by writ for entertaining untimely appeals from judgments of conviction entered in municipal court); *Walker v. Scully*, 99 Nev. 45, 46, 657 P.2d 94, 94 (1983) (holding that a district court lacks authority to extend the 30-day period to file a notice of appeal set forth by the Nevada Rules of Appellate Procedure).

CONCLUSION

We hold that the appeals time limit set forth in JCRCP 98 is jurisdictional and mandatory. Because LVPC filed its appeal outside the allotted five-day period, the district court did not have jurisdiction to entertain the untimely appeal. We therefore grant the petition and direct the clerk of this court to issue a writ of prohibition instructing the district court to arrest its exercise of jurisdiction over LVPC's appeal.

Douglas, C.J., and Cherry, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

SANDRA LYNN NANCE, Appellant, *v.*
CHRISTOPHER MICHAEL FERRARO, Respondent.

No. 72454-COA

April 5, 2018 418 P.3d 679

Appeal from a district court order granting a motion to modify child custody and relocate a minor child. Eighth Judicial District Court, Family Court Division, Clark County; Denise L. Gentile, Judge.

Reversed and remanded.

McFarling Law Group and *Emily McFarling*, Las Vegas, for Appellant.

Hutchison & Steffen, LLC, and *Michael K. Wall* and *Shannon R. Wilson*, Las Vegas, for Respondent.

Before the Court of Appeals, Silver, C.J., Tao and Gibbons, JJ.

OPINION

By the Court, Silver, C.J.:

In this appeal, we consider whether the district court in a custody modification and child relocation action properly granted a motion in limine to exclude, among other things, evidence of domestic vio-

lence under *McMonigle v. McMonigle*, 110 Nev. 1407, 887 P.2d 742 (1994), and *Castle v. Simmons*, 120 Nev. 98, 86 P.3d 1042 (2004).[1] Respondent Christopher Ferraro moved to modify custody and relocate the parties' minor child, and when appellant Sandra Nance opposed the motion, Christopher filed a motion in limine to exclude facts that occurred before the prior custody order was entered. The district court granted the motion in limine under *McMonigle* and *Castle*, and thereafter determined the parties had been exercising joint physical custody and granted Christopher's motion.

To succeed on a motion to modify custody, a party in a joint physical custody arrangement must show that modification is in the child's best interest; but if the opposing party has primary physical custody of the child, the movant must show there has been a substantial change in circumstances affecting the welfare of the child and that modification is in the child's best interest. *Rivero v. Rivero*, 125 Nev. 410, 430, 216 P.3d 213, 227 (2009). Read together, *McMonigle* and *Castle* hold that a party seeking to modify primary physical custody may not use evidence of domestic violence known to the parties or the court when the prior custody order was entered to show a substantial change in circumstances warranting modification. *McMonigle*, 110 Nev. at 1408, 887 P.2d at 743; *Castle*, 120 Nev. at 105, 86 P.3d at 1047. Because questions regarding the scope and application of *McMonigle* and *Castle* continue to come before this court, we take this opportunity to clarify the law.

The threshold issue for this court is whether *McMonigle* and *Castle* also prevent parties from relying on previously known domestic violence evidence to demonstrate modification is not in the child's best interest. We thereafter consider whether the district court abused its discretion by determining the parties shared joint physical custody and granting Christopher's motion to modify custody and relocate the child. We conclude *McMonigle* and *Castle* do not bar the district court from reviewing the facts and evidence underpinning its prior rulings or custody determinations in deciding whether the modification of a prior custody order is in the child's best interest. These decisions likewise do not prohibit parties from presenting previously known domestic violence evidence defensively to show modification is not in the child's best interest. As a result, we conclude the district court abused its discretion by granting the motion in limine. We further conclude the district court abused its discretion by thereafter determining the parties shared joint physical custody and granting Christopher's motion to modify custody and relocate the minor child without considering the domestic violence evidence in determining the child's best interest.

[1]We note that *McMonigle* was overruled in part by *Castle*, as discussed below. *Castle*, 120 Nev. at 105, 86 P.3d at 1047.

FACTS AND PROCEDURAL HISTORY

Sandra Nance and Christopher Ferraro have one minor child, born in 2008. Sandra currently resides in Las Vegas, and Christopher resides in New York. The parties' relationship has long been tumultuous, particularly regarding custody and whether the minor child should reside in Nevada or New York. As relevant to this appeal, prior to the parties' divorce, Sandra alleged that Christopher committed acts of domestic violence and child abuse against her and one of her other children. Child Protective Services (CPS) investigated these allegations, and Sandra represented to the district court that CPS substantiated some of her claims. Then, in the spring of 2011, the parties stipulated to joint legal custody of the minor child, with Sandra being the primary residential parent and Christopher having parenting time. At the time of that stipulation, the parties were still contemplating reconciliation.

The parties' relationship continued to deteriorate, however, and as a result of their ongoing co-parenting problems, the district court ordered the parties to undergo a custody evaluation in November 2011. The following March, the district court thereafter considered and adopted the recommendations in that evaluation and ordered Christopher to temporarily exercise his parenting time with the minor child in Nevada while Sandra and Christopher worked with a parenting coordinator and completed extensive parenting classes. In November 2012, the parties entered into a stipulated parenting plan, which the district court confirmed, and in which both agreed to share what they termed joint legal and physical custody. The court ordered that Nevada was the child's home state within the terms of the Uniform Child Custody Jurisdiction and Enforcement Act. *See* NRS 125A.005-.585. Thereafter, the child resided with Sandra in Nevada, subject to Christopher exercising parenting time in New York.

In 2015, shortly before the child entered the first grade, Christopher moved the district court to modify the November 2012 order and sought primary physical custody, including permission to relocate the child to New York. Sandra opposed Christopher's motion, arguing she had primary physical custody of the child and Christopher had not shown a substantial change in circumstances since November 2012. She further argued that Christopher had not demonstrated relocation was warranted under Nevada law. Sandra pointed to the domestic violence presumption and the child's best interest, referencing the custody evaluation and evidence of Christopher's domestic violence. Christopher then filed a motion in limine seeking to bar all evidence "relative to the facts and circumstances existing between the parties prior to the [November 2012] custody order." Christopher argued Sandra's evidence was outdated and barred by *McMonigle*, *Castle*, and the rules of evidence. Sandra opposed Christopher's blanket motion in limine, specifically arguing that the

prior custody evaluation and evidence of Christopher's domestic violence and child abuse, including CPS reports and eyewitness testimony, was both relevant and not barred by *McMonigle* or *Castle*.

The district court granted Christopher's motion in limine, first citing *McMonigle*. According to the district court minutes, the court barred evidence of the domestic violence allegations "unless [the allegation] was unknown to Plaintiff . . . or unknown to the Court at the time of the last order, as prescribed by *Castle v. Simmons*." The district court advised that, if Sandra attempted to raise domestic violence evidence, Christopher would bear the burden of proving that the parties or the court previously considered that evidence.

Following an evidentiary hearing, the district court granted Christopher's motion to modify joint custody in favor of primary physical custody and granted his motion to relocate the child to New York. In so doing, the district court concluded that, as a matter of law, the parties had been exercising joint physical custody over the child and made detailed findings regarding the child's best interest. The district court separately concluded that even if Sandra had been exercising primary physical custody, changed circumstances and the best interest considerations still supported modifying custody.[2] This appeal followed.

ANALYSIS

On appeal, the parties ultimately contest whether the district court properly granted Christopher's motion to relocate the minor child. At a fundamental level, however, the parties disagree about the nature of their custody arrangement at the time Christopher brought his motion and whether the district court properly granted the motion in limine excluding Sandra's evidence of domestic violence.[3] These issues are interrelated, as the district court must consider evidence relevant to the child's best interest when determining what custody arrangement is actually in effect and whether modification of that arrangement is warranted. *See Bluestein v. Bluestein*, 131 Nev. 106, 109, 345 P.3d 1044, 1046 (2015). We therefore begin our analysis by addressing the motion in limine ruling before turning to the district court's determination that the parties exercised joint physical custo-

[2]In determining that circumstances affecting the child's welfare had changed since the prior custody determination, the court relied on the child's decreased need for weekly therapy; the child's age and the importance of extracurricular activities, socialization, and better educational opportunities in New York; Sandra's failure to ensure her oldest child successfully completed high school on time; and the changes in Christopher's career.

[3]Christopher also contends Sandra waived her argument that the court improperly barred her evidence by failing to try to introduce such evidence below. This argument is without merit as the district court barred Sandra from raising that evidence below.

dy and its subsequent decisions regarding custody modification and relocation.

Standard of review

We review the district court's evidentiary decisions and custody determinations for an abuse of discretion. *Castle*, 120 Nev. at 101, 86 P.3d at 1045 (noting we review custody determinations for an abuse of discretion); *State ex rel. Dep't of Highways v. Nev. Aggregates & Asphalt Co.*, 92 Nev. 370, 376, 551 P.2d 1095, 1098 (1976) (reviewing a decision on a motion in limine for an abuse of discretion). Questions of law, however, we review de novo. *Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011) (noting we review questions of law de novo).

The motion in limine

In granting the motion in limine and excluding Sandra's evidence, the district court relied on *McMonigle* and *Castle*. These cases both addressed district court decisions that modified primary physical custody. *See McMonigle*, 110 Nev. at 1408-09, 887 P.2d at 743-44; *Castle*, 120 Nev. at 103-06, 86 P.3d at 1046-48. In *McMonigle*, the supreme court reinforced long-standing Nevada law holding that a court may modify primary physical custody only where a party's circumstances have materially changed since the last custody order was entered. 110 Nev. at 1408-09, 887 P.2d at 743-44. In so doing, the court held that events that took place before the last custody order was entered were inadmissible to show that circumstances have changed. *Id*.

In *Castle*, the supreme court revisited *McMonigle*'s general rule that previously existing evidence is inadmissible to show a change in circumstances, and clarified that an exception to this rule exists if the evidence was previously unknown to the parties or the court, particularly where the evidence at issue is evidence of domestic violence. 120 Nev. at 104-05, 86 P.3d at 1046-47. There, the supreme court addressed a post-divorce decree order that granted a father's motion to modify custody based on newly discovered evidence that the mother previously engaged in acts of domestic violence against the children. *Id.* at 100-01, 86 P.3d at 1044-45. The court considered whether modification was proper where the facts giving rise to the modification existed before the parties divorced. *Id.* at 101, 86 P.3d at 1045. Ultimately, the court concluded that, although the domestic violence occurred prior to the parties' divorce, the res judicata doctrine "should not be used to preclude parties from introducing evidence of domestic violence that was unknown to a party or to the court when the prior custody determination was made." *Id.* at 105, 86 P.3d at 1047.

In adopting this modified rule, *Castle* specifically recognized that courts must review domestic violence evidence when determining the child's best interest. 120 Nev. at 105-06, 86 P.3d at 1047-48. The *Castle* opinion went on to state that the district court "must hear *all* information regarding domestic violence in order to determine the child's best interests." *Id.* at 105, 86 P.3d at 1047. Noting that domestic violence can naturally be difficult to discover, the supreme court further explained that the district court "should not be precluded from considering [newly discovered domestic violence evidence] simply because it was not previously raised" and held that "[e]ven previously litigated acts of domestic violence may need to be reviewed if additional acts occur." *Id.* at 105-06, 86 P.3d at 1047-48. However, the court further noted that the doctrine of res judicata would still prevent "parties from relitigating isolated instances of domestic violence that the court has previously examined." *Id.* at 106 n.22, 86 P.3d at 1048 n.22.

