relief in post-judgment collection proceedings under NRS 31.070.

Motion denied.

Law Office of Mitchell Stipp and *Mitchell D. Stipp*, Las Vegas, for Appellant.

Dickinson Wright PLLC and *Brian R. Irvine* and *Brooks T. Westergard*, Reno, for Respondent.

Before the Supreme Court, HARDESTY, STIGLICH, and HERNDON, JJ.

OPINION

By the Court, HARDESTY, J.:

Does a third-party entity in a post-judgment collection action have party standing to appeal from a district court's order resolving its petition to return property levied pursuant to a writ of execution? Because we have not previously addressed this issue in a published opinion, we take this opportunity to answer the question in the affirmative. Since the third-party entity has standing under NRS 31.070 to join an action in post-judgment proceedings, we conclude that the third-party entity has standing to appeal under NRAP 3A(a) and deny respondent's motion to dismiss.

Respondent Jennifer Goldstein, a former member of NuVeda, LLC (plaintiff below and nonparty to this appeal), obtained a judgment against NuVeda for over $2.5 million. In post-judgment collection proceedings, Goldstein had a writ of execution served on appellant Clark NMSD, LLC, dba The Sanctuary, and cash was seized as a result.

Clark NMSD maintains that it is not subject to Goldstein's judgment. It filed a third-party claimant petition in the district court case pursuant to NRS 31.070(5) seeking return of the seized cash and requested that Goldstein be prohibited from any further collection activity without court approval. NuVeda joined in the petition. The district court denied the petition, and Clark NMSD appeals that decision.

Goldstein filed the instant motion to dismiss, arguing that Clark NMSD is not a party to the proceedings below and thus has no standing to appeal. *See* NRAP 3A(a) (recognizing that only an aggrieved party may appeal); *Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 448, 874 P.2d 729, 735 (1994) (holding that an "entity is not a party within the meaning of NRAP 3A(a) unless that person or entity has been served with process, appeared in the court below and has been named as a party of record in the trial court"). Clark NMSD counters that it has standing to pursue an appeal by virtue of having intervened under NRS 31.070.

NRS 31.070 sets forth a specific process by which a third-party claimant may challenge a writ of attachment by making a written, verified claim. If the claim is contested, subsection 5 of the statute provides for the right to a hearing before the court presiding over the matter to determine title to the property in question, upon petition and notice to all parties in the action and all parties claiming an interest in the property. While NRS Chapter 21 governs post-judgment writs of execution, NRS 21.120(2) directs that third-party claims to property levied under such writs shall also be resolved through the process envisioned by NRS 31.070.[1] In other words, the statutory remedy for questions regarding right and title to property levied upon by a judgment creditor and claimed by a third party is set forth in NRS 31.070. *Brooksby v. Nev. State Bank*, 129 Nev. 771, 773, 312 P.3d 501, 502 (2013); *see also Elliott v. Denton & Denton*, 109 Nev. 979, 980, 860 P.2d 725, 726 (1993) (noting that NRS 31.070 sets forth the procedure to resolve questions to title where "the property levied on is claimed by a third person as his [or her] property" (quoting NRS 31.070(1))); *Kulik v. Albers, Inc.*, 91 Nev. 134, 137, 532 P.2d 603, 605-06 (1975) (referring third-party claims concerning writs of execution to the NRS 31.070 process).

NRS 31.070 therefore necessarily conveys party standing on the third-party entities that petition the district court pursuant to it for the return of property levied under a writ of execution. NRAP 3A(b)(5) allows appeals from an order refusing to dissolve an attachment, and NRAP 3A(b)(8) allows appeals from special orders after final judgment. Accordingly, we conclude that Clark NMSD has party standing to challenge the district court's order and hold that this court has jurisdiction over this appeal. NRAP 3A(a); *see also LFC Mktg. Grp., Inc. v. Loomis*, 116 Nev. 896, 900, 8 P.3d 841, 844 (2000) (considering an appeal from a district court order granting a

[1]"If any property levied upon by writ of execution or by writ of garnishment in aid of execution is claimed by a third person as his or her property, the same rules prevail as to the contents and making of the claim, as to the holding of the property and as to a hearing to determine title thereto, as in the case of a claim after levy under writ of attachment, as provided for by law." NRS 21.120(2).

motion for a writ of attachment by a party joining the action under NRS 31.070). Therefore, the motion to dismiss is denied.[2]

STIGLICH and HERNDON, JJ., concur.

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[2]This conclusion aligns with this court's jurisprudence governing appeals in post-judgment garnishment proceedings. *See, e.g.*, NRS 31.460 (providing that an appeal may be taken from any final judgment in a garnishment proceeding, as in other civil cases); *accord Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1214, 197 P.3d 1051, 1056-57 (2008) (clarifying that final orders in garnishment proceedings brought properly under NRS Chapter 31 are appealable under NRS 31.460).