

B.S., PETITIONER, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DAWN THRONE, DISTRICT JUDGE, RESPONDENTS, AND JEFFREY S.; NANCY S.; JENNIFER S.; AND MICHAEL KLIMT, REAL PARTIES IN INTEREST.

No. 88453

June 27, 2024

550 P.3d 835

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

Petition granted.

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

Escobar & Associates Law Firm, Ltd., and Christy Brad Escobar, Las Vegas, for Real Parties in Interest Jeffrey S. and Nancy S.

Jennifer S., Pro Se.

Michael Klimt, Pro Se.

Before the Supreme Court, STIGLICH, PICKERING, and PARRA-GUIRRE, JJ.

OPINION¹

PER CURIAM:

Temporary court-ordered guardianships allow minors to obtain emergency care or protection pending a formal decision on a petition for general guardianship. In Nevada, such temporary guardianships may take either of two forms. NRS 159A.052 provides for temporary guardianships of minors who need immediate medical attention, while NRS 159A.053 provides for temporary guardianships of minors for other good cause. Although the district court here concluded that temporary guardianship over petitioner was not warranted under NRS 159A.052 because no medical emergency existed, the court failed to consider whether temporary guardianship

¹This matter was resolved on April 19, 2024, by an unpublished Order Granting Petition for Writ of Mandamus. On April 30, petitioner filed a motion to reissue the order as an opinion. We grant the motion and enter this opinion in place of our prior order. NRAP 36(f). As the writ of mandamus issued on April 19 in accordance with the prior order and was returned by the district court on May 1, no new writ need issue with the filing of this opinion.

was warranted under NRS 159A.053. In failing to consider an NRS 159A.053 temporary guardianship despite the proposed guardians' showing of good cause, the court manifestly abused its discretion, warranting our extraordinary intervention.

FACTS AND PROCEDURAL HISTORY

On March 8, 2024, real parties in interest Jeffrey and Nancy S. filed a petition in the district court seeking to be appointed guardians of B.S., their grandson; the petition included a request for temporary guardianship. In the guardianship petition, Jeffrey and Nancy asserted that B.S. had lived with them his entire life. His mother, real party in interest Jennifer S., who has a history of drug abuse and mental health issues, also lived with them on and off during that time. In February 2024, they alleged, Jennifer took B.S. to Missouri, where she had a psychotic or drug-induced episode and was hospitalized for a period of time. The child protective services agencies of Missouri and Nevada arranged for B.S. to stay with Jeffrey and Nancy under a Present Danger Plan, to which Jennifer apparently orally agreed and which prevented Jennifer from having unsupervised contact with B.S. The Present Danger Plan, Jeffrey and Nancy claimed, expired on March 10, and the Nevada child protective services agency had not been further involved, apparently relying on the court to conduct guardianship proceedings. Jeffrey and Nancy asserted that before the Plan expired, Jennifer contacted them to let them know that she would remove B.S. from their home, although she had not yet done so, and they claimed that a temporary guardianship was needed both to protect B.S. from risk associated with being in his mother's care and to enroll B.S. in school and obtain special services for his autism. With the petition, Jeffrey and Nancy provided affidavits from the persons with whom Jennifer and B.S. had stayed while in Missouri detailing Jennifer's behavior while with them and the circumstances of her episode, their own declaration detailing the facts leading up to the filing of the guardianship petition, a copy of the Present Danger Plan, and video clips for the district court's in camera review (which have not been provided to this court).

The district court immediately issued a citation to appear and show cause, scheduling the hearing for May 28, 2024. Four days later, on March 12, without holding a hearing, the district court entered minutes denying the request for temporary guardianship, concluding simply that Jeffrey and Nancy had failed to show that a medical emergency existed under NRS 159A.052.²

B.S. subsequently filed this emergency petition for a writ of mandamus seeking to compel the district court to grant Jeffrey

²To date, this court has not been provided with any written order denying the request for a temporary guardianship.

and Nancy temporary guardianship. In it, he asserts that the district court manifestly abused its discretion and acted arbitrarily and capriciously when it failed to even consider granting a temporary guardianship for good cause under NRS 159A.053, the general temporary guardianship statute, when Jennifer is presumptively unsuitable under NRS 159A.061(4)(a) and (b) and nonmedical emergency circumstances exist. Jeffrey and Nancy have filed a joinder to the petition. As Jeffrey and Nancy asserted below that they do not have any contact information for Jennifer or B.S.'s father, real party in interest Michael Klimt, who has not previously been involved with B.S., those parties were not served below or with the writ petition currently before us. Because no adequate legal remedy exists to challenge the denial of temporary guardianship, we consider the petition. NRS 34.170.

DISCUSSION

NRS 159A.052 and NRS 159A.053 provide for temporary guardianships over minors, which may issue when needed before the petition for general guardianship is decided. NRS 159A.052 governs temporary guardianships of minors who need immediate medical attention, while NRS 159A.053 governs temporary guardianships for other reasons. Although the district court here concluded that temporary guardianship was not warranted under NRS 159A.052, the court failed to consider whether temporary guardianship was warranted under NRS 159A.053. In failing to do so, the court manifestly abused its discretion.

General, nonmedical temporary guardianships may issue upon a finding of good cause, so long as the petitioner attempted to provide prefiling notice or was excused from so doing. NRS 159A.053(2). Here, Jeffrey and Nancy alleged that providing prefiling notice was not feasible under the circumstances, in accordance with subsection (2)(c), and thus that they were excused from providing notice at this stage in the proceedings. While the statute does not define good cause, NRS 159A.061(4)(a) and (b) presume a parent is unsuitable to care for their child if the parent is unable to provide for the child's basic needs or poses a significant risk to the child's physical or emotional safety, respectively. Jeffrey and Nancy's petition and supporting documentation demonstrated that both presumptions likely apply. Thus, Jeffrey and Nancy demonstrated, at least preliminarily, that Jennifer, B.S.'s custodial parent, is presumed unsuitable and is currently unlocatable; B.S. has schooling and other special needs that cannot be met absent a guardianship; and they have been entrusted with much of his care since birth, including most recently by both Jennifer and child protective services agencies. These circumstances constitute good cause for temporary guardianship under NRS 159A.053, and the district court thus was required to issue the

requested relief. Consequently, we conclude that mandamus relief is warranted to compel the district court to issue temporary guardianship of B.S. to Jeffrey and Nancy. *See* NRS 34.160; *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 637 P.2d 534 (1981).

We note that, when a temporary guardianship is issued ex parte, the district court must hold a hearing within 10 days to determine whether to extend the guardianship, and any extension is conditioned on proof, by clear and convincing evidence, of the child's continued need for temporary guardianship. NRS 159A.053(8). Further, additional prehearing notice requirements are imposed. *See* NRS 159A.053(6), (7), (9). These provisions will be triggered upon issuance of the temporary guardianship in this case.

CONCLUSION

For the reasons set forth above, we grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to grant Jeffrey and Nancy's request for temporary guardianship over B.S. and to comply with the hearing requirements imposed by NRS 159A.053.

ISAAC ANTONIO RODRIGUEZ, APPELLANT, v. THE STATE
OF NEVADA, RESPONDENT.

No. 86524

July 3, 2024

551 P.3d 311

Appeal from a judgment of conviction, pursuant to a jury verdict, of five counts of sexual assault of a child under the age of 14, lewdness with a child under the age of 14, and possession of visual presentation depicting sexual conduct of a person under 16 years of age. Second Judicial District Court, Washoe County; David A. Hardy, Judge.

Affirmed.

Evelyn A. Grosenick, Public Defender, and *Erica P. Roth*, Appellate Deputy Public Defender, Washoe County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Christopher J. Hicks*, District Attorney, and *Marilee Cate*, Appellate Deputy District Attorney, Washoe County, for Respondent.