The rule adopted in *McMonigle* and later modified by *Castle* stems from the principle that a party must show that a substantial change in circumstances has occurred since the last custody order as a threshold requirement for modifying primary physical custody. *See McMonigle*, 110 Nev. at 1408, 887 P.2d at 743; *Castle*, 120 Nev. at 104, 86 P.3d at 1046. As recognized by the *Castle* court, this substantial change in circumstances requirement is, itself, derived from res judicata principles, which prevent dissatisfied parties from filing repetitive, serial motions until they obtain their desired result. *Castle*, 120 Nev. at 103-04, 86 P.3d at 1046. And the supreme court opinions applying this rule all do so only in the context of addressing the propriety of a moving party seeking to demonstrate changed circumstances based on evidence that existed at the time the prior custody order was entered.[4] *See, e.g.*, *Castle*, 120 Nev. at 104, 86 P.3d at 1046; *Hopper v. Hopper*, 113 Nev. 1138, 1143, 946 P.2d 171, 174-75 (1997), *overruled in part by Castle*, 120 Nev. 98, 86 P.3d 1042; *McMonigle*, 110 Nev. at 1408, 887 P.2d at 743.

Thus, *McMonigle* and *Castle* applied their rule in the context of a party seeking to use preexisting evidence to show a change in circumstances supporting a motion to modify primary physical custody. Here, however, the district court applied the rule to an opposition

[4]In *Mosley v. Figliuzzi*, 113 Nev. 51, 58, 930 P.2d 1110, 1115 (1997), *overruled in part by Castle*, 120 Nev. at 105 n.20, 86 P.3d at 1047 n.20, the supreme court applied the res judicata principles set forth in *McMonigle* in the context of a motion to modify joint custody to conclude that, even under a best interest analysis, parties may not file repetitive, serial motions seeking to relitigate the same issues based on the same underlying facts. The *Castle* court later overruled this decision "to the extent that it can be read to preclude evidence of which the moving party was unaware when the prior custody order was entered." *Castle*, 120 Nev. at 105 n.20, 86 P.3d at 1047 n.20.

to a motion to modify what the court later determined was a joint physical custody arrangement, where the evidence was relevant to the best interest requirement. As noted above, the threshold requirement for modifying primary physical custody is that the moving party shows there has been a substantial change in circumstances affecting the welfare of the child since the last custody order was entered. *Rivero*, 125 Nev. at 430, 216 P.3d at 227. In contrast, a motion to modify joint physical custody turns solely on whether the modification is in the child's best interest. *Id.*; *see also Bluestein*, 131 Nev. at 111-12, 345 P.3d at 1048 (holding that when the parties dispute whether their custody agreement constitutes joint or primary physical custody, the child's best interest is the "paramount" consideration in the district court's determination of the true nature of the parties' agreement).

The distinction between the substantial change in circumstances and best interest requirements is a critical one and is highlighted by our supreme court's 2007 decision in *Ellis v. Carucci* to revise the test governing motions to modify primary physical custody. Under *Ellis*, while a party moving to modify primary physical custody must still demonstrate a substantial change in circumstances affecting the welfare of the child, the court will only modify custody if the party also shows modification is in the child's best interest.[5] *See Ellis v. Carucci*, 123 Nev. 145, 150-51, 161 P.3d 239, 242-43 (2007). Moreover, both the Legislature and the Nevada Supreme Court have recognized that, in determining physical custody of a minor child, the sole consideration is the best interest of the child. NRS 125.480;[6] *Ellis*, 123 Nev. at 151-52, 161 P.3d at 243.

In the course of determining whether a custody modification is in the child's best interest, courts must consider and articulate specific findings regarding the nonexhaustive list of best interest factors set forth by statute. *See* NRS 125.480(4); *Lewis v. Lewis*, 132 Nev. 453, 459, 373 P.3d 878, 882 (2016). And in making this determination, a court must consider, amongst the factors, "[w]hether either parent or any other person seeking custody has engaged in an act of domestic violence against the child, a parent of the child or any other person residing with the child." NRS 125.480(4)(k). Indeed, the *Castle* court emphasized that courts "must hear *all* information regarding domestic violence in order to determine the child's best interests" and noted that our Legislature recognized the threat domestic vi-

[5]This test replaced the standard set forth by *Murphy v. Murphy*, 84 Nev. 710, 711, 447 P.2d 664, 665 (1968), which required a party moving to modify primary physical custody to show that the parent's circumstances were materially altered and that the change would substantially enhance the child's welfare. *Ellis*, 123 Nev. at 150, 161 P.3d at 242.

[6]Since Christopher filed his motion, NRS 125.480(4) has been repealed and replaced by NRS 125C.0035(4), which lists the same 12 best interest factors enumerated in NRS 125.480(4).

olence poses "to a child's safety and well-being" and created a rebuttable presumption to this end: that awarding a parent physical custody is not in the child's best interest if that parent has engaged in acts of domestic violence. 120 Nev. at 105-06, 86 P.3d at 1047-48; *see also* NRS 125.480(5); NRS 125C.003(1)(c).

When a district court considers a motion to modify a prior custody order, it logically follows that the court's evaluation of whether modification is in the child's best interest will necessarily be informed by the findings and conclusions that resulted in the prior custody determination. As a result, it may at times be necessary for the district court to review the evidence that underpinned its previous rulings to determine whether modification of the existing arrangement is warranted. This is especially true where, as here, issues of potential domestic violence are involved.[7] *Castle*, 120 Nev. at 105-06, 86 P.3d at 1047-48.

Moreover, broadly limiting the court's ability to consider evidence that predates the latest custody order would be contrary to the policy underlying Nevada's "one family, one judge" rule, which was enacted to keep family cases before a single judge who would be familiar with all facts and history in the case and be better informed when rendering subsequent decisions. *See, e.g.*, NRS 3.025(3); Hearing on A.B. 154 Before the Assembly Committee on Judiciary, 70th Leg. (Nev., March 5, 1999) (addressing the purpose of the rule). Further, to the extent that so limiting the evidence could prevent the district court from determining whether a party engaged in domestic violence in the course of considering what custody arrangement is in the child's best interest, such a result flies in the face of Nevada law requiring the district court to presume that it is not in the child's best interest for an abuser to have custody. *See* NRS 125.480(5); NRS 125C.003(1)(c).

That does not mean, however, that parties are free to relitigate previously decided issues. *See Castle*, 120 Nev. at 105-06, 86 P.3d at 1047-48; *Mosley*, 113 Nev. at 58-59, 930 P.2d at 1114-15 (reversing an order modifying joint physical custody based on a best interest analysis where the motion to modify relied on the same facts that existed when the previous order was entered).[8] For example, if a district court determines that allegations of domestic violence have not been proven in resolving a custody dispute, a party cannot point to only the same set of facts surrounding this alleged instance

[7]Indeed, the *Castle* court recognized that, even in the changed circumstances context, previously litigated instances "of domestic violence may need to be reviewed if additional acts occur." *Castle*, 120 Nev. at 106, 86 P.3d at 1047-48.

[8]As noted above, *Castle* overruled *Mosley* to the extent that *Mosley* purports to bar "evidence of which the moving party was unaware when the prior custody order was entered." *Castle*, 120 Nev. at 105 n.20, 86 P.3d at 1047 n.20. And *Castle* further recognized that such would also apply to evidence of which the district court was not aware. *See id.* at 105, 86 P.3d at 1047-48.

of domestic violence to support a subsequent custody modification. Similarly, if a district court finds that domestic violence occurred and determines that the offending parent should only have supervised parenting time with the child, the other parent cannot rely on only this same instance of domestic violence to support a subsequent modification to provide the offending parent with even less or no time with the child. Even in the context of opposing a motion to modify custody, a party generally cannot relitigate prior instances of domestic violence the court has previously addressed and decided.

But because a district court will necessarily need to consider the factual basis underlying its prior decision in determining whether it should be modified, it is axiomatic that, in opposing a motion to modify, the nonmoving party can point to the facts and evidence on which the prior order was based to demonstrate that, despite events following the prior order, modification is not in the child's best interest. As noted above, even under the changed circumstances analysis, *Castle*'s provision that pre-decision evidence of domestic violence can be considered only if the parties or the court were unaware of its existence or the extent of the offending conduct applies only to limit what the party *seeking* a custody change can present to demonstrate that changed circumstances supporting modification exist.[9] *Castle*, 120 Nev. at 105, 86 P.3d at 1047.

We now apply this framework to the issue before us. The record demonstrates that Sandra intended to present the contested evidence to support her position that custody modification was not in the child's best interest. The record also shows that the district court did consider at least some of this evidence in March of 2012 when it ordered the parties to complete parenting classes, and it appears that this evidence weighed into the court's decision to temporarily require that Christopher exercise his parenting time with the child in Nevada pending completion of those classes. In thereafter granting the motion in limine, however, the district court concluded *McMonigle* and *Castle* barred Sandra from presenting evidence that was known to the parties or the court at the time of the November

[9]This is not to suggest that preexisting evidence can never be used offensively by a party seeking to show custody modification is in the child's best interest. We note that under *Mosley*, as modified by *Castle*, a moving party could present preexisting evidence of domestic violence so long as it was unknown to the parties or the court when the prior order was entered. *Castle*, 120 Nev. at 105, 86 P.3d at 1047; *Mosley*, 113 Nev. at 58-59, 930 P.2d at 1115-16. And as consistent with *Castle*, even previously litigated evidence of domestic violence may need to be reviewed if new instances of domestic violence recur. *Castle*, 120 Nev. at 105-06, 86 P.3d at 1047-48.

We further note that the framework set forth in this opinion applies to a court's performance of a best interest analysis in the context of requests to modify both joint and primary physical custody, regardless of whether that analysis comes about under the prior statutory framework, *see, e.g.*, NRS Chapter 125, or under the framework set forth by NRS Chapter 125C.

2012 stipulation and order and excluded this same evidence from its subsequent decisions.

We conclude the district court abused its discretion by granting the motion in limine. Although the record is not entirely clear as to what specific evidence Sandra sought to present or what evidence the court's ruling barred, *McMonigle* and *Castle* do not support the district court's decision under these facts to broadly exclude Sandra's evidence that was known to the parties or the court at the time of the prior custody order. Critically, in opposing Christopher's motion to modify custody, Sandra did not seek to present this evidence to show circumstances had changed or even that modification was in the child's best interest. Rather, she intended to offer the evidence to oppose the modification request and therefore to show modification was not in the child's best interest. Moreover, the district court could review its prior rulings and the facts underpinning those decisions in determining whether a modification of the custody arrangement was, in fact, in the child's best interest. Thus, the district court misapplied *McMonigle* and *Castle* in this context, as the record does not show that Sandra sought to relitigate the evidence.

With this in mind, we next consider the error's effect on the district court's subsequent rulings and whether the error warrants reversal.

The custody determinations

We now turn to Sandra's arguments regarding the district court's finding that the parties exercised joint physical custody and the district court's subsequent decision to modify custody, grant Christopher primary physical custody, and allow him to relocate the child. The record demonstrates that, in evaluating the existing custody arrangement and the motion to modify, the district court carefully and thoroughly applied the law to the facts before the court. However, because the district court erroneously granted the motion in limine, it did not have all of the pertinent facts necessary to conduct the required best interest analysis in assessing the nature of the parties' custody arrangement and resolving Christopher's motion.

Nevada law is clear: the district court *must* consider all the best interest factors in determining the nature of the parties' custody arrangement—that is, whether the parties share joint physical custody or whether one of the parties exercises primary physical custody, in deciding whether to modify custody and in deciding whether to grant relocation. *See Lewis*, 132 Nev. at 459, 373 P.3d at 882 (holding the court must consider each of the best interest factors when modifying custody); *Bluestein*, 131 Nev. at 112, 345 P.3d at 1048-49 (holding that the child's best interest is the "paramount" consideration in determining the nature of an existing custody arrangement and whether that arrangement should be modified); *Druckman v.*

Ruscitti, 130 Nev. 468, 473, 327 P.3d 511, 515 (2014) (holding the child's best interest must form the basis of a court's decision regarding relocation).[10] After improperly granting Christopher's motion in limine, however, the district court prevented Sandra from opposing Christopher's motion with evidence of Christopher's alleged history of domestic violence and child abuse, even though such evidence is directly relevant to the best interest analysis. *See* NRS 125.480(4).