Before the Supreme Court, HERNDON, LEE, and BELL, JJ.

OPINION

By the Court, HERNDON, J.:

Isaac Antonio Rodriguez appeals a judgment of conviction for five counts of sexual assault of a child under the age of 14, lewdness with a child under the age of 14, and possession of visual presentation depicting sexual conduct with a child under the age of 16. His conviction stems from his sexual relationship with a minor, A.F., from 2017 to 2019. Rodriguez now appeals on three grounds. First, Rodriguez argues that the district court erred in admitting text messages (the State's exhibits 9 and 16) over his objection. Next, he argues that the State committed prosecutorial misconduct in its closing argument when it argued that the jury could draw inferences from the time gaps between text messages. Finally, Rodriguez argues the district court erred in denying his request for a jury instruction regarding the edited nature of the admitted text messages.

We conclude that the district court properly admitted the State's exhibits 9 and 16, and we clarify that the rule of completeness is a rule of admission, not of exclusion. Additionally, the prosecution did not commit misconduct in its closing argument. Finally, the district court did not err in failing to instruct the jury regarding the edited nature of the State's exhibits 9 and 16. Accordingly, we affirm.

FACTS AND PROCEDURAL HISTORY

Rodriguez briefly lived with A.F. and her family before his relationship with A.F. began. In November 2017, Rodriguez moved out of A.F.'s home and began communicating regularly with A.F. via social media and text messages. When they first began messaging, A.F. was 11 years old and Rodriguez was an adult. Over time, the relationship became romantic and sexual in nature. A.F. began sending nude photographs of her chest and buttocks to Rodriguez. The two also began sexting and role-playing fantasy sexual scenarios. About eight months into the relationship, Rodriguez and A.F. started to meet in person. On December 31, 2018, the evening before A.F.'s thirteenth birthday, Rodriguez and A.F. engaged in sexual intercourse for the first time. Over the next five months, Rodriguez and A.F. met regularly to engage in sexual intercourse. The two met three or four times per week and engaged in sexual intercourse, according to A.F., "most of the time" they met. On at least one occasion, Rodriguez and A.F. met and did not engage in intercourse but still had sexual contact.

In April 2019, A.F.'s parents discovered the relationship and contacted the police. A.F. was interviewed by a child advocacy center, and law enforcement confiscated A.F.'s cell phone for the investigation. Later, the police brought Rodriguez in for a voluntary interview and advised him of his rights. During the interview, Rodriguez admitted to having sexual intercourse with A.F. approximately 17 times. Rodriguez also consented to a search of his cell phone and iPad. The police forensically examined A.F.'s cell phone and Rodriguez's cell phone and iPad. The forensic examination yielded thousands of text messages, some sexually explicit, as well as nude photographs of A.F. on one of Rodriguez's devices. The admitted evidence of the text conversations also indicated that there were time gaps between messages after the two discussed meeting in person.

The State charged Rodriguez with five counts of sexual assault against a child under the age of 14. It brought one count for each month that Rodriguez engaged in the sexual relationship with A.F. The State also charged Rodriguez with lewdness with a child under the age of 14 and possession of visual presentation depicting sexual conduct of a child. Rodriguez pleaded not guilty and proceeded to trial.

On the first day of trial, the district court identified concerns regarding the rule of completeness because only portions of the voluminous number of text messages between A.F. and Rodriguez were submitted as evidence by the State. Prior to the State's case-in-chief, Rodriguez expressed to the court that while he had originally intended to seek introduction of some additional text messages through proposed defense exhibits 78 and 79 to complete the

State's proposed exhibits 9 and 16, he had since decided that he would not seek to admit those additional messages. At the same time, Rodriguez objected to the State's possible introduction of its proposed exhibits 9 and 16 on the basis that they were "redacted to such an extent that they mischaracterize[d] evidence." The district court overruled the objection. During the State's case-in-chief, the State moved to admit exhibit 9, and Rodriguez objected again on the bases of authentication and "mischaracterization." Outside of the presence of the jury, the court held a hearing on the matter and overruled Rodriguez's objection. The district court admitted the State's exhibits 9 and 16. Rodriguez never moved to admit proposed defense exhibits 78 and 79 for any purpose.

During the State's closing argument, the State noted that in A.F. and Rodriguez's text conversations, they often texted back and forth about meeting in person, and there would then be gaps of time with no text messages. The State argued that these gaps in time with no text messages supported the inference that they had indeed met in person. Rodriguez objected to the argument; the district court overruled the objection. Rodriguez also sought a jury instruction explaining that the text messages in the State's exhibits 9 and 16 were only a sampling of the full conversations between A.F. and him, but the district court declined to instruct the jury on the matter.

At the close of trial, the jury returned a verdict of guilty on all counts. On counts 1-5, the five sexual assault charges, Rodriguez was sentenced to concurrent sentences of life in prison with the possibility of parole after 35 years. For count 6, the lewdness charge, Rodriguez was sentenced to a concurrent term of life in prison with the possibility of parole after 10 years. For count 7, the possession charge, Rodriguez received a consecutive sentence of 30 months in prison with the possibility of parole after 12 months.

DISCUSSION

The district court did not err in admitting the State's exhibits 9 and 16, which contain text messages between Rodriguez and A.F.

Rodriguez argues that the district court erred in admitting the State's exhibits 9 and 16 over his objection, asserting that the rule of completeness bars their admission. The State contends that Rodriguez failed to preserve this error because his objection was based on authentication and mischaracterization. We agree with the State, as Rodriguez did not frame his objection at trial as being based on the rule of completeness. Rodriguez's objection was based on the form of the State's exhibits, and more narrowly, the way the redactions appeared in the text message exchanges. Thus, Rodriguez did not object on the grounds that NRS 47.120(1), the rule of completeness, barred the admission of the State's exhibits.

Because Rodriguez failed to object below on the same grounds urged here, we review his argument for plain error. *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485 (2006). “In conducting plain error review, we must examine whether there was error, whether the error was plain or clear, and whether the error affected the defendant’s substantial rights.” *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003) (internal quotation marks omitted). Also, Rodriguez has the burden of proof to demonstrate actual prejudice. *Id.*

Here, Rodriguez fails to demonstrate error. NRS 47.120(1) codifies the rule of completeness: “When any part of a writing or recorded statement is introduced by a party, the party may be required at that time to introduce any other part of it which is relevant to the part introduced, and any party may introduce any other relevant parts.” Rodriguez argues that without defense exhibits 78 and 79, the State’s exhibits 9 and 16 were inadmissible. But Rodriguez misunderstands the purpose of NRS 47.120(1). This rule is one of admission, not of exclusion. See *Collman v. State*, 116 Nev. 687, 707, 7 P.3d 426, 439 (2000) (explaining that under NRS 47.120(1), a party is permitted to introduce other relevant parts of a writing). It functions as a mechanism for an adverse party to *introduce* additional statements to complete portions of a written or recorded statement. Thus, a party’s failure to move for admission of additional statements under NRS 47.120(1) will not render the initial statements *inadmissible*. Rodriguez never sought to introduce exhibits 78 and 79 to complete the State’s exhibits.¹ Since the State’s exhibits were otherwise admissible under the Nevada rules of evidence, the district court did not err in admitting them.

The State did not commit prosecutorial misconduct in its closing argument

Next, Rodriguez argues that the prosecution engaged in misconduct during its closing argument by arguing that every gap between text messages was proof that A.F. and Rodriguez were together and engaging in sexual conduct. The State asserts that Rodriguez failed to preserve this error because his objection was untimely.

Untimely objections preclude appellate review. *Pasgove v. State*, 98 Nev. 434, 435, 651 P.2d 100, 101 (1982). Here, Rodriguez made his objection after the State finished its closing argument, when the court invited counsel to address any issues before the defense closing argument began. Accordingly, we review the claim for plain error.

¹We note as well that even if Rodriguez had moved to admit defense exhibits 78 and 79 and the court had granted their admission, the additional statements would not have changed the outcome of the trial due to the overwhelming evidence of Rodriguez’s guilt. See *Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (holding that a nonconstitutional error is harmless unless it had a substantial and injurious effect on the jury’s verdict); NRS 178.598.

Even if we reviewed the merits of Rodriguez's claim under a more favorable standard, Rodriguez would not prevail. We engage in a two-step analysis when considering prosecutorial misconduct claims: we determine (1) whether the prosecutor's conduct was improper, and (2) if the conduct was improper, whether the conduct warrants reversal. *Valdez v. State*, 124 Nev. 1172, 1188, 196 P.3d 465, 476 (2008). We have long held that the prosecution has "a right to comment upon the testimony and to ask the jury to draw inferences from the evidence, and has the right to state fully [its] views as to what the evidence shows." *State v. Green*, 81 Nev. 173, 176, 400 P.2d 766, 767 (1965). The prosecution may "argue inferences from the evidence and offer conclusions on contested issues." *Miller v. State*, 121 Nev. 92, 100, 110 P.3d 53, 59 (2005) (quoting *Jones v. State*, 113 Nev. 454, 467, 937 P.2d 55, 63 (1997)).

The prosecution's conduct was proper, so Rodriguez cannot demonstrate error. Rodriguez contends that the prosecution argued that every gap in text messages was proof that A.F. and Rodriguez were together and engaging in sexual conduct. This assertion is disproved by the record. The prosecution's closing argument walked through each month of A.F. and Rodriguez's sexual relationship, linking the events with each count of sexual assault. In doing so, the prosecution addressed the text messages that involved Rodriguez and A.F. discussing meeting up in person. The State then identified gaps in time, with no text messaging, that occurred after these text exchanges. The State argued that, in conjunction with other evidence, the jury could infer from the gaps between messages after discussions of meeting up that A.F. and Rodriguez did in fact meet up in person. In examining the entire closing argument, the prosecution permissibly argued that the jury could use its common sense to draw a reasonable inference that the evidence presented—which included the gaps in text messages—demonstrated that A.F. and Rodriguez were together and engaging in sexual intercourse. Accordingly, we conclude that the prosecution did not engage in misconduct.

The district court did not err in instructing the jury

Rodriguez argues that the district court erred in denying his request for a jury instruction explaining that the text messages introduced in the State's exhibits 9 and 16 were only a sampling of the conversations between A.F. and Rodriguez. But the record is devoid of any jury instruction language that he may have proposed to the district court. There was no proposed written instruction provided in the record, and there is no transcript wherein proposed language for an instruction was offered or discussed. Moreover, Rodriguez fails to cite any relevant legal authority for the inclusion of his alleged proposed instruction. *See Jeremias v. State*, 134 Nev. 46, 59, 412 P.3d 43, 54 (2018) (providing that we may decline

to consider arguments that are not supported by cogent argument or authority). Thus, we decline to consider the contention.²

CONCLUSION

The rule of completeness does not prohibit the admission of otherwise admissible statements. Instead, NRS 47.120(1) provides the adverse party the opportunity to introduce additional material relevant to complete the already admitted statements. Thus, the district court did not err in admitting the State's exhibits 9 and 16. Regarding prosecutorial misconduct, the State is permitted to argue that the jury may draw reasonable inferences from the evidence. Here, the prosecution did not commit misconduct in its closing argument by arguing that gaps in text messages indicated A.F. and Rodriguez had met in person. Finally, Rodriguez fails to cogently argue that the district court erred in failing to provide the jury with an instruction that the text messages were a sampling of communications between A.F. and himself. Accordingly, we affirm the judgment of conviction.

LEE and BELL, JJ., concur.

²We note that A.F. testified that the messages in exhibits 9 and 16 were not all of the messages that the two exchanged. Rodriguez argued to the jury that the messages were "cherrypick[ed]." Thus, the jury clearly was made aware that the text messages introduced were but a sampling of all the messages Rodriguez and A.F. had exchanged.

MELINDA ADKINS, AN INDIVIDUAL; GERALD ED ANDREWS, AN INDIVIDUAL; THE ESTATE OF RICH ROMER, DECEASED, BY PRISCILLA ROMER BARATA, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; JO BARBER, AN INDIVIDUAL; THE ESTATE OF KIM BUSH, DECEASED, BY SPENCER BUSH, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; ELIZA CHAVEZ, AN INDIVIDUAL; IRENE CIAURI, AN INDIVIDUAL; LESLIE DAVIS, AN INDIVIDUAL; THE ESTATE OF DAVID EDWARDS, DECEASED, BY CAROL EDWARDS, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; THE ESTATE OF JANET GOGO, DECEASED, BY KRISTINA GOGO, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; JERRY HUGHES, AN INDIVIDUAL; THE ESTATE OF MARIE LEGGIO, DECEASED, BY HER HUSBAND AND HEIR, JOHN LEGGIO; THE ESTATE OF SHARON ODEN, DECEASED, BY MICHAEL ODEN, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; KAREN PAONE, AN INDIVIDUAL; THE ESTATE OF PATRICIA PORTER, DECEASED, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; CAROL CORBETT, AN INDIVIDUAL; KATHLEEN STAITE, AN INDIVIDUAL; VALERIE STEWART, AN INDIVIDUAL; MELISSA DAVIES, AN INDIVIDUAL; DAVID EFROS, AN INDIVIDUAL; ERIC ESCHMAN, AN INDIVIDUAL; WENDY FENNER, AN INDIVIDUAL; MORGAN FENNER, AN INDIVIDUAL; RACHEL FENNER, AN INDIVIDUAL, BY AND THROUGH HER LEGAL GUARDIAN AND MOTHER, WENDY FENNER; MAGDALEN FOK, AN INDIVIDUAL; JOSEPH GLICK, AN INDIVIDUAL; SONIA GRIVE, AN INDIVIDUAL; TARGA JEFFERSON, AN INDIVIDUAL; THE ESTATE OF ANDRE KELLEY, DECEASED, BY ZENETA KELLEY, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; MARKETTA KELLY, AN INDIVIDUAL; KATHLEEN KINGSTON, AN INDIVIDUAL; SPENCER KIRKSEY, AN INDIVIDUAL; BOB MATHEWS, AN INDIVIDUAL; AUDREY MITCHELL, AN INDIVIDUAL; EILEEN MULHERN, AN INDIVIDUAL; IRENE NAVIS, AN INDIVIDUAL; ADRIENNE PATTERSON, AN INDIVIDUAL; NICHOLAS ROMANO, AN INDIVIDUAL; BRIDGET RUSSO, AN INDIVIDUAL; JOSEPH SAIN, AN INDIVIDUAL; DENISE SASSER, AN INDIVIDUAL; BRUCE TORREY, AN INDIVIDUAL; JAMIE YEPSON, AN INDIVIDUAL; THE ESTATE OF JOHN KOSWAN, DECEASED, BY DEBRA PAPPRICH-ADAMSON, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; SHURNICE COLEMAN, AN INDIVIDUAL; EARNEST JOHNSON, AN INDIVIDUAL; DONNA JOLLY, AN INDIVIDUAL; CARLA GALLEGOS-STEPHENS, AN INDIVIDUAL; SIERRA STE-