We conclude the district court abused its discretion by determining the parties exercised joint physical custody without considering all evidence relevant to the best interest factors.[11] *Bluestein*, 131 Nev. at 113, 345 P.3d at 1048-49. Similarly, the district court further abused its discretion when it failed to consider this domestic violence evidence when the court granted Christopher primary physical custody of the minor child and granted Christopher's motion to relocate the minor child. *See Lewis*, 132 Nev. at 459, 373 P.3d at 882 (requiring the court to consider the statutory best interest factors in determining whether custody modification is in the child's best interest); *Druckman*, 130 Nev. at 473, 327 P.3d at 515 (holding that a decision on a motion to relocate a child must be based on the child's best interest).

These errors mandate reversal. *See Lewis*, 132 Nev. at 459, 373 P.3d at 882 (reversing an order modifying custody where the district court failed to set forth specific findings showing adequate consideration of all the statutory best interest factors). On remand, we direct the court to allow Sandra to present evidence in accordance with the principles set forth in this opinion, including the domestic violence evidence and evaluation that the district court considered when making its prior rulings. Likewise, although the district court may not revisit the parties' prior arguments or otherwise allow the parties to relitigate issues, the district court may review any prior rulings and the facts on which those rulings were based.[12]

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[10]In the district court, the parties addressed the propriety of allowing Christopher to relocate the child under Nevada's relocation scheme as it existed prior to the enacting of NRS 125C.007 (governing petitions for relocation and setting forth factors for consideration in reviewing such petitions), as that statute was not in effect at the time Christopher's motion was filed. Therefore, this opinion does not apply NRS 125C.006, NRS 125C.0065, or NRS 125C.007. Nonetheless, even under the new relocation statute, a party seeking to relocate a child must show that relocation is in the child's best interest. *See* NRS 125C.007(1)(b).

[11]We also note NRS 125.480(5), and the statute that replaced it, NRS 125C.0035(5), sets forth a rebuttable presumption against awarding physical custody to a perpetrator of domestic violence. By excluding Sandra's proposed evidence, the district court failed to consider whether a rebuttable presumption existed here and, if so, whether Christopher rebutted that presumption.

[12]We note nothing in this opinion would preclude the district court from determining incidents of domestic violence that the court has not yet ruled upon, in accordance with *Castle*, 120 Nev. at 105-06, 86 P.3d at 1047-48.

CONCLUSION

Under *McMonigle* and *Castle*, litigants who are seeking to modify primary physical custody may not use facts known to the parties or the court at the time the prior custody order was entered to demonstrate there has been a substantial change in circumstances. *McMonigle* and *Castle* do not, however, bar district courts from reviewing the facts and evidence underpinning their prior rulings in deciding whether the modification of a prior custody order is in the child's best interest. These decisions likewise do not prevent litigants from using previously known evidence of domestic violence defensively to argue modification is not in the child's best interest. Here, the district court abused its discretion by concluding *McMonigle* and *Castle* barred the evidence and by granting the motion in limine. Because the district court thereafter failed to consider evidence relevant to the best interest factors, the court further abused its discretion by determining the parties shared joint custody and thereafter granting the motion to modify custody and relocate the minor child. We therefore reverse the district court's order modifying custody and granting relocation and remand for proceedings consistent with this opinion.

Tao and Gibbons, JJ., concur.

MICHAEL KIRSCH; and SIU YIP, Appellants, *v.* PETER G. TRABER; JAMES C. CZIRR; JACK W. CALLICUTT; GILBERT F. AMELIO; KEVIN D. FREEMAN; ARTHUR R. GREENBERG; ROD D. MARTIN; JOHN F. MAULDIN; STEVEN PRELACK; HERMAN PAUL PRESSLER, III; DR. MARC RUBIN; and GALECTIN THERAPEUTICS, INC., a Nevada Corporation, Respondents.

No. 70854

April 5, 2018 414 P.3d 818

Appeal from a district court order granting a motion to dismiss in a derivative shareholder action. Eighth Judicial District Court, Clark County; Elizabeth Goff Gonzalez, Judge.

Affirmed.

Lee, Hernandez, Landrum & Garofalo, A.P.C., and *David S. Lee, Natasha A. Landrum*, and *Dirk W. Gaspar*, Las Vegas; *Lifshitz & Miller* and *Edward W. Miller* and *Joshua M. Lifshitz*, Garden City, New York, for Appellant Michael Kirsch.

Aldrich Law Firm, Ltd., and *John P. Aldrich*, Las Vegas; *The Weiser Law Firm, P.C.*, and *Robert B. Weiser, Brett D. Stecker*, and

James Ficaro, Berwyn, Pennsylvania; *The Weiser Law Firm, P.C.*, and *Kathleen A. Herkenhoff*, San Diego, California, for Appellant Siu Yip.

Kaempfer Crowell and *Ryan W. Daniels* and *Lyssa S. Anderson*, Las Vegas; *King & Spalding LLP* and *Michael R. Smith* and *B. Warren Pope*, Atlanta, Georgia, for Respondents.

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

OPINION

By the Court, Stiglich, J.:

Under the doctrine of issue preclusion, a Nevada court defers to a foreign court's final judgment resolving an issue between litigants if those same litigants previously litigated the same issue before the foreign court. However, the Nevada court does not defer to the foreign court's final judgment if it contravenes a final judgment previously entered by a Nevada court.

The question to be resolved in this appeal is whether a Nevada district court's order denying a motion to dismiss constituted a final judgment on the issue of demand futility. To the extent that we have not previously defined "final judgment" within this context, we take this opportunity to clarify that Nevada applies the definition set forth within section 13 of the Restatement (Second) of Judgments. Applying that definition to the facts of this case, we agree with the district court that its denial of a motion to dismiss was not a final judgment on the issue of demand futility. Therefore, it was proper for the district court to accord preclusive effect to a subsequent final judgment from a foreign court. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Galectin Therapeutics, Inc. (Galectin) is a pharmaceutical company incorporated in Nevada and headquartered in Georgia. Beginning in October 2013, the directors of Galectin commenced a "stock promotion scheme" in which they published glowing reviews of Galectin in third-party publications. In July 2014, shortly after news of that promotion scheme became public, Galectin's share price dropped approximately 50 percent.

In August 2014, several Galectin shareholders filed shareholder derivative actions against Galectin's officers and directors in the United States District Court for the District of Nevada. Appellant Siu Yip was a named plaintiff in one of those federal cases, which were consolidated and transferred to the Northern District of Georgia.

Shortly after the federal cases were filed, appellant Michael Kirsch filed the instant derivative shareholder suit in Clark County

district court against Galectin's officers and directors (here, respondents). In his complaint, Kirsch conceded that he did not make a demand on Galectin's board of directors prior to filing suit. He alleged that such a demand would have been futile. Siu Yip later intervened in Kirsch's suit.

Respondents moved to dismiss Kirsch's complaint pursuant to NRCP 23.1, which requires a plaintiff in a shareholder derivative action either to make a demand upon the corporation's directors prior to filing suit or to plead particularized facts demonstrating that such a pre-suit demand would have been futile. At a hearing on the motion, the district court noted that Kirsch's complaint contained "conclusory allegations" that a pre-suit demand would have been futile. Nonetheless, the district court denied the motion to dismiss, commenting: "The allegations related to the conflicted directors who may face personal liability are not the best I've ever seen, but they are not enough to merit dismissal at this point." The district court granted Kirsch leave to amend his complaint to add additional plaintiffs, advising him "to beef up [the] factual allegations" in the amended complaint. Finally, the district court sua sponte stayed the case pending a decision in the parallel shareholder derivative action filed in federal court.

The United States District Court for the Northern District of Georgia dismissed the federal action in an order. *See In re Galectin Therapeutics, Inc. Derivative Litig.*, No. 1:15-CV-208-SCJ, 2015 WL 12806566 (N.D. Ga. Dec. 30, 2015). That order held that the Nevada district court's denial of defendants' motion to dismiss was not "a final ruling on the merits with respect to the issue of demand futility." *Id.* at *4. Turning to the merits of the demand futility issue, the federal court "conclude[d] that Plaintiffs have not set forth particularized allegations that a majority of the board of directors face a substantial likelihood of liability." *Id.* at *5.

Armed with the federal court's order of dismissal in the federal action, respondents moved again to dismiss Kirsch's suit, this time on the ground of issue preclusion. In ruling on that motion, the Nevada district court concluded that "the parties are identical" between the Nevada and federal cases, "the issue of demand futility is identical," and the federal court's dismissal constituted a final order as to the issue of demand futility. Therefore, the district court granted respondents' motion to dismiss. Kirsch and Siu Yip appeal from the order of dismissal.

DISCUSSION

This case turns on whether the Nevada district court's order was a final judgment on the issue of demand futility.[1] If it was, then the

[1]Appellants concede that the federal court's order has preclusive effect if the district court's prior order was not a final judgment.

district court erred in according issue preclusive effect to the federal court's subsequent decision. While a district court is free to revisit and reverse its own rulings upon request of a party, *see* EDCR 2.24, it may not reverse its own final judgment simply because a subsequent foreign judgment resolved the issue differently. Reversing on that ground alone would be giving the foreign judgment "greater credit and respect than the prior decree of our own state lawfully entered." *Colby v. Colby*, 78 Nev. 150, 157, 369 P.2d 1019, 1023 (1962). We review de novo the district court's legal conclusion that its order of denial was not a "final judgment" within the context of issue preclusion. *See Alcantara v. Wal-Mart Stores, Inc*., 130 Nev. 252, 256, 321 P.3d 912, 914 (2014) ("We review a district court's conclusions of law, including whether claim or issue preclusion applies, de novo.").

Nevada defines "final judgment" as set forth in section 13 of the Restatement (Second) of Judgments

Before turning to the merits of this case, we must first determine what it means for a judgment to be "final" such that it is immune from the potential preclusive effects of a subsequent foreign judgment. In defining that term, we will keep in mind the purpose of the issue preclusion doctrine: "to prevent multiple litigation causing vexation and expense to the parties and wasted judicial resources by precluding parties from relitigating issues." *Univ. of Nev. v. Tarkanian*, 110 Nev. 581, 598, 879 P.2d 1180, 1191 (1994) (describing the purpose of res judicata generally, of which issue preclusion is one of two "species"), *holding modified on other grounds by Exec. Mgmt., Ltd. v. Ticor Title Ins. Co.*, 114 Nev. 823, 963 P.2d 465 (1998).

Respondents urge us to apply the definition of "final judgment" used to determine whether an order is appealable—that is, a judgment "that disposes of all the issues presented in the case, and leaves nothing for the future consideration of the court, except for post-judgment issues such as attorney's fees and costs." *Lee v. GNLV Corp*., 116 Nev. 424, 426, 996 P.2d 416, 417 (2000). Appellants criticize that definition as overly narrow and point instead to the Restatement (Second) of Judgments section 13 (Am. Law Inst. 1982), which provides: " 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect."

This court has touched upon this definitional issue on only one occasion.[2] In *Tarkanian*, the finality of a judgment was not at issue,

[2]Appellants cite to *Garcia v. Prudential Insurance Co. of America* as another case wherein this court addressed this definitional issue. 129 Nev. 15, 22 n.7, 293 P.3d 869, 874 n.7 (2013) ("It is widely recognized that the finality requirement is less stringent for issue preclusion than for claim preclusion." (internal quotation

but this court nonetheless offered dicta as to what constitutes a "final judgment" within the context of issue preclusion. 110 Nev. at 599, 879 P.2d at 1191. We quoted Restatement (Second) of Judgments section 13 (Am. Law Inst. 1982) for the proposition that "[f]or purposes of issue preclusion . . . , 'final judgment' includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect." In citing approvingly to the Restatement's definition, *Tarkanian* affirmed this court's "long-standing reliance on the Restatement (Second) of Judgments in the issue and claim preclusion context." *Alcantara*, 130 Nev. at 261 & n.3, 321 P.3d at 917 & n.3 (listing Nevada cases that have relied on the Restatement (Second) of Judgments in the issue and claim preclusion context).