PHENS, AN INDIVIDUAL, BY AND THROUGH HER LEGAL GUARDIAN AND MOTHER, CARLA GALLEGOS-STEPHENS; ANDREA POWE-WILLIAMS, AN INDIVIDUAL; CARIN OWENS, AN INDIVIDUAL; ALBERTA WILLIAMS, AN INDIVIDUAL; ROBERTA SWOOPES, AN INDIVIDUAL; ROYAL ALEXANDER, AN INDIVIDUAL; SHOLEH AMIRMOKRI, AN INDIVIDUAL; ROSEANNA ARDOLINO, AN INDIVIDUAL; THE ESTATE OF ANN ASBERGER, DECEASED, BY NICOLE BREEDEN, INDIVIDUALLY AND AS HEIR; CATHERINE ASBERGER, INDIVIDUALLY AND AS HEIR TO ANN ASBERGER, DECEASED; CHRISTOPHER ASBERGER, INDIVIDUALLY AND AS HEIR TO ANN ASBERGER, DECEASED; CARLY BRESCIA, INDIVIDUALLY AND AS HEIR TO ANN ASBERGER, DECEASED, AND IN HER CAPACITY AS SPECIAL ADMINISTRATOR OF THE ESTATE OF ANN ASBERGER; EUGENE ASTARITA, AN INDIVIDUAL; CHRISTINA ASTARITA, AN INDIVIDUAL; LENORA AVELLA, AN INDIVIDUAL; AMAYA BERISTAIN, AN INDIVIDUAL; THE ESTATE OF BARBARA BLOYER, DECEASED, BY ELIZABETH BLOYER-FREEMAN, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; ANTOINETTE WAILANI CARY, AN INDIVIDUAL; GINA CINQUEGRANI, AN INDIVIDUAL; DAPHNE CLARK, AN INDIVIDUAL; REGINA CRUDEN, AN INDIVIDUAL; CHERYL DAILY, AN INDIVIDUAL; MELISA DAVIES, AN INDIVIDUAL; TONI LEANNE DAVIS, AN INDIVIDUAL; WANDA DURNEN, AN INDIVIDUAL; CHERI EDELMAN, AN INDIVIDUAL; NORMA ESPINOSA, AN INDIVIDUAL; CLAUDIA EWING, AN INDIVIDUAL; CRAIG FALKNER, AN INDIVIDUAL; KIMBERLY FLOWERS, AN INDIVIDUAL; DAWN FOREN, AN INDIVIDUAL; THE ESTATE OF ALEXANDER FORTUNATO, DECEASED, BY SHERY SHIVELY, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; SANDRA FOSTER, AN INDIVIDUAL; JOANNE FRANK, AN INDIVIDUAL; KATHERINE GALLAGHER, AN INDIVIDUAL; VICTORIA GONZALES, AN INDIVIDUAL; RICHARD GRAY, AN INDIVIDUAL; JENNIFER HANNA, AN INDIVIDUAL; TAMMY JO HANSEN, AN INDIVIDUAL; GRETTA HAYWOOD, AN INDIVIDUAL; DANIEL HIGGINS, AN INDIVIDUAL; NICOLE HOFFMAN, AN INDIVIDUAL; JACQUELINE HOLLOWAY, AN INDIVIDUAL; PATRICIA HOOD, AN INDIVIDUAL; MARY HUGHES-APPEL, AN INDIVIDUAL; DENISE HUMPHREY, AN INDIVIDUAL; TOMMY JOHNSON, AN INDIVIDUAL; KATHY JOINES, AN INDIVIDUAL; THOMAS KENDRICK, AN INDIVIDUAL; IRIS KIKUCHI, AN INDIVIDUAL; IRENE KING, AN INDIVIDUAL; JACQUELINE KINSEY, AN INDIVIDUAL; SEJLA KOPCIC, AN INDIVID-

UAL; THE ESTATE OF VICTOR LARGESSE, DECEASED, BY MAILE BECKWITH, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; CONNIE ANN LEE, AN INDIVIDUAL; ADELLA LOGAN, AN INDIVIDUAL; JILL MACFARLANE, AN INDIVIDUAL; ANN MAGLIERE, AN INDIVIDUAL; MARIANN MATZ, AN INDIVIDUAL; THE ESTATE OF ANNE MCCALL, DECEASED, BY HANNA RAILEY, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; GRETA MCCALL, INDIVIDUALLY AS HEIR TO ANNE MCCALL, DECEASED; THE ESTATE OF ZANE MOSER, DECEASED, BY PATRICIA MOSER, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; THE ESTATE OF TERRY MUNN, DECEASED, BY TOMMIE MUNN, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; THOMAS NAFTAL, AN INDIVIDUAL; SILVIA NORIEGA-BINYONS, AN INDIVIDUAL; THOMAS PICKRELL, AN INDIVIDUAL; LESLEE PIERCE, AN INDIVIDUAL; DAVID PIERCE, AN INDIVIDUAL; NORMA PORTER, AN INDIVIDUAL; SYDNEY RABIN, AN INDIVIDUAL; SHERYL ROMINES, AN INDIVIDUAL; EVELYN ROSS, AN INDIVIDUAL; KAREN SANCHEZ, AN INDIVIDUAL; THE ESTATE OF KAREN SARAE, DECEASED, BY TONI-ANTOINETTE STEPHENS, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; KAREN SHELTON, AN INDIVIDUAL; CHARLENE SHEPARD, AN INDIVIDUAL; EDWARD SIMMS, AN INDIVIDUAL; MAGIC SIXX, AN INDIVIDUAL; ANNA SLESINSKI, AN INDIVIDUAL; LISA SNIPES, AN INDIVIDUAL; NORMA SNYDER, AN INDIVIDUAL; ROBERT SPENCER, AN INDIVIDUAL; ROCKY STEELE, AN INDIVIDUAL; THE ESTATE OF STUART STILLING, DECEASED, BY JANELL ROSENBERG, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; GWYN TAYLOR, AN INDIVIDUAL; ANTHONY TINNIN, AN INDIVIDUAL; STEPHEN TOMS, AN INDIVIDUAL; PAMELA TOWERS, AN INDIVIDUAL; THE ESTATE OF JEFFREY TRULL, DECEASED, BY JENNIFER TRULL-SPAULDING, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; MICHELLE VANHORN, AN INDIVIDUAL; CAROLE VILL'NEUVE, AN INDIVIDUAL; KATHY VORNBERG, AN INDIVIDUAL; THE ESTATE OF DANIELLE WALLISER, DECEASED, BY STEPHEN WALLISER, AS PERSONAL REPRESENTATIVE, INDIVIDUALLY AND AS HEIR; ZELLA WATSON, AN INDIVIDUAL; SUSIE WESLEY, AN INDIVIDUAL; DIANE WILLIAMS, AN INDIVIDUAL; SHARON WITT, AN INDIVIDUAL; KATINA WOODWARD, AN INDIVIDUAL; AND ELIZABETH ZYLKA, AN INDIVIDUAL, APPELLANTS, v. UNION PACIFIC RAILROAD COMPANY, A FOREIGN CORPORATION; MONSANTO COMPANY; SOLU-

TIA INC.; PHARMACIA LLC; CALNEV PIPE LINE, LLC; KINDER MORGAN PIPELINE, LLC; KINDER MORGAN ENERGY PARTNERS, LP; KINDER MORGAN, INC.; and CITY OF LAS VEGAS DOWNTOWN REDEVELOPMENT AGENCY, RESPONDENTS.

No. 85569

August 15, 2024

554 P.3d 212

Appeal from a district court order granting respondents' motion to dismiss appellants' first amended complaint in a tort action on statute of limitations grounds. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed and remanded.

Eglet Adams Eglet Ham Henriod and Joel D. Henriod and Erica D. Entsminger, Las Vegas; *Mueller & Associates, Inc.*, and *Craig A. Mueller*, Las Vegas; *The Law Office of Lindsay A. Dibler, LLC*, and *Lindsay A. Dibler*, St. Louis, Missouri, for Appellants.

Perkins Coie LLP and *M. Ray Hartman, III*, San Diego, California; *King Scow Koch Durham LLC* and *David R. Koch*, Henderson, for Respondents CalNev Pipe Line, LLC; Kinder Morgan Energy Partners, LP; Kinder Morgan Pipeline, LLC; and Kinder Morgan, Inc.

Jeffrey M. Dorocak, City Attorney, and *Timothy J. Geswein*, Deputy City Attorney, Las Vegas, for Respondent City of Las Vegas Downtown Redevelopment Agency.

Evans Fears & Schuttert LLP and *Kelly A. Evans*, *Chad R. Fears*, *Jay J. Schuttert*, and *Hayley E. Miller*, Las Vegas; *Shook, Hardy & Bacon, LLP*, and *Thomas M. Goutman* and *Kim Kocher*, Philadelphia, Pennsylvania, *Adam E. Miller*, Clayton, Missouri, and *Richard L. Campbell*, Boston, Massachusetts, for Respondents Monsanto Company, Pharmacia LLC, and Solutia Inc.

Greenberg Traurig, LLP, and *Tami D. Cowden*, *Kara B. Hendricks*, and *Alayne M. Opie*, Las Vegas, for Respondent Union Pacific Railroad Company.

Matthew L. Sharp, Ltd., and *Matthew L. Sharp*, Reno; *Sharp Law Center* and *A. J. Sharp*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before the Supreme Court, CADISH, C.J., and PICKERING and BELL, JJ.

OPINION

By the Court, PICKERING, J.:

Plaintiffs (appellants here) sued for injuries allegedly caused by exposure to toxic chemicals while they worked at the Clark County Government Center. They invoked the discovery rule to extend the two-year limitations period in NRS 11.190(4)(e) that would otherwise bar their claims. Under the discovery rule, a statute of limitations is tolled until the injured party discovers or reasonably should have discovered facts supporting a cause of action. Unlike some of Nevada's other statutes of limitation, NRS 11.190(4)(e) does not expressly reference discovery-rule tolling. Based on this omission, the district court concluded that the discovery rule could not extend the limitations period in NRS 11.190(4)(e) and dismissed the case as time-barred. The district court's narrow reading of NRS 11.190(4)(e) conflicts with long-standing judicial precedent, which supports application of the discovery rule in appropriate circumstances even though the statute supplying the limitations period does not specifically refer to it. Because it was error for the district court to categorically conclude that the discovery rule did not apply, we reverse and remand for further proceedings consistent with this opinion.

I.

Plaintiffs brought personal injury and wrongful death claims against Union Pacific Railroad, various companies that manufacture polychlorinated biphenyl (PCBs) and other toxic chemicals, companies involved with the CalNev Pipe Line, and the City of Las Vegas Downtown Redevelopment Agency (collectively "defendants"). Over the years, they alleged, toxic chemicals had been released on Union Pacific property, which later became the Clark County Government Center (CCGC) site. Shortly after the CCGC opened in 1995, workers began getting sick. Basement workstations accumulated black soot, and soot was seen coming out of air vents, which turned black. Some employees put screens on the vents to block the soot, and one employee was so concerned that he scraped soot from his desk and into an envelope. At the time, Clark County dismissed suggestions that the workers' illnesses were related to the building, assuring the workers that there was no problem with the property.

Plaintiffs alleged that the defendants knew of the toxic chemicals present on the land and that workers at the CCGC would be exposed to those toxic chemicals. In their first amended complaint, plaintiffs invoked the discovery rule, averring that their claims did not accrue and the two-year limitations period in NRS 11.190(4)(e)

did not start to run until they reasonably could have discovered their injuries and the cause of those injuries. But they did not provide details about individual plaintiffs' experiences at the CCGC, such as the dates that each worked at the CCGC or were exposed to toxic chemicals, what they knew about workers' concerns, when each plaintiff became ill, and when each plaintiff discovered or reasonably should have discovered their claims. Rather, plaintiffs allege that, as a group, they could not reasonably have discovered their claims until 2020, when a toxicologist linked outside ground contamination of PCBs to indoor contamination of the same PCBs at the CCGC, and a doctor linked plaintiffs' various illnesses to exposure to toxins. Defendants moved to dismiss the first amended complaint on statute-of-limitations grounds, and the district court granted the motion after concluding the discovery rule did not apply and plaintiffs' claims were time-barred. Plaintiffs appeal, arguing that the district court erred by failing to apply the discovery rule or equitable tolling to their claims.

II.

A.

A district court may dismiss an action under NRCP 12(b)(5) for "failure to state a claim upon which relief can be granted" when the action is barred by the statute of limitations. *Bemis v. Est. of Bemis*, 114 Nev. 1021, 1024, 967 P.2d 437, 439 (1998). As with any other NRCP 12(b)(5) challenge, an action may be dismissed based on the statute of limitations having run "only if it appears beyond a doubt that the plaintiff could prove no set of facts, which, if true, would entitle the plaintiff to relief." *Nelson v. Burr*, 138 Nev. 847, 850, 521 P.3d 1207, 1210 (2022) (alterations omitted) (quoting *Buzz Stew, LLC v. City of North Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008)). De novo review applies on appeal from an order granting a motion to dismiss an action as time-barred. *Berberich v. Bank of Am., N.A.*, 136 Nev. 93, 95, 460 P.3d 440, 441 (2020). Although statute of limitations challenges often present questions of fact not resolvable on a motion to dismiss, *see Siragusa v. Brown*, 114 Nev. 1384, 1400-01, 971 P.2d 801, 812 (1998), the correct legal interpretation of a statute of limitations is a question of law to which de novo review likewise applies, *Berberich*, 136 Nev. at 96, 460 P.3d at 442.

When a statute's meaning is clear and unambiguous, we give effect to that meaning. *Great Basin Water Network v. State Eng'r*, 126 Nev. 187, 196, 234 P.3d 912, 918 (2010). Statutes are interpreted in harmony with other statutes, *Albios v. Horizon Cmty's., Inc.*, 122 Nev. 409, 418, 132 P.3d 1022, 1028 (2006), and in interpreting Nevada statutes, we may consider how other states have interpreted similar statutes, *cf. State, Dep't of Bus. & Indus. v. Granite Constr. Co.*, 118 Nev. 83, 90, 40 P.3d 423, 428 (2002) (considering how other

states interpreted their prevailing wage laws). Stare decisis plays an important role, and legal precedent, including statutory interpretation, should be respected unless “compelling reasons” to depart from that precedent are shown to exist. *See A Cab, LLC v. Murray*, 137 Nev. 805, 810, 501 P.3d 961, 969 (2021).

NRS 11.190(4)(e) provides a two-year limitations period for actions “to recover damages for injuries to a person or for the death of a person caused by the wrongful act or neglect of another.” “The general rule concerning statutes of limitation is that a cause of action accrues when the wrong occurs and a party sustains injuries for which relief could be sought.” *Petersen v. Bruen*, 106 Nev. 271, 274, 792 P.2d 18, 20 (1990). But the discovery rule provides an exception to this general rule. *Id.* Under the discovery rule, a claim does not accrue “until the injured party discovers or reasonably should discover facts supporting a cause of action.” *Id.* (citing *Sorenson v. Pavlikowski*, 94 Nev. 440, 443-44, 581 P.2d 851, 853-54 (1978)).