According to the Restatement's definition, a judgment is final if it is "sufficiently firm." Restatement (Second) of Judgments § 13 (Am. Law Inst. 1982). The Restatement's comments provide helpful guidance as to what "sufficiently firm" means. "A judgment may be final in a res judicata sense as to a part of an action although the litigation continues as to the rest." *Id.* at cmt. e. "The test of finality . . . is whether the conclusion in question is procedurally definite and not whether the court might have had doubts in reaching the decision." *Id.* at cmt. g. "Finality will be lacking if an issue of law or fact essential to the adjudication of the claim has been reserved for future determination . . . ," *id.* at cmt. b, or "if the decision was avowedly tentative," *id.* at cmt. g. Factors indicating finality include (a) "that the parties were fully heard," (b) "that the court supported its decision with a reasoned opinion," and (c) "that the decision was subject to appeal." *Id*.

Of the competing definitions proposed by the parties, the Restatement's definition best effectuates issue preclusion's purpose of increasing judicial efficiency by preventing parties from relitigating issues definitively decided by a court. *See Tarkanian*, 110 Nev. at 598, 879 P.2d at 1191. The Restatement's definition achieves that purpose by according finality to any judgment a court intended to definitively resolve an issue fully litigated between parties. Under respondents' definition, by contrast, an interlocutory order could never be considered a final judgment as to an issue—even when the district court intended an interlocutory order to definitively resolve an issue.

Therefore, to the extent that this court did not formally adopt the Restatement's definition of "final judgment" in *Tarkanian*, 110 Nev. at 599, 879 P.2d at 1191, we do so now.

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marks omitted)). In *Garcia*, however, this court was applying New Jersey issue preclusion law, *id*. at 22, 293 P.3d at 873, so it has little relevance to this case, wherein Nevada law controls.

The district court's order denying respondents' motion to dismiss was not a final judgment

Applying the Restatement's definition to this case, we conclude that the Nevada district court's order was not a "final judgment" on the issue of demand futility.

Only one factor suggests that the order of denial could be considered a "final judgment" as to the issue of demand futility: The parties fully briefed the issue and argued it at length during a hearing on the motion to dismiss. Thus, "the parties were fully heard." Restatement (Second) of Judgments § 13 cmt. g (Am. Law Inst. 1982).

Several factors militate against this order being a final judgment on the demand futility issue. First, an order denying a motion to dismiss is not "subject to appeal." *Id.*; *see also* NRAP 3A(b) ("Appealable Determinations."). Second, the district court's decision was not "supported . . . with a reasoned opinion." Restatement (Second) of Judgments § 13 cmt. g (Am. Law Inst. 1982). Rather, the district court's order dismissed the respondents' motion without explanation.

Moreover, the district court's statements during the hearing strongly indicate that it did not intend to fully resolve the issue of demand futility.[3] Restatement (Second) of Judgments § 13 cmt. b (Am. Law Inst. 1982). First, the district court suggested that the complaint's allegations were lacking in particularity when it described those allegations as "conclusory." Second, the district court revealed that its decision was tentative when it stated, "[t]he allegations . . . are not the best I've ever seen, but they are not enough to merit dismissal *at this point*." (Emphasis added.) Third, the district court indicated that it intended to revisit the demand futility issue when it advised Kirsch to "beef up [his] factual allegations" if he decided to amend his complaint. Combined, these three statements show that the district court did not intend to fully resolve the demand futility issue, but instead "reserved [it] for future determination." *Id.* at cmt. b.

In sum, the district court's order denying respondents' motion to dismiss was not a final judgment on the issue of demand futility. Therefore, because that issue had not been definitively resolved by a Nevada court, the district court did not give "greater credit and respect" to a foreign court's judgment than to "the prior decree of our

[3]We reject appellants' argument that this court is prohibited from examining the statements made by the district court during the hearing. The cases cited to for that proposition merely establish that a written order controls over *conflicting* statements made during a hearing. *See Canterino v. Mirage Casino-Hotel*, 118 Nev. 191, 194, 42 P.3d 808, 810 (2002); *cf. Mortimer v. Pac. States Sav. & Loan Co.*, 62 Nev. 142, 153, 145 P.2d 733, 735 (1944) (holding that a district court's formal written order controls over a conflict in the minute order). "But a court may consult the record and proceedings giving rise to another court's order, at least when the latter is ambiguous." *Holt v. Reg'l Tr. Servs. Corp.*, 127 Nev. 886, 895, 266 P.3d 602, 608 (2011).

own state" when it accorded preclusive effect to the federal court's judgment. *Colby*, 78 Nev. at 157, 369 P.2d at 1023.

CONCLUSION

A judgment is final within the context of issue preclusion if it is "sufficiently firm" and "procedurally definite" in resolving an issue. Restatement (Second) of Judgments § 13 & cmt. g (Am. Law Inst. 1982). In this case, the district court's order denying the respondents' motion to dismiss reserved for future determination the demand futility issue. Therefore, the district court correctly held that its prior order did not prohibit it from according preclusive effect to the federal court's order. Accordingly, we affirm.

Cherry and Parraguirre, JJ., concur.

THE STATE OF NEVADA, Appellant, *v.* GREGORY FRANK ALLEN SAMPLE, aka GREGORY F.A. SAMPLE, Respondent.

No. 71208

April 5, 2018 414 P.3d 814

Appeal from a district court order granting respondent's motion to suppress. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Affirmed in part, reversed in part, and remanded.

Adam Paul Laxalt, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Jennifer P. Noble* and *Stephan J. Hollandsworth*, Deputy District Attorneys, Washoe County, for Appellant.

Larry K. Dunn & Associates and *Karena K. Dunn* and *Larry K. Dunn*, Reno, for Respondent.

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

OPINION

By the Court, Hardesty, J.:

Respondent Gregory Frank Allen Sample was arrested for driving under the influence of alcohol after failing a preliminary breath test (PBT). The results of the PBT were subsequently used to obtain a search warrant for an evidentiary blood draw. The district court suppressed the PBT results, concluding that they were obtained in violation of Sample's Fourth Amendment rights, and also suppressed

the evidentiary blood draw as the fruit of an illegal search. The State argues on appeal that the district court erred because Sample was under arrest at the time the PBT was administered, the PBT was a legal search incident to the arrest, and the blood evidence was legally obtained pursuant to the search warrant. Although the State fails to demonstrate that the suppression of the PBT evidence was erroneous, we hold that the district court erred in invalidating the telephonic search warrant and suppressing the blood draw evidence because there was probable cause to support the search warrant even without the PBT evidence.

FACTS AND PROCEDURAL HISTORY

While on patrol one night, Deputy Swanson noticed a northbound vehicle cross over fog lines and double yellow lines, accelerate rapidly, cross into a southbound turn lane, and veer back into the northbound travel lane. Deputy Swanson first activated his overhead lights, and then activated his siren in an attempt to initiate a traffic stop. The vehicle did not stop and continued driving to Sample's residence where it pulled into the driveway.

Deputy Swanson also pulled into the driveway and approached the vehicle where he observed the driver, later identified as Sample, with red, watery eyes and the smell of alcohol coming from inside the vehicle. Sample drank a clear liquid from a plastic bottle despite Deputy Swanson's repeated demands to stop. Based on these observations, Deputy Swanson asked Sample how much he had to drink, and Sample admitted to drinking "[a] couple of beers." Deputy Swanson further observed that Sample's "speech was slow and slurred," and that Sample repeatedly refused to comply with commands to stop drinking out of the plastic bottle or to roll his window down further.

Deputy Swanson's partner arrived on the scene, and the deputies asked Sample to exit the vehicle. Sample refused, and the officers had to reach through the window and open the vehicle's door before Sample exited, "unsteady on his feet." Sample was directed to remain at the front of the patrol vehicle but, instead, he attempted to walk toward the front door of his residence while the deputies gathered field sobriety test paperwork from their patrol vehicle. The deputies then put Sample in a wristlock and escorted him to the front of the patrol car where they placed him in handcuffs. Deputy Swanson felt that Sample "was absolutely under the influence of an alcoholic substance," and he decided not to conduct the field sobriety test because of Sample's uncooperative behavior including his attempt to walk toward the entrance of the residence. Sample was then placed in the back of the patrol car.

While Sample was handcuffed in the back of the patrol car, a third officer arrived on the scene and Deputy Swanson utilized that officer's equipment to administer the PBT on Sample. Sample failed the

PBT, blowing a 0.172 blood-alcohol concentration. Deputy Swanson placed Sample under arrest for driving under the influence.

Because Sample would not give consent for blood testing, Deputy Swanson obtained a telephonic search warrant for three descending blood draws for evidentiary testing and analysis. As probable cause for the warrant, Deputy Swanson told the magistrate judge his observations of Sample's intoxicated state and the fact that Sample had a prior DUI conviction. Deputy Swanson also told the judge the results of the PBT and that Sample had consented to the PBT. The judge granted the warrant and three blood samples were taken and analyzed.

Sample waived a preliminary hearing and the State filed an information charging him with driving under the influence pursuant to NRS 484C.110, which is punishable as a felony under NRS 484C.410 due to Sample's previous felony DUI conviction in 2009. Sample moved to suppress the PBT on the grounds that it was a nonconsensual search in violation of the Fourth Amendment and that without the improperly obtained PBT results, there was no probable cause to support his arrest. At the suppression hearing, Deputy Swanson testified that "I used the PBT only to confirm my observations. I don't use it as a probable cause arrest." Although he had testified at an earlier administrative hearing that he obtained Sample's consent to administer the PBT, Deputy Swanson conceded at the suppression hearing that he did not obtain Sample's consent and merely directed him to blow.

The district court granted Sample's motion to suppress. Because Deputy Swanson had testified inconsistently regarding whether Sample had consented to the PBT, the district court found that no consent was given and therefore the PBT was a warrantless search in violation of the holding in *Birchfield v. North Dakota*, 136 S. Ct. 2160 (2016). The district court further found that without the PBT results, no probable cause existed for Sample's arrest and that the good faith exception to the warrant requirement did not apply to Deputy Swanson's execution of the telephonic search warrant. The effect of the suppression order was not only to suppress the PBT,[1] but also to invalidate the telephonic search warrant and suppress the evidentiary blood draw evidence. The State appeals.

DISCUSSION

In reviewing a district court's resolution of a motion to suppress, we review its factual findings for clear error and its legal conclusions de novo. *State v. Beckman*, 129 Nev. 481, 486, 305 P.3d 912, 916 (2013).

[1]Pursuant to NRS 484C.150(3), PBT results are not admissible "in any criminal action, except to show there were reasonable grounds to make an arrest."

The district court did not err in finding that the PBT results were obtained in violation of Sample's Fourth Amendment rights

The district court found that a warrant was required for the administration of the PBT and that the PBT was unlawfully administered without Sample's consent. The State concedes that Sample did not consent to the PBT, but argues that a warrant was not required because the placement of Sample in handcuffs in the patrol vehicle constituted an arrest at the time the PBT was administered; thus, the PBT was a valid search incident to arrest. *See Birchfield*, 136 S. Ct. at 2184 (holding that the Fourth Amendment permits a warrantless breath test administered as a search incident to an arrest for drunk driving). However, the State makes this argument for the first time on appeal and it was not considered by the district court. Accordingly, we decline to consider it. *See McKenna v. State*, 114 Nev. 1044, 1054, 968 P.2d 739, 746 (1998) ("Where a defendant fails to present an argument below and the district court has not considered its merit, we will not consider it on appeal."). Because the PBT was not administered pursuant to a warrant or an exception to the warrant requirement, we conclude that the district court properly suppressed the PBT evidence as an unconstitutional search. *See Byars v. State*, 130 Nev. 848, 854, 336 P.3d 939, 943 (2014) (stating that "[a] warrantless search is reasonable only where it falls within a recognized exception" to the warrant requirement).

The district court erroneously invalidated the telephonic search warrant used to obtain the evidentiary blood draw

The district court invalidated the search warrant and suppressed the subsequent blood draw evidence "as fruit of the poisonous tree" stemming from Deputy Swanson's violation of Sample's rights when he administered the PBT without Sample's consent. The State argues that this was error. We agree and hold that this suppression was error because even though the telephonic search warrant contained a false statement by Deputy Swanson regarding the improperly obtained PBT, it was, nevertheless, supported by other facts showing probable cause.

"This court will not overturn a magistrate's finding of probable cause for a search warrant unless the evidence in its entirety provides no substantial basis for the magistrate's finding." *Garrettson v. State*, 114 Nev. 1064, 1068-69, 967 P.2d 428, 431 (1998). "A defendant is not entitled to suppression of the fruits of a search warrant, even based on intentional falsehoods or omissions, unless probable cause is lacking once the false information is purged and any omitted information is considered." *Doyle v. State*, 116 Nev. 148, 159, 995 P.2d 465, 472 (2000). Probable cause requires "trustworthy facts and circumstances which would cause a person of reasonable caution to believe that it is more likely than not that the specific

items to be searched for are: seizable and will be found in the place to be searched." *Keesee v. State*, 110 Nev. 997, 1002, 879 P.2d 63, 66 (1994). Further, "[w]hether probable cause is present to support a search warrant is determined by a totality of the circumstances," and "the issuing judge's determination of probable cause should be given great deference by a reviewing court." *Doyle*, 116 Nev. at 158, 995 P.2d at 471.

When Deputy Swanson called the magistrate judge to obtain the telephonic search warrant, he told the judge that Sample had been driving erratically and speeding, would not obey orders, had glassy, red, and watery eyes, had slow and slurred speech, had an odor of alcohol, was unsteady on his feet, attempted to enter his home while the deputies prepared the field sobriety test paperwork, and had at least one prior felony DUI conviction. Deputy Swanson's observations of Sample's intoxicated state were included in the district court's findings of fact. This court has found probable cause under similar circumstances. *See Dixon v. State*, 103 Nev. 272, 273-74, 737 P.2d 1162, 1163-64 (1987) (holding that probable cause for arrest existed where defendant was driving erratically, smelled of alcohol, had slurred speech, had an inability to stand straight, had bloodshot, watery eyes, and failed a field sobriety test).

Deputy Swanson also told the magistrate judge that Sample consented to a PBT and registered a 0.172 blood-alcohol concentration. Conducting our own analysis of the facts as found by the district court, and ignoring the PBT evidence, we conclude that Deputy Swanson's remaining observations still support the magistrate judge's finding of probable cause. Those remaining facts "cause a person of reasonable caution to believe that it is more likely than not that" an evidentiary draw of Sample's blood would contain evidence of his driving while under the influence of alcohol. *Keesee*, 110 Nev. at 1002, 879 P.2d at 66.

CONCLUSION

We conclude that the district court properly suppressed the PBT evidence, but erred in invalidating the telephonic search warrant and suppressing the evidentiary blood draw. Without considering the PBT, the search warrant was still supported by probable cause, and the evidentiary blood draw was a valid search and seizure pursuant to that warrant. Accordingly, we affirm in part the district court's order granting Sample's motion to suppress as to the PBT evidence but reverse and remand as to the suppression of the search warrant and evidentiary blood draw.

Parraguirre and Stiglich, JJ., concur.

CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, Appellant, *v.* LAS VEGAS REVIEW-JOURNAL, Respondent.

No. 75095

April 12, 2018 415 P.3d 16

Motion for stay pending appeal without supersedeas bond or other security.

Motion granted.

Cherry, J., dissented in part.

Steven B. Wolfson, District Attorney, and *Laura C. Rehfeldt*, Deputy District Attorney, Clark County; *Marquis Aurbach Coffing* and *Micah S. Echols*, Las Vegas, for Appellant.

McLetchie Shell LLC and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Respondent.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Douglas, C.J.:

Appellants may obtain a stay of a money judgment pending appeal upon posting a supersedeas bond pursuant to NRCP 62(d). Under NRCP 62(e), when a state or local government appeals and the judgment is stayed, no bond is required. Nevertheless, here, the district court denied appellant Clark County Office of the Coroner/Medical Examiner's motion to stay enforcement of the attorney fees and costs judgment awarded to respondent Las Vegas Review-Journal (LVRJ) under NRS 239.011(2) after it prevailed on its public records request to obtain certain autopsy reports. The Coroner's Office then moved this court for a stay. We conclude that, as a local government entity that moved for a stay under these provisions below, the Coroner's Office was entitled to a stay of the money judgment without bond or other security as a matter of right.

DISCUSSION

The Coroner's Office asserts that a stay from the attorney fees and costs award should have been granted as a matter of right under

[1]The Honorable Mark Gibbons, Justice, did not participate in the decision of this matter.

NRCP 62(d), with no bond required per NRCP 62(e).[2] NRCP 62(d) provides as follows:

> When an appeal is taken the appellant by giving a supersedeas bond may obtain a stay subject to the exceptions contained in subdivision (a) of this rule. The bond may be given at or after the time of filing the notice of appeal. The stay is effective when the supersedeas bond is filed.[3]

And NRCP 62(e) reads:

> When an appeal is taken by the State or by any county, city or town within the State, or an officer or agency thereof and the operation or enforcement of the judgment is stayed, no bond, obligation, or other security shall be required from the appellant.[4]

We have addressed these rules in two pertinent cases. In *Public Service Commission v. First Judicial District Court*, we considered whether the appellant, a state entity, was entitled as of right to a stay of a district court order granting a petition for judicial review and directing it to grant the respondent Southwest Gas Corporation's application to impose a surcharge, merely upon filing a notice of appeal and without posting a supersedeas bond. 94 Nev. 42, 574 P.2d 272 (1978), *abrogated in part by Nelson*, 121 Nev. at 834 n.4, 122 P.3d at 1253 n.4. There, the court "interpret[ed] the 'may' in Rule 62(d) to be permissive and not mandatory and construe[d] the conjunctive 'and' contained in Rule 62(e) to require a separate and distinct application for a stay." *Id.* at 46, 574 P.2d at 274. As a result, we determined that a stay did not automatically arise merely because the state entity filed a notice of appeal. *Id.* at 45-46, 574 P.2d at 274.

Several years later, in *Nelson v. Heer*, this court again considered whether NRCP 62(d) entitled the appellant to a stay upon posting

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[2]LVRJ contends that NRCP 62 does not apply here because that rule applies in district court actions and the motion before this court is governed by NRAP 8. In considering the motion for stay, however, this court may review the district court order denying a stay without security below. *See Nelson v. Heer*, 121 Nev. 832, 834, 122 P.3d 1252, 1253 (2005), *as modified* (Jan. 25, 2006).

[3]Subsection (a) excepts injunctions and orders in receivership actions from the automatic stay provisions.

[4]*See also* NRS 20.040 ("In any action or proceeding before any court or other tribunal in this State, wherein the State of Nevada or any county, city or town of this State, or any officer thereof in his or her official capacity, is a party plaintiff or defendant, no bond, undertaking or security shall be required . . . , but on complying with the other provisions of law the State, county, city or town, or officer thereof, acting as aforesaid, shall have the same rights, remedies and benefits as though such bond, undertaking or security were given and approved as required by law.").

a supersedeas bond. 121 Nev. at 834, 122 P.3d at 1253. Recognizing that "[t]his rule is substantially based on its federal counterpart, FRCP 62(d)," and that "[m]ost federal courts interpreting the rule generally recognize that FRCP 62(d) allows an appellant to obtain a stay pending appeal as of right upon the posting of a supersedeas bond for the full judgment amount," this court overruled *Public Service Commission* to the extent that it implied a stay is discretionary in such circumstances. *Id.* at 834 n.4, 122 P.3d at 1253 n.4. In so doing, the court expressly maintained the second holding in *Public Service Commission*: "*PSC*'s requirement that the State or a state agency file a motion for stay pending appeal is not in any way affected by this opinion, however." *Id.*

Notably, *Nelson v. Heer* involved an appeal from a money judgement, to which the automatic stay provisions of NRCP 62 apply, while *Public Service Commission* did not. Thus, neither case directly addresses the question here, whether the Coroner's Office is entitled to a stay from a money judgment for attorney fees and costs without bond under both NRCP 62(d) and NRCP 62(e) together. Most federal courts to have addressed the issue with respect to the analogous Federal Rules of Civil Procedure, however, conclude that the subsections should be read together to provide the government with a stay as of right without posting a bond.

For instance, in *Hoban v. Washington Metropolitan Area Transit Authority*, 841 F.2d 1157, 1159 (D.C. Cir. 1988), the court stated that the rules must be read "in tandem," such that the right to an automatic stay upon posting a bond under subsection (d) and the exception to the bond requirement for the government under subsection (e) meant that the governmental agency "is entitled to a stay as a matter of right without posting a supersedeas bond." *Id.* (citing 7 J. Moore & J. Lucas, *Moore's Federal Practice* ¶ 62.07, at 62–36 (2d ed. 1985) (" 'When an appeal is taken by the United States or an officer or agency thereof or by direction of any department of the Government of the United States' and a stay is authorized under other subdivisions of Rule 62, the United States is entitled to a stay without the necessity of giving bond, obligation or security.")). *See also Lightfoot v. Walker*, 797 F.2d 505, 507 (7th Cir. 1986) ("Judgments against the United States, for example, are paid out of a general appropriation (the 'Judgments Fund,' as it is called) to the Treasury. This makes Rule 62(e), which entitles the federal government (and its departments, agencies, and officers) to a stay of execution pending appeal, without its having to post a bond or other security, appropriate." (citations omitted)); *Rhoads v. F.D.I.C.*, 286 F. Supp. 2d 532, 540 (D. Md. 2003) ("Pursuant to Rules 62(d) and (e) of the Federal Rules of Civil Procedure, the FDIC is entitled to a stay of enforcement of the money judgment, and no bond is required of

the United States when it seeks a stay pending appeal."); *United States v. U.S. Fishing Vessel Maylin*, 130 F.R.D. 684, 686 (S.D. Fla. 1990) ("Stay as a matter of right lies where the judgment involved is monetary, because the bond serves to guarantee the judgment in kind with interest. In addition, when it seeks a stay, the Government need not actually post the bond, as the court can look to the fisc for a guarantee on the judgment."); *In re Rape*, 100 B.R. 288, 288 (W.D.N.C. 1989) ("This Court . . . is of the opinion that the Government is entitled as a matter of right, without the necessity of posting a supersedeas bond, to a stay of the bankruptcy court's order.").

Only a few federal district courts have disagreed. *See, e.g.*, *In re Westwood Plaza Apartments*, 150 B.R. 163, 165-68 (Bankr. E.D. Tex. 1993) (holding that FRCP 62(e) is separate and independent from FRCP 62(d) and, thus, the United States is not entitled to supersedeas as a matter of right); *C.H. Sanders Co. v. BHAP Hous. Dev. Fund Co.*, 750 F. Supp. 67, 72-76 (E.D.N.Y. 1990) (noting that the government was not entitled to supersedeas as a matter of right because the judgment was not stayed under any other subdivisions of FRCP 62, which is required under FRCP 62(e)). *Westwood Plaza Apartments*, however, involved staying a plan of reorganization pending appeal of the order confirming the reorganization plan, 150 B.R. at 164, and in *C.H. Sanders*, the court was addressing whether the government's notice of appeal gave rise to an automatic stay, without the need to separately seek one, 750 F. Supp. at 76. Both courts read the conjunctive "and" in FRCP 62(e) as requiring the government to obtain a stay under a different subsection or authority before the bond requirement is waived. 150 B.R. at 164; 750 F. Supp. at 73, 76.