Some sections of NRS 11.190 include explicit discovery-rule language, while others do not. For instance, NRS 11.190(3)(b) provides a three-year limitations period for claims alleging waste or trespass of real property, “but when the waste or trespass is committed by means of underground works upon any mining claim, the cause of action shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the waste or trespass.” And NRS 11.190(3)(d) provides a three-year limitations period for claims alleging fraud or mistake, “but the cause of action in such a case shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the fraud or mistake.” *See also* NRS 11.190(2)(d), (3)(c), (e), (f) (variously providing for delayed accrual of certain causes of action depending on when the injured party discovered or should have discovered certain facts). Other sections, like 11.190(4)(e), set forth limitation periods without referring to a plaintiff’s discovery of the injury. *See* NRS 11.190(1)(a)-(b) (providing that claims upon a judgment or written contract must be brought “[w]ithin 6 years”); NRS 11.190(2)(a)-(c) (providing that claims on open accounts for goods, articles charged on a store account, and oral contracts must be brought “[w]ithin 4 years”); *see also* NRS 11.190(3)(a), (4)(a)-(f), (5)(a)-(b) (similarly omitting discovery-rule language).

Often, such difference in wording is seen as deliberate, signifying a difference in meaning. *Cf. Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 777, 500 P.3d 1257, 1261 (2021) (recognizing that the omission of language in one part of the statute that appeared in another part of the statute signified different meanings). But each of the NRS 11.190 subsections should be construed in harmony with each other if they “seek to accomplish the same purpose or object.” *See State, Div. of Ins. v. State Farm Mut. Auto Ins. Co.*, 116 Nev.

290, 294, 995 P.2d 482, 485 (2000) (explaining the *in pari materia* canon of statutory construction), *abrogated on other grounds* by *Killebrew v. State ex rel. Donohue*, 139 Nev. 401, 403-05, 535 P.3d 1167, 1171 (2023). And here, the discovery-related language in the various sections of NRS 11.190 serves to specify when or how the discovery rule applies to determine the accrual date for particular claims; it does not purport to govern the accrual date for all of the other claims covered by the statute. *See Sunrise Hosp. & Med. Ctr., LLC v. Eighth Jud. Dist. Ct.*, 140 Nev. 124, 127, 544 P.3d 241, 246 n.1 (2024) (explaining that the applicability of the negative-implication canon “is limited to when the subjects specified in the rule can reasonably be thought to be an expression of all that share in the quality described”) (internal quotation marks and citations omitted).

We have previously read the discovery rule into other subsections of NRS 11.190 and limitations periods that, like NRS 11.190(4)(e), do not include explicit discovery-rule language. For example, in *Oak Grove*, the court applied the discovery rule to the catch-all limitations statute, NRS 11.220, which also does not include express discovery-rule language but merely bars an action four years “after the cause of action shall have accrued.” *Oak Grove Invs. v. Bell & Gossett Co.*, 99 Nev. 616, 623, 668 P.2d 1075, 1079 (1983). The court reasoned that the word “accrued” in NRS 11.220 incorporated the “diligent discovery” rule. *Id.* at 622-23, 668 P.2d at 1079. Later, in *Soper*, we explained that a cause of action for breach of a written or oral contract does not accrue under NRS 11.190(1)(b) and 11.190(2)(c) until the plaintiff discovers or should have discovered the cause of action. *Soper v. Means*, 111 Nev. 1290, 1294, 903 P.2d 222, 224 (1995). Again, neither of those subsections includes discovery-rule language. And in *Bemis*, we relied on *Soper* to read the discovery rule into the limitations period NRS 11.190(3)(c) set for the plaintiffs’ conversion claims, even though the limited discovery rule the statute contained did not by its plain terms apply to them. 114 Nev. at 1025, 967 P.2d at 440. Shortly thereafter, in *Siragusa*, we revisited *Oak Grove*’s interpretation of NRS 11.220, the catch-all statute of limitations, to hold that the discovery rule applied to actions for civil conspiracy. 114 Nev. at 1393, 971 P.2d at 807. These prior decisions suggest that the discovery rule may apply to the statute of limitations for personal injury or wrongful death actions despite that rule’s absence in the statute’s text. *Compare* Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 322 (2012) (explaining that when a jurisdiction’s highest court has construed a statute’s words or phrases, the language should be interpreted the same way in other statutes), *with BMO Harris Bank, N.A. v. Whittemore*, 139 Nev. 274, 276-77, 535 P.3d 241, 244 (2023) (citing legislative acquiescence in long-standing

judicial interpretations of a statute as a reason to adhere to that interpretation).

To determine whether the discovery rule should apply here, we consider the statute's history. See *Great Basin Water Network*, 126 Nev. at 196, 234 P.3d at 918 (explaining that when a statute is ambiguous, we determine the Legislature's intent by evaluating the statute's history and construing it "in a manner that conforms to reason and public policy"). When originally adopted, the Legislature based NRS 11.190 on statutes from both California and Utah. James G. Sweeney, et al., *Revised Laws of Nevada*, Vol. 2, § 4967, at 1441 (1912); see also 2B Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 52:2 (7th ed. rev. 2012) (noting that where one state adopts a statute from another state, the adopting state may look to the other state's interpretation of that statute); *Hobbs v. State*, 127 Nev. 234, 238, 251 P.3d 177, 180 (2011) (explaining that when Nevada copies a statute from another state, that state's subsequent case law interpreting the statute constitutes "persuasive authority"). Because NRS 11.190 was based on California and Utah statutes, interpretations of those states' statutes are persuasive in determining whether the discovery rule applies to NRS 11.190(4)(e).

The California Supreme Court applies the discovery rule to its statute of limitations for personal injury and wrongful death actions. See, e.g., *Jolly v. Eli Lilly & Co.*, 751 P.2d 923, 926-27 (Cal. 1988) (addressing the 1982 statute). Under California's version of the discovery rule, "the accrual date of a cause of action is delayed until the plaintiff is aware of her injury and its negligent cause." *Id.* "[T]he statute of limitations begins to run when the plaintiff suspects or should suspect that her injury was caused by wrongdoing." *Id.* at 927. California has since expressly provided for the discovery rule in its statute of limitations for wrongful death or personal injury toxic-tort actions. Cal. Civ. Proc. Code § 340.8 (West 2022).

Utah has likewise applied the discovery rule to its wrongful-death statute of limitations. *Myers v. McDonald*, 635 P.2d 84, 85, 87 (Utah 1981). The concurrence noted that the plain wording of the statute did not include a discovery-rule exception to the running of the statute but agreed that a judicially created exception was necessary to preserve the plaintiffs' constitutional rights. *Id.* at 87-88 (Howe, J., concurring). The Utah Supreme Court later clarified that the discovery rule applies if (1) "a plaintiff does not become aware of the cause of action because of the defendant's concealment or misleading conduct," or (2) "the case presents exceptional circumstances and the application of the [strict limitations period] would be irrational or unjust, regardless of any showing that the defendant has prevented the discovery of the cause of action." *Russell Packard Dev., Inc. v. Carson*, 108 P.3d 741, 747 (Utah 2005) (internal quotation marks

omitted). But “an initial showing must be made that the plaintiff did not know and could not reasonably have discovered the facts underlying the cause of action in time to commence an action within the limitations period.” *Colosimo v. Roman Cath. Bishop of Salt Lake City*, 156 P.3d 806, 812 (Utah 2007) (alterations and internal quotation marks omitted).

We agree with California and Utah that the discovery rule can apply to the statute of limitations governing wrongful death and personal injury actions, even in the absence of express language incorporating that rule into the statute. Fairness and justice require that in certain circumstances, a claim should not accrue before a claimant is aware—or should be aware through the exercise of reasonable diligence—of the claim. *See Siragusa*, 114 Nev. at 1393-94, 971 P.2d at 807 (citing *Spitler v. Dean*, 436 N.W.2d 308, 310-11 (Wis. 1989)); *see also Sorenson*, 94 Nev. at 443, 581 P.2d at 853 (noting that the discovery rule is “a fairer rule”). “The rationale behind the discovery rule is that the policies served by statutes of limitation do not outweigh the equities reflected in the proposition that plaintiffs should not be foreclosed from judicial remedies before they know that they have been injured and can discover the cause of their injuries.” *Petersen*, 106 Nev. at 274, 792 P.2d at 20. In such circumstances, applying the discovery rule will still “satisfy the purpose of the statute of limitations,” *Oak Grove*, 99 Nev. at 622, 668 P.2d at 1078, which “is to encourage the plaintiff to pursu[e] his rights diligently,” *Fausto v. Sanchez-Flores*, 137 Nev. 113, 113, 482 P.3d 677, 679 (2021) (alteration in original) (quoting *CTS Corp. v. Waldburger*, 573 U.S. 1, 10 (2014)).

We therefore conclude that the discovery rule may toll NRS 11.190(4)(e)’s two-year limitations period where the plaintiff is not aware of a cause of action because of the defendant’s concealment of the facts constituting the plaintiff’s claims, *see Siragusa*, 114 Nev. at 1393-94, 971 P.2d at 807, or “where the occurrence and the manifestation of damage are not contemporaneous,” *Oak Grove*, 99 Nev. at 622, 668 P.2d at 1078, such that, despite diligent investigation, the plaintiff did not discover and could not reasonably be expected to have discovered facts supporting a cause of action earlier, *Petersen*, 106 Nev. at 274, 792 P.2d at 20. *Accord Ridenour v. Boehringer Ingelheim Pharms., Inc.*, 679 F.3d 1062, 1065-66 (8th Cir. 2012) (applying the discovery rule to NRS 11.190(4)(e)); *Heinrich v. Ethicon, Inc.*, Case No. 2:20-cv-00166-CDS-VCF, 2023 WL 3963611, at *2 (D. Nev. 2023) (same).¹

¹The federal Comprehensive Environmental Resources, Compensation, and Liability Act (CERCLA) imports a discovery rule into state statutory schemes that have an earlier commencement date than the federal commencement date in certain cases involving toxic torts. *See* 42 U.S.C. § 9658. We invited supplemental briefing on whether the CERCLA discovery rule applies in this case but do not reach it since our holding makes it unnecessary to do so.

B.

Plaintiffs seeking to invoke discovery-rule tolling must show that they used reasonable diligence in determining the existence of a cause of action. *Bemis*, 114 Nev. at 1025, 967 P.2d at 440; *see also Colosimo*, 156 P.3d at 812 (addressing tolling pursuant to the exceptional circumstances doctrine). Under the discovery rule, a plaintiff's reasonable diligence delays accrual of the cause of action until the plaintiff is on inquiry notice of an injury. *Bemis*, 114 Nev. at 1024-25, 967 P.2d at 440.

A plaintiff is on inquiry notice when he or she knows or should know "of facts that would lead an ordinarily prudent person to investigate the matter further." *Winn v. Sunrise Hosp. & Med. Ctr.*, 128 Nev. 246, 252, 277 P.3d 458, 462 (2012) (internal quotation marks omitted); *see also Jolly*, 751 P.2d at 928 ("So long as a suspicion exists, it is clear that the plaintiff must go find the facts; she cannot wait for the facts to find her."). These facts need only extend "to the plaintiff's general belief that someone's negligence may have caused his or her injury." *Winn*, 128 Nev. at 252-53, 277 P.3d at 462 (citing *Massey v. Litton*, 99 Nev. 723, 728, 669 P.2d 248, 252 (1983)). Ignorance of the defendant's identity will not delay accrual of a cause of action under the discovery rule if the plaintiff fails to use reasonable diligence in discovering the defendant's role. *Siragusa*, 114 Nev. at 1394, 971 P.2d at 807-08.

C.

Here, plaintiffs contend that Clark County dismissed workers' concerns and assured them that nothing was wrong with the CCGC building. They also alleged in their first amended complaint that "representations and/or nondisclosures made by" defendants left workers with "no knowledge or understanding that they were in fact being exposed to dangerous toxic chemicals on a daily basis that was causing their illness and disease." Thus, some plaintiffs may raise facts supporting that one or more defendants intentionally concealed key information related to their potential claims. Moreover, where latent injury occurs through toxic exposure that does not manifest itself until years later, the occurrence and the manifestation of the injury were not contemporaneous and enforcing NRS 11.190(4)(e)'s two-year statute of limitations could be unjust.

Additionally, questions remain as to whether the plaintiffs used reasonable diligence to discover their cause of action. The first amended complaint includes over 100 plaintiffs and did not allege when the individual plaintiffs began working at the CCGC, when they were exposed to toxic chemicals, or when they became ill. In the first amended complaint, plaintiffs acknowledged that soot and a high incidence of worker illness were apparent from the start, which could mean that some or all of the plaintiffs were on inquiry notice

of their cause or causes of action. *See Ridenour*, 679 F.3d at 1066 (concluding that the plaintiff was on inquiry notice because he told his doctor that his complained-of, compulsive behaviors could be caused by his medication). But they also alleged that Clark County supervisors deflected workers' concerns. They further alleged that the plaintiffs could not have reasonably discovered that their illnesses were linked to exposure to toxic substances until mid-to-late 2020, when an expert consulted by the law firm the plaintiffs retained established the link between ground contamination and exposure to toxic substances at the CCGC and that exposure was in turn linked to their illnesses. This allegation does not carry the day for the plaintiffs, since it does not establish when each individual plaintiff discovered or reasonably should have discovered their causes of action. But drawing all inferences in the plaintiffs' favor, as we must at this stage, *Buzz Stew*, 124 Nev. at 228, 181 P.3d at 672, dismissal of the entire complaint under NRCP 12(b)(5) for failure to state claims upon which relief can be granted was error.

Nevada case law does not require a plaintiff to plead the facts supporting discovery-rule tolling with specificity. *Siragusa*, 114 Nev. at 1392 n.6, 971 P.2d at 807 n.6. Although ordinarily a question of fact, application of the discovery rule can be resolved as a matter of law where uncontroverted evidence proves the date by which the plaintiff discovered or should have discovered the facts giving rise to the claim. *Id.* at 1401, 971 P.2d at 812. But without knowing the individual plaintiffs' dates of employment, dates of injury, and when each plaintiff discovered or should have discovered their claims, the statute of limitations question cannot be resolved without further factual development, which we leave to the parties and the district court on remand.

D.

The two-year limitations period under NRS 11.190(4)(e) is additionally subject to equitable tolling. *Fausto*, 137 Nev. at 113, 482 P.3d at 679. "[E]quitable tolling is a nonstatutory remedy that permits a court to suspend a limitations period and allow an otherwise untimely action to proceed when justice requires it." *Id.* at 115, 482 P.3d at 680. To equitably toll the two-year limitations period in NRS 11.190(4)(e), a plaintiff must show (1) diligent action in pursuing the claim, and (2) that "extraordinary circumstances" beyond the plaintiff's control caused the claim to be filed outside the limitations period. *Id.* at 118, 482 P.3d at 682. Our review of the record shows that the plaintiffs adequately raised, and the district court failed to address, equitable tolling. That issue, too, remains open on remand, as do the alternative arguments advanced in the motions to dismiss, which the district court declined to reach because it resolved the motions based on its reading of NRS 11.190(4)(e).

III.

The district court erred when it dismissed this action as time-barred by NRS 11.190(4)(e) and rejected discovery-rule tolling as a matter of law. It also erred by dismissing the action without considering equitable tolling. For these reasons, we reverse and remand to the district court for proceedings consistent with this opinion.

CADISH, C.J., and BELL, J., concur.

ERIKA KRAGEN, PETITIONER, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE PAUL M. GAUDET, DISTRICT JUDGE, RESPONDENTS, AND MICHAEL KRAGEN, REAL PARTY IN INTEREST.

No. 88187-COA

August 15, 2024

555 P.3d 1218

Original petition for a writ of mandamus or prohibition challenging a district court order in a divorce action assuming jurisdiction over child custody issues.

Petition denied.

Onello Law Group, PLLC, and *Jason W. Onello*, Las Vegas, for Petitioner.

McFarling Law Group and *Emily M. McFarling*, Las Vegas, for Real Party in Interest.

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

OPINION

By the Court, WESTBROOK, J.:

Petitioner Erika Kragen contends that the district court improperly assumed jurisdiction over child custody determinations concerning the minor children she shares with real party in interest Michael Kragen. Erika posits that Nevada is not the children’s “home state” for purposes of the Uniform Child Custody Jurisdiction and Enforcement Act (UCCJEA) because she physically removed the children from Nevada just four days short of the six-month residency period set forth in NRS 125A.085(1). Michael contends that Erika’s actions in removing the children effected a “temporary absence” that did not interrupt their Nevada residency until he filed for divorce a few weeks later. As a result, he argues that the district court properly exercised home state jurisdiction over custody matters in this case.

Although the UCCJEA does not define the phrase “temporary absence,” most UCCJEA states apply a totality of the circumstances test when determining if an absence is temporary. Today we formally adopt this approach and hold that, under the totality of the circumstances, the district court properly found that Nevada has home state jurisdiction notwithstanding the children’s temporary absence from the state. We therefore deny Erika’s petition.

PROCEDURAL AND FACTUAL HISTORY

Erika and Michael were married in 2016 in San Diego, California, and have three minor children together. On August 4, 2022, they relocated from San Diego to Henderson, Nevada, where they lived with Michael's parents. They subsequently enrolled their children in a private school where Erika took a job as a teacher's aide.

On or about January 12, 2023, Erika indicated that she wanted a trial separation from Michael. In response, Michael allegedly began crying, grabbed a kitchen knife, pointed it at himself, and threatened suicide. When Erika attempted to calm him down, Michael walked outside alone with the knife. Then, according to Erika, Michael stabbed the knife through the netting of their children's trampoline, while Michael claimed he threw the knife to the ground, inadvertently slicing the trampoline. Erika did not call the police, nor did she seek a protective order at that time.

More than a week later, on January 21, Erika took the children to San Diego to visit her family for a week during a school break. They returned to Henderson on January 29. Two days later, on January 31, while Michael was still at work and unbeknownst to him, Erika again took the children and drove back to stay with her family in San Diego. Only after their departure did Erika notify Michael by text that they had left for San Diego, that he was "welcome to call or visit," and that they "need[ed] a divorce." Michael stayed behind in Nevada.

The parties agree that January 31 was the last day the children were physically present in Nevada. Nevertheless, for several weeks after their departure, the children remained enrolled in their Nevada school, and Erika was still employed by the school. Erika and Michael also began attending marriage counseling.

Towards the end of February, Erika stopped communicating with Michael and withdrew the children from their school. On February 26, after speaking with Erika over the phone, Michael realized their relationship was over. That same day, he filed a complaint for divorce in Clark County, Nevada. Two days later, on February 28, Erika petitioned for legal separation in San Diego County, California.¹

Erika was served with Michael's Nevada complaint on March 9 and filed an answer. More than two weeks later, on March 28, Erika applied for an emergency domestic violence restraining order in California, citing the January knife incident and prior alleged physical and emotional abuse. On April 4, while Erika's restraining order request was pending in California, the Nevada district court orally announced a temporary custody arrangement providing that the

¹In her petition, Erika wrote that the children lived in Henderson, Nevada, from August 1, 2022, to January 31, 2023.

parties would share joint legal and physical custody of their children. This temporary order was reduced to writing on April 20. Meanwhile, on April 18, the California court granted Erika's request for the emergency domestic violence restraining order and also issued its own temporary custody order awarding Erika sole legal custody and joint physical custody, with Michael permitted two monitored visits per week.²

The Nevada district court then held a telephonic conference with the California court to address the competing temporary custody orders and discuss which state had jurisdiction over the parties' children. Both courts acknowledged that Nevada had jurisdiction over the parties' divorce and the division of marital assets; they further recognized that the children had resided in Nevada for close to the six months necessary to establish Nevada's home state jurisdiction under the UCCJEA. The California court ultimately agreed to "defer" to the Nevada court's decision on the issue of child custody jurisdiction.

Following the telephonic conference, the Nevada district court entered an order finding that it had home state jurisdiction over the parties' children. The court determined that the children had resided in Nevada for six consecutive months—between August 1, 2022, and January 31, 2023—relying on Erika's statement in her California petition for legal separation. Erika petitioned this court for a writ of mandamus or prohibition, arguing that the district court abused its discretion by relying on the August 1 date when the record contained evidence that they arrived in Nevada on a later date. Noting that the district court had "conflicting evidence of the parties' time in Nevada," this court granted Erika's petition and vacated the district court's order with instructions to hold an evidentiary hearing and to reconsider the jurisdictional issue. *Kragen v. Eighth Jud. Dist. Ct.*, No. 86626-COA, 2023 WL 7141048, at *4 (Nev. Ct. App. Oct. 30, 2023) (Order Granting Petition for Writ of Mandamus).

Thereafter, the Nevada court held an evidentiary hearing to determine whether Nevada or California had home state jurisdiction. At the hearing, both parties agreed that the children arrived in Nevada on August 4. However, the parties disputed whether the children's absence from Nevada after January 31 was temporary or permanent.

Erika took the position that the children's state of residence changed on January 31, testifying that the reason she moved back

²Although this arrangement would likely not constitute joint physical custody under Nevada law, see *Rivero v. Rivero*, 125 Nev. 410, 417, 216 P.3d 213, 219 (2009) (defining joint physical custody generally as a parenting time arrangement where each party has physical custody at least 40 percent of the time), overruled on other grounds by *Romano v. Romano*, 138 Nev. 1, 3, 501 P.3d 980, 982 (2022), the California court's custody order was issued on a form with a checked box indicating "joint" physical custody.

to San Diego was “[b]ecause there was domestic violence.” Erika further testified that she had not intended to return to Nevada but acknowledged that she and Michael began attending marriage counseling thereafter.

Michael testified that when Erika left with the children, he believed they were coming back to Nevada for several reasons. Specifically, the children were still enrolled in their Nevada school, and they had initially moved to Nevada to attend that school; Erika was still employed at their children’s school as a teacher’s aide; he and Erika began marriage counseling, causing him to “expect things to go back to normal”; and Erika did not lay down roots upon her arrival in San Diego. During closing argument, Michael asserted that until the end of February, he believed the children’s absence from Nevada was temporary.

The district court entered an order finding that Nevada had home state jurisdiction over the parties’ children. The court recounted Erika’s stated reason for leaving Nevada due to domestic violence, as well as Michael’s reasons why he believed the children would return, and the district court found Michael “to be more credible than [Erika] in relation to stated intent pertaining to relocation to San Diego.” The court determined that Erika’s testimony about the reason for her departure was not credible because she did not pursue a restraining order in California until well after she was served with Michael’s complaint for divorce.³

The district court also found that Erika’s decision to remove the children without notice or permission from Michael was “unjustifiable conduct” that was intended to defeat Nevada’s home state jurisdiction. The court noted that the statutory definition of “home state” included “any temporary absence from the state” and that permitting Erika “to circumvent this definition . . . by unilaterally departing that [s]tate with the children, while giving the expectation of return through participation in therapy and continued enrollment of the children in school would be grossly unfair.” As such, the court effectively concluded that the children’s time in San Diego from January 31 to February 26 constituted a temporary absence that did not interrupt their Nevada residency. Including this time period, the court determined that the children’s residency exceeded the six consecutive months required to establish Nevada’s home state jurisdiction under the UCCJEA. Erika then filed the instant petition for a writ of mandamus