We disagree with that interpretation. As noted above, we have already explained that the "and" means simply that the government is not entitled to a stay merely upon filing a notice of appeal, but rather must move for a stay in the district court. *Nelson*, 121 Nev. at 834 n.4, 122 P.3d at 1253 n.4; *Pub. Serv. Comm'n*, 94 Nev. at 45-46, 574 P.2d at 274. Upon motion, as a secured party, the state or local government is generally entitled to a stay of a money judgment under NRCP 62(d) without posting a supersedeas bond or other security.

CONCLUSION

We conclude that NRCP 62(d) must be read in conjunction with NRCP 62(e), such that, upon motion, state and local government appellants are generally entitled to a stay of a money judgment pending appeal, without needing to post a supersedeas bond or other security. Further, in this case, LVRJ concedes that no irreparable or serious harm will ensue if the stay is granted. Therefore, the Coroner's Office is entitled to a stay of the attorney fees and costs judg-

ment pending appeal, and the stay motion is granted pending further order of this court.

Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

Cherry, J., concurring in part and dissenting in part:

As the majority points out, NRCP 62(e) precludes requiring a state or local government to post a bond or other security in order to obtain a stay pending appeal. However, nothing in that provision also suggests that a stay must be granted as a matter of right. Indeed, the only right discussed in subsection (e) is the waiver of any bond requirement.

Other courts have also noted that subsection (e) sets forth two requirements that must be met before the bond is waived: (1) the appellant must be the state or local government, and (2) the judgment must be stayed. No provision for a stay is made. In *In re Westwood Plaza Apartments*, the bankruptcy court analyzed the analogous federal rule's plain language, explaining that "[s]ubdivision (e) is complete and not dependent on subdivision (d)," as "[t]he second condition of subdivision (e) is not worded as to provide an appeal as a matter of right as the first sentence of subdivision (d) does," and if read together, that second condition "becomes superfluous." 150 B.R. 163, 166 (Bankr. E.D. Tex. 1993) (holding that the United States was not entitled to supersedeas as a matter of right). And in *C.H. Sanders Co. v. BHAP Housing Development Fund Co.*, the federal district court analyzed "[a] careful reading of the statutes, their historical antecedents and [a] commentator" and concluded that "when the government files a notice of appeal it need not file a bond and that the notice in and of itself, does not operate as a stay." 750 F. Supp. 67, 76 (E.D.N.Y. 1990) (holding that the government was not automatically entitled to supersedeas without bond because the judgment had not been stayed under any other provisions of FRCP 62, as FRCP 62(e) requires).

I read NRCP 62 in the same manner as those courts read the equivalent federal rule. Subsection (d) stays a money judgment when a supersedeas bond is posted as security, and subsection (e) independently waives any bond requirement when a state or local government has obtained a stay, which necessarily must have been obtained under separate authority. *See, e.g.*, NRCP 62(b), (c), (h) (authorizing stays in various situations and granting the court power to condition such stays upon providing appropriate bond or other security); NRAP 8(a)(2)(E) ("The [appellate] court may condition relief on a party's filing a bond or other appropriate security in the district court."). Accordingly, the district court had discretion to deny the stay motion, and the Coroner's Office's motion to this court must be reviewed under the authority now applicable, NRAP 8.

Under NRAP 8(c), this court considers (1) whether the object of the appeal will be defeated in the absence of a stay, (2) whether the appellant will suffer irreparable or substantial harm in the absence of a stay, (3) whether the respondent will suffer irreparable or substantial harm if a stay is granted, and (4) whether the appellant is likely to prevail on the merits of the appeal. With regard to the first factor, the Coroner's Office has not explained how the payment of the attorney fees and costs award will defeat the object of the appeal, which is merely to reverse the award. Further, it does not appear that the Coroner's Office will suffer irreparable or serious harm if it is required to pay the judgment before the appeal is decided, as it merely asserts that it will be put in the position of having to recover the payment from LVRJ if the appeal is successful, a position that does not in and of itself constitute serious harm. And as for the third factor, LVRJ concedes that it will not suffer severe harm if a stay is granted. Thus, of the four NRAP 8(c) factors, the likelihood of success is perhaps the most relevant here. As for that factor, the plain language of NRS 239.011(2) provides that attorney fees and costs are to be awarded to persons who prevail on public record requests, and even given the existence of a divergent ruling in another case below, I do not believe that the Coroner's Office has presented a legal question sufficient, when considered with the other factors, to warrant staying payment of the judgment. As LVRJ points out, the public interest in implementing the purpose behind the Nevada Public Records Act, and the fees and costs provision in particular, which is to encourage transparency within the government, as well as in saving on interest imposed on the fees and costs award, weighs in favor of denying a stay.[1] Accordingly, I would deny the stay.

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[1]NRAP 8 does not preclude this court from considering the public interest when determining whether a stay is warranted. *See* NRAP 8(c) (appellate courts "will generally consider" the listed factors in considering stay motions); *see also Hilton v. Braunskill*, 481 U.S. 770, 776, (1987) (providing that federal district and appellate courts will consider, as one factor, "where the public interest lies" when deciding a stay motion).

U.S. HOME CORPORATION, a Delaware Corporation, Appellant, *v.* THE MICHAEL BALLESTEROS TRUST; RODRIGO ASANION, Individually; FEDERICO AGUAYO, Individually; FELIPE ENRIQUEZ, Individually; JIMMY FOSTER, JR., Individually; THE GARCIA FAMILY TRUST; ARNULFO ORTEGO-GOMEZ, Individually; ELVIRA GOMEZ-ORTEGA, Individually; JOHN J. OLSON, Individually; IRMA A. OLSON, Individually; OMAR PONCE, Individually; BRANDON WEAVER, Individually; JON YATES, Individually; and MINTESNOT WOLDETSADIK, Individually, Respondents.

No. 68810

April 12, 2018 415 P.3d 32

Appeal from a district court order denying a motion to compel arbitration. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Reversed and remanded with instructions.

Payne & Fears LLP and *Gregory H. King, Sarah J. Odia*, and *Chad D. Olsen*, Las Vegas, for Appellant.

Shinnick, Ryan & Ransavage P.C. and *Duane E. Shinnick, Courtney K. Lee, Melissa Orr*, and *Bradley S. Rosenberg*, Las Vegas, for Respondents.

Canepa Riedy Abele and *Scott K. Canepa*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Wood, Smith, Henning & Berman, LLP, and *Janice M. Michaels, T. Blake Gross*, and *Anthony S. Wong*, Las Vegas, for Amicus Curiae Nevada Home Builders Association.

Before the Supreme Court, En Banc.

OPINION

By the Court, Pickering, J.:

This is an appeal from an order denying a motion to compel arbitration in a construction defect action. The Federal Arbitration Act (FAA) declares written arbitration agreements "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract." 9 U.S.C. § 2. In this appeal, we must determine whether the FAA governs the arbitration agreement contained in the common-interest community's Covenants, Conditions, and Restrictions (CC&Rs). Because the underlying transac-

tion involved interstate commerce, we hold that it does and that, to the extent Nevada case law concerning procedural unconscionability singles out and disfavors arbitration of disputes over transactions involving interstate commerce, that case law is preempted by the FAA. We therefore reverse and remand for entry of an order directing the parties to arbitration.

I.

This construction defect action concerns 12 single-family homes located in a southern Nevada common-interest community. Appellant U.S. Home Corporation is the developer. The community is subject to CC&Rs that define U.S. Home as a "declarant." The CC&Rs include a section entitled "Arbitration," which states in relevant part:

> **Arbitration.** Any dispute that may arise between: (a) the . . . Owner of a Unit, and (b) the relevant Declarant, or any person or entity who was involved in the construction of any . . . Unit, shall be resolved by submitting such dispute to arbitration before a mutually acceptable arbitrator who will render a decision binding on the parties which can be entered as a judgment in court pursuant to NRS 38.015, et seq.

Three of the respondents are original purchasers who contracted directly with U.S. Home to build and sell them homes. These respondents each signed a Purchase and Sales Agreement (PSA). The PSAs include an arbitration clause, in addition to that contained in the CC&Rs, in which the parties "specifically agree that this transaction involves interstate commerce and that any dispute . . . shall first be submitted to mediation and, if not settled during mediation, shall thereafter be submitted to binding arbitration as provided by the Federal Arbitration Act (9 U.S.C. §§ 1 *et seq*.) or, if inapplicable, by similar state statute, and not by or in a court of law." The remaining ten respondents are subsequent purchasers who took title subject to the CC&Rs but did not sign a PSA.

Between August 2013 and February 2015, U.S. Home received construction defect pre-litigation notices on behalf of all respondents (the Homeowners). U.S. Home responded with letters demanding arbitration. The Homeowners then filed, in the district court, an NRS Chapter 40 construction defect complaint against U.S. Home seeking damages for breach of contract, breach of implied warranties, and negligence. U.S. Home filed a motion to compel arbitration based on the arbitration clauses in the CC&Rs and PSAs. The district court denied the motion. It held that the underlying transaction did not involve interstate commerce so the FAA did not apply. Applying state law, the district court invalidated the arbitration agreements as unconscionable. This appeal followed.

II.

Before considering whether the FAA controls, there is a threshold question we must resolve: Does the arbitration clause in the CC&Rs bind the Homeowners?[1] The Homeowners maintain that U.S. Home cannot compel arbitration based on the CC&Rs because "CC&Rs are not 'contracts,' but covenants that run with the land." Citing *Pinnacle Museum Tower Association v. Pinnacle Market Development, LLC*, 282 P.3d 1217 (Cal. 2012), where the California Supreme Court held that an arbitration provision contained in recorded CC&Rs was enforceable against a non-signatory homeowners' association, U.S. Home argues that, by purchasing homes in a common-interest community, the Homeowners assented to the obligations the CC&Rs impose, including, in this case, the obligation to arbitrate their construction defect claims. To resolve these issues we must consider the nature and purpose of CC&Rs and whether arbitration agreements can properly be contained in CC&Rs.

NRS 116.2101 permits the creation of a common-interest community "by recording a declaration executed in the same manner as a deed and, in a cooperative, by conveying the real estate subject to that declaration to the association." A declaration must contain a number of required statements, NRS 116.2105(1), and "may contain any other matters the declarant considers appropriate." NRS 116.2105(2). "CC&Rs become a part of the title to [a homeowner's] property." NRS 116.41095(2). By law, a person who buys a home subject to CC&Rs must receive an information statement warning that "[b]y purchasing a property encumbered by CC&Rs, you are agreeing to limitations that could affect your lifestyle and freedom of choice" and that the CC&Rs "bind you and every future owner of the property whether or not you have read them or had them explained to you." *Id.* The statement must further advise the prospective homebuyer that "[t]he law generally provides for a 5-day period in which you have the right to cancel the purchase agreement." NRS 116.41095(1).

The Uniform Arbitration Act of 2000 (UAA), adopted in Nevada as NRS 38.206-.248, does not require any particular formality to create an enforceable arbitration agreement. Rather, it states simply: "An agreement contained in a record to submit to arbitration any

[1]We decline to address U.S. Home's assertion that an arbitrator should determine arbitrability, as it did not raise that issue in district court. *See Rent-A-Center, W., Inc. v. Jackson*, 561 U.S. 63, 75-76 (2010) (refusing to review delegation-clause argument first raised on appeal); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (deeming waived any issue that was not raised before the district court). We also note that the Homeowners do not dispute that, if enforceable, the arbitration clause in the CC&Rs is broadly worded enough to encompass their claims.

existing or subsequent controversy arising between the parties to the agreement is valid, enforceable and irrevocable except upon a ground that exists at law or in equity for the revocation of a contract." UAA § 6(a), 7 U.L.A. 25 (part 1A) (West 2009), *codified in substantially similar form at* NRS 38.219(1). Though arbitration agreements often appear in conventional two-party contracts, they can also arise from other written records where signatures are not required. *See Tallman v. Eighth Judicial Dist. Court*, 131 Nev. 713, 720, 359 P.3d 113, 119 (2015) ("While NRS 38.219(1) requires that the arbitration agreement be 'contained in a record,' it does not require that the written record of the agreement to arbitrate be signed."). Indeed, the UAA provides an example of a valid unsigned arbitration agreement—"arbitration provisions contained in the bylaws of corporate or other associations"—and notes that "[c]ourts that have addressed whether arbitration provisions contained in [an organization's] bylaws . . . are enforceable under the UAA have unanimously held that they are." UAA § 6(a), 7 U.L.A. 25 part 1A & cmts.

The same principle—that arbitration agreements can exist in a document not labeled "contract"—has been applied to arbitration clauses in CC&Rs. Thus, in *Pinnacle*, the California Supreme Court compelled arbitration of a dispute between a developer and a homeowners' association based on an arbitration clause in the CC&Rs. 282 P.3d at 1221. In doing so, the court emphasized the contractual nature of terms contained in a recorded declaration of CC&Rs. *Id.* at 1225-26. By purchasing a unit within the common-interest community, the homebuyer manifests acceptance of the CC&Rs. *Id.* "Having a single set of recorded covenants and restrictions that applies to an entire common interest development protects the intent, expectations, and wishes of those buying into the development and the community as a whole by ensuring that promises concerning the character and operation of the development are kept." *Id.* at 1225. It thus comes as "no surprise that courts have described recorded declarations as contracts" and enforced them as such, as between developer/declarants and homeowners. *Id.* at 1227 (collecting cases).

The proposition that CC&Rs create contractual obligations, in addition to imposing equitable servitudes, is widely accepted. *See* Restatement (Third) of the Law of Prop.: Servitudes, ch. 4 intro. note (Am. Law Inst. 2000) ("One of the basic principles underlying the Restatement is that the function of the law is to ascertain and give effect to the likely intentions and legitimate expectations of the parties who create servitudes, *as it does with respect to other contractual arrangements*.") (emphasis added). By accepting the deed or other possessory interest in a unit, the homeowner manifests

his or her assent to the CC&Rs.[2] Thus, even apart from the arbitration setting, numerous cases, including at least one from Nevada, recognize the contractual nature of the obligations imposed by a common-interest community's CC&Rs, which cover such diverse subjects as indemnification, restrictions on resale or use, and dispute resolution. *See Sandy Valley Assocs. v. Sky Ranch Estate Owners Ass'n*, 117 Nev. 948, 954, 35 P.3d 964, 968 (2001), *receded from on other grounds by Horgan v. Felton*, 123 Nev. 577, 170 P.3d 982 (2007) ("the CC&Rs constituted a written contract to convey land"); *see also Ahwatukee Custom Estates Mgmt. Ass'n v. Turner*, 2 P.3d 1276, 1279 (Ariz. Ct. App. 2000) (recognizing that CC&Rs impose contractual obligations); *Harbour Pointe, LLC v. Harbour Landing Condo. Ass'n*, 14 A.3d 284, 288 (Conn. 2011) (same); *Marino v. Clary Lakes Homeowners Ass'n*, 770 S.E.2d 289, 293 (Ga. Ct. App. 2015) (construing a homeowners' association declaration as a contract); *Chase v. Bearpaw Ranch Ass'n*, 133 P.3d 190, 197 (Mont. 2006) (analyzing a provision for attorney fees included in CC&Rs under principles of contract law); *Diaz v. Ferne*, 120 Nev. 70, 73, 84 P.3d 664, 665-66 (2004) (using contract interpretation rules to interpret CC&Rs).

As *Pinnacle* recognizes, accepting the premise that CC&Rs can impose contractual obligations to which a homeowner assents by purchasing a unit leads to the conclusion that CC&Rs can state agreements to arbitrate, enforceable under the UAA or the FAA. *See* 282 P.3d at 1231 (since "the FAA precludes judicial invalidation of an arbitration clause based on state law requirements that are not generally applicable to other contractual clauses . . . . [i]t stands to reason that the FAA would preempt state decisional law singling out an arbitration clause as the only term in a recorded declaration [of CC&Rs] that may not be regarded as contractual in nature"). There may be defenses to the arbitration agreement—including unconscionability if such can be shown—but the agreement itself exists. Consistent with this general law, both treatises and case law alike have deemed CC&Rs an appropriate repository of an agreement to arbitrate. Thomas H. Oehmke & Joan M. Brovins, 1 *Commercial Arbitration* § 17:10 (3d ed. 2015) (recognizing that "master deed[s]," or declarations, are "good instruments within which to place an arbitration clause" because they are "recorded" and "widely available"); *Graziano v. Stock Farm Homeowners Ass'n*, 258 P.3d 999, 1006-07

[2]Section 17.8 of the CC&Rs at issue in this case provides:

> Every Person who owns, occupies or acquires any right, title, estate or interest in or to any Unit or other portion of the Property does hereby consent and agree, and shall be conclusively deemed to have consented and agreed, to every limitation, restriction, easement, reservation, condition and covenant contained herein . . . .

(Mont. 2011) (enforcing an arbitration clause in CC&Rs under a contract analysis).

The Homeowners distinguish and would have us reject *Pinnacle* as dependent on California's unique statutory scheme. We disagree, for two reasons. First, close comparison of California's and Nevada's statutory schemes shows them to be far more alike than unalike. The most salient difference appears to be that California has an administrative regulation authorizing CC&Rs to include alternative dispute resolution provisions, *see* Cal. Code Regs., tit. 10, § 2791.8, while Nevada does not. But Nevada statutorily requires mediation of disputes arising under CC&Rs, *see* NRS 38.300-.360, suggesting Nevada's legislative endorsement of alternative dispute resolutions in this setting. Further, NRS 116.2105(2) states, without limitation, "[t]he declaration [of CC&Rs] may contain any other matters the declarant considers appropriate." California had the same provision, Cal. Civ. Code § 1353(b) (West 2007) (repealed 2014), which *Pinnacle* construed as permitting the inclusion of an arbitration clause in CC&Rs. 282 P.3d at 1228-29. Second, if *Pinnacle* were analytically an outlier, there would be other cases holding that arbitration clauses in CC&Rs do not qualify as agreements under the UAA or FAA, but no such authority has been cited or found. We recognize that *Pinnacle* addressed whether a homeowners' association, rather than a homeowner, was bound by the arbitration agreement contained in the CC&Rs. But this is a distinction without a difference because, as the *Pinnacle* court emphasized, the CC&Rs bind the homeowner equally with the homeowners' association. *See id.* at 1226-27; *cf.* NRS 116.41095(2) (providing that, by purchasing property within a common-interest community, a purchaser agrees to be bound by the declaration of CC&Rs).

We are not persuaded that adopting *Pinnacle* will result in parties unwittingly entering into arbitration agreements. Whether to purchase property in a common-interest community is a choice that requires consideration of the CC&Rs, which are binding on the developer, association, and individual owners and reflect the expectations of those buying into the community. Nevada law includes strict notice provisions respecting CC&Rs. *See* NRS 116.4101-.4109. The Homeowners do not dispute that they received the CC&Rs when they purchased their homes, along with the information statements required by NRS 116.41095. By law, the information statements advised the Homeowners that the "CC&Rs become a part of the title of your property," that the CC&Rs "bind you and every future owner of the property, whether or not you have read them or had them explained to you," and, perhaps most importantly, that the Homeowners had 5 days to cancel the purchase. *See also* NRS 116.4103(1)(l); NRS 116.4108; NRS 116.4109(1)(a); NRS 116.41095. These safe-

guards ensure that a person who buys a home in a common-interest community will abide by the CC&Rs and can fairly expect that others in the community will do so too.

III.

Having concluded that the CC&Rs properly included an arbitration agreement, we next consider whether the FAA applies to that agreement. U.S. Home argues that the underlying transactions affect interstate commerce, so the FAA controls. The Homeowners disagree. In their view, the FAA does not apply because the underlying transaction concerns the purchase and sale of individual homes, a local issue that does not affect or involve interstate commerce.

A.

By its terms, the FAA applies to contracts "evidencing a transaction involving [interstate] commerce." 9 U.S.C. § 2 (2012). The word "involving" in the FAA is broad and functionally equivalent to the word "affecting" for purposes of determining the FAA's reach. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 274-75 (1995). A transaction affects or involves interstate commerce if Congress could regulate the transaction through the Commerce Clause. *See id.* at 273-75, 282. Thus, in *Allied-Bruce Terminix*, the Supreme Court applied the FAA to a dispute between a pest-control company and a homeowner over substandard termite-control services, citing the company's multistate presence and the fact that termite-eradication supplies traveled across state lines. *Id.* at 268, 282. Even contracts evidencing intrastate economic activities are governed by the FAA if the activities, when viewed in the aggregate, "substantially affect interstate commerce." *United States v. Lopez*, 514 U.S. 549, 556 (1995); *see Citizens Bank v. Alafabco, Inc.*, 539 U.S. 52, 56-57 (2003) ("Congress' Commerce Clause power 'may be exercised in individual cases without showing any specific effect upon interstate commerce' if in the aggregate the economic activity in question would represent 'a general practice . . . subject to federal control.'") (quoting *Mandeville Island Farms, Inc. v. Am. Crystal Sugar Co.*, 334 U.S. 219 (1948)). So it was that, in *Katzenbach v. McClung*, 379 U.S. 294 (1964), the Supreme Court declared that whether a person could sit at a local lunch counter so substantially affected interstate commerce that Congress could regulate the matter under its Commerce Clause power. *See id.* at 302-05 (upholding as a proper exercise of Commerce Clause powers a statute prohibiting racial discrimination in restaurants, including family-owned Ollie's Barbeque, which did business in one location in Birmingham, observing that local restaurants serve interstate travelers and food that moves through interstate commerce). What this means in the

context of arbitration is that "[s]o long as 'commerce' is involved, the FAA applies." *Tallman*, 131 Nev. at 724, 359 P.3d at 121. There must be evidence, however, that interstate commerce was actually involved. *See Allied-Bruce Terminix*, 513 U.S. at 281 (adopting the commerce-in-fact test to determine whether a transaction subject to an arbitration agreement is governed by the FAA).

In applying the commerce-in-fact test, the Supreme Court has interpreted "involving commerce" in 9 U.S.C. § 2 as "the functional equivalent of the more familiar term 'affecting commerce'—words of art that ordinarily signal the broadest permissible exercise of Congress' Commerce Clause power." *Alafabco*, 539 U.S. at 56. And, "[b]ecause the statute provides for the enforcement of arbitration agreements within the full reach of the Commerce Clause, it is perfectly clear that the FAA encompasses a wider range of transactions than those actually 'in commerce'—that is, within the flow of interstate commerce." *Id.* (internal quotation marks and citations omitted).

B.

In support of their argument that the underlying transaction involves purely intrastate—rather than interstate—commerce, the Homeowners stress that the CC&Rs address residential real estate and that land, unlike money or goods, is traditionally a local concern. But this observation fails to take into account that the CC&Rs were recorded to allow the declarant "to subdivide, develop, construct, market and sell a single family detached residential neighborhood in a common-interest planned community." It also does not account for the CC&Rs' larger purpose: to facilitate the creation and governance of a common-interest community consisting of common areas and multiple homes with stable uses and amenities that protect the purchasers' investments and expectations. The underlying complaint is for construction defects, and the arbitration agreement specifically provides that it governs any dispute between any entity or person "involved in the construction of any [home]." According to the affidavits U.S. Home submitted in district court, multiple out-of-state businesses provided supplies and services in constructing the homes.

These facts demonstrate that the transactions underlying the CC&Rs' arbitration agreement—the construction and sale of multiple homes by out-of-state contractors using out-of-state supplies and suppliers—affect interstate commerce, meaning the FAA controls. *See Greystone Nev., LLC v. Anthem Highlands Cmty. Ass'n*, 549 Fed. App'x 621 (9th Cir. 2013) (applying the FAA to arbitration agreements contained in PSAs in construction defect litigation arising out of the "development by an out-of-state-developer, construc-

tion by an out-of-state contractor, and the sale of homes assembled with out-of-state materials"); *Elizabeth Homes, LLC v. Cato*, 968 So. 2d 1, 4 n.1 (Ala. 2007) ("Evidence that a builder obtained materials and components for a house from out-of-state suppliers is sufficient to establish that a transaction for the construction and sale of a house sufficiently involved interstate commerce for purposes of the FAA."); *Anderson v. Maronda Homes, Inc.*, 98 So. 3d 127, 129-30 (Fla. Dist. Ct. App. 2012) (per curiam) (LaRose, J., specially concurring) (emphasizing that the FAA applies "to contracts for the construction, financing, and sale of homes" when interstate commerce is involved in those transactions) (citing cases); *R.A. Bright Constr., Inc. v. Weis Builders, Inc.*, 930 N.E.2d 565, 569 (Ill. App. Ct. 2010) (holding that evidence demonstrating that an out-of-state supplier provided materials for a building proved the requisite interstate commerce for the arbitration provision to be governed by the FAA); *Zabinski v. Bright Acres Assocs.*, 553 S.E.2d 110, 117-18 (S.C. 2001) (applying the FAA to a land development partnership dispute because, while "the development of land within South Carolina's borders is the quintessential example of a purely intrastate activity . . . the transaction involved interstate commerce as contemplated by the FAA because the partnership utilized out-of-state materials, contractors, and investors"); *Satomi Owners Ass'n v. Satomi, LLC*, 225 P.3d 213, 226 (Wash. 2009) ("[T]he substantial use of out-of-state materials places the transactions [of purchasing the homes at issue] within the reach of the FAA.").

The cases relied on by the Homeowners and the district court are not to the contrary. They involved the purchase and sale of unimproved land, *see SI V, LLC v. FMC Corp.*, 223 F. Supp. 2d 1059, 1062 (N.D. Cal. 2002), or of a single residence, *see Cecala v. Moore*, 982 F. Supp. 609, 611-12 (N.D. Ill. 1997); *Saneii v. Robards*, 289 F. Supp. 2d 855, 858-59 (W.D. Ky. 2003); *Bradley v. Brentwood Homes, Inc.*, 730 S.E.2d 312, 318 (S.C. 2012), not the construction, development, and governance of a multi-unit residential community.

IV.

Because it has been established that the CC&Rs evidenced transactions involving interstate commerce, the FAA applies. The Supreme Court has made unmistakably clear that, when the FAA applies, it preempts state laws that single out and disfavor arbitration. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011). Applying state law, the district court invalidated the CC&Rs' arbitration agreement as procedurally and substantively unconscionable. The district court did not consider whether the FAA preempted its unconscionability determination, because it erroneously determined that the underlying transactions only involved intrastate commerce, such that the FAA did not apply. The final question we

must consider, then, is whether the FAA preempts the bases for the district court's decision to invalidate the arbitration agreement in the CC&Rs as unconscionable.

A.

Our analysis begins with the FAA. It provides that an arbitration agreement is "valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Under the FAA, "[s]tates may regulate contracts, including arbitration clauses, under general contract law principles," which include fraud, duress, and unconscionability. *Allied-Bruce*, 513 U.S. at 281; *see also Doctor's Assocs. v. Casarotto*, 517 U.S. 681, 687 (1996). What a state may not do is "decide that a contract is fair enough to enforce all of its basic terms (price, service, credit), but not fair enough to enforce its arbitration clause." *Allied-Bruce*, 513 U.S. at 281. This is true whether the state law is of judicial or legislative origin. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987); *Doctor's Assocs.*, 517 U.S. at 685 (reaffirming the *Perry* holding). Under the FAA, a state must place arbitration provisions on the same footing as other contractual provisions rather than "singling out arbitration provisions for suspect status." *Doctor's Assocs.*, 517 U.S. at 687.

FAA-preempted state laws generally fall into two categories. First, the FAA preempts state laws that outright prohibit arbitration of a specific claim. *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 341 (2011); *see Doctor's Assocs.*, 517 U.S. at 687 ("Courts may not . . . invalidate arbitration agreements under state laws applicable *only* to arbitration provisions."). Second, FAA preemption arises when a "doctrine normally thought to be generally applicable, such as duress or, as relevant here, unconscionability, is alleged to have been applied in a fashion that disfavors arbitration." *Concepcion*, 563 U.S. at 341. In assessing this second type of law, "a court may not 'rely on the uniqueness of an agreement to arbitrate as a basis for a state-law holding that enforcement would be unconscionable, for this would enable the court to effect what . . . the state legislature cannot.'" *Id.* (alteration in original) (quoting *Perry*, 482 U.S. at 492 n.9). Such laws may be preempted by the FAA even though they do not mention arbitration, if they rely on the defining features of an arbitration as the basis for invalidating the agreement. *Kindred Nursing Ctrs. Ltd. P'ship v. Clark*, 137 S. Ct. 1421, 1426 (2017) ("The Act also displaces any rule that covertly accomplishes the same objective [of discriminating against arbitration] by disfavoring contracts that (oh so coincidentally) have the defining features of arbitration agreements."). For example, the FAA preempts laws that invalidate an arbitration agreement as unconscionable for failing to provide for judicially monitored discovery, not heeding the Federal

Rules of Evidence, or not affording a right to jury trial. *Concepcion*, 563 U.S. at 341-42.

B.

Nevada law requires both procedural and substantive unconscionability to invalidate a contract as unconscionable. *See Burch v. Second Judicial Dist. Court*, 118 Nev. 438, 443, 49 P.3d 647, 650 (2002) ("Generally, both procedural and substantive unconscionability must be present in order for a court to exercise its discretion to refuse to enforce a contract or clause as unconscionable."). Here, the district court deemed the CC&Rs' arbitration agreement procedurally unconscionable, first, because it was inconspicuous and, second, because it abrogated procedural rights provided under NRS Chapter 40. *See D.R. Horton, Inc. v. Green*, 120 Nev. 549, 553, 96 P.3d 1159, 1162 (2004) (discussing procedural unconscionability and providing that it generally involves the failure to reasonably inform a person of a contract's consequences). U.S. Home asserts that the rules relied on by the district court and the Homeowners are preempted by the FAA. We agree.

The district court deemed the CC&Rs' arbitration agreement fatally inconspicuous because it was written using the same size type as the rest of the CC&Rs, not bolded or capitalized, and it did not "draw an average homebuyer's attention to the waiver of important legal rights." *See id.* at 556, 96 P.3d at 1164 (invalidating an arbitration clause for procedural unconscionability in part because "nothing drew attention to the arbitration provision"). If the arbitration clause were actually inconspicuous—that is to say, in smaller print than the rest of the CC&Rs or buried in an endnote or exhibit—this argument might have merit. *See Tandy Computer Leasing v. Terina's Pizza, Inc.*, 105 Nev. 841, 844, 784 P.2d 7, 8 (1989) (invalidating a forum selection clause because it was in very fine print, was on the back of the agreement while the signature lines were on the front of the agreement, and was buried in a paragraph labeled "miscellaneous"). But here no such infirmity appears. The arbitration provision is in the same size font as the other provisions in the CC&Rs. Requiring an arbitration clause to be more conspicuous than other contract provisions, *D.R. Horton*, 120 Nev. at 557, 96 P.3d at 1164 ("to be enforceable, an arbitration clause must at least be conspicuous"); *see also Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 559, 245 P.3d 1164, 1170 (2010) (same), is exactly the type of law the Supreme Court has held the FAA preempts because it imposes stricter requirements on arbitration agreements than other contracts generally. In *Doctor's Associates v. Casarotto*, the Court invalidated a Montana statute declaring an arbitration clause unenforceable

unless the first page of the contract stated in typed and underlined capital letters that the contract was subject to arbitration, because it governed "not 'any contract' but specifically and solely contracts 'subject to arbitration' [and thus] conflicts with" and is preempted by the FAA. 517 U.S. at 683, 687 (citing 9 U.S.C. § 2). Similar to the first-page, all-capital-letter, underlined notice-of-arbitration statute struck down in *Doctor's Associates*, the "conspicuousness" requirement applied by the district court to invalidate the arbitration clause in the CC&Rs singles out and disfavors arbitration and thus is preempted by the FAA.

The Homeowners next assert—and the district court found—that the CC&Rs' arbitration agreement is unconscionable because it abrogates procedural rights provided by NRS Chapter 40 by "requiring different timelines and/or additional procedures to bring construction defect claims." *See Gonski*, 126 Nev. at 560, 245 P.3d at 1170 (invalidating an arbitration agreement in part because it failed to notify the parties "that they were agreeing to forego important rights under Nevada law"). Specifically, the district court faulted the CC&Rs' arbitration agreement for requiring that "the arbitration hearing is to be convened no later than one hundred eighty (180) days from the date the arbitrator is appointed," an expedited "timeline and procedure . . . not mandated under NRS Chapter 40." But giving up procedural rights provided by other laws is a "defining feature[ ]" and a "primary characteristic" of arbitration. *Kindred*, 137 S. Ct. at 1426-27. The FAA protects arbitration agreements from invalidation on the grounds that they trade the procedural protections litigation affords for the more streamlined process arbitration provides. So it was that, in *Concepcion*, the Supreme Court reversed a state court decision invalidating as unconscionable an arbitration agreement that prohibited class arbitration. 563 U.S. at 338. It held that the FAA preempted the state's unconscionability determination because requiring class arbitration was inconsistent with the FAA's object of "ensur[ing] the enforcement of arbitration agreements according to their terms so as to facilitate streamlined proceedings." *Id.* at 344.

Nearly all arbitration agreements forgo some procedural protections, such as the right to a trial by jury or court-monitored discovery. *See id.* at 341-42 (noting that the FAA would preempt a state law invalidating as procedurally unconscionable an arbitration agreement requiring waiver of the rights to judicially monitored discovery or a jury trial). The FAA and UAA suggest that public policy favors such waivers in the arbitration setting because arbitration provides a quicker and less costly means for settling disputes. Thus, although the rule that an abrogation of other legal rights makes a

clause procedurally unconscionable arguably applies to any contractual clause, "[i]n practice, of course, the rule would have a disproportionate impact on arbitration agreements." *Id.* at 342.

The FAA preempts the only bases on which the district court and the Homeowners relied to establish procedural unconscionability. We do not address substantive unconscionability, since both must exist to invalidate a contract as unconscionable. *See Burch*, 118 Nev. at 443, 49 P.3d at 650.

V.

Although CC&Rs are not conventional two-party contracts, they create contractual obligations that bind the parties subject to them. In this case, the CC&Rs bound the Homeowners to arbitrate their construction defect claims against the developer. And, because the CC&Rs in this case evidence "transaction[s] involving commerce," 9 U.S.C. § 2, the FAA controls. To the extent our holdings in *D.R. Horton* and *Gonski* regarding the unconscionability of arbitration agreements disfavor arbitration in cases controlled by the FAA, they are overruled because they do not establish rules that "exist at law or in equity for the revocation of *any* contract." 9 U.S.C. § 2 (emphasis added). Rather, the procedural unconscionability rules established in those cases either apply only to arbitration agreements or, in practice, have a disproportionate effect on arbitration agreements. Because the district court relied on these preempted rules to find that the CC&Rs' arbitration agreement was unconscionable, we reverse and remand for entry of an order directing the parties to arbitration in accordance with the CC&Rs.

Douglas, C.J., and Cherry, Gibbons, Hardesty, Parraguirre, and Stiglich, JJ., concur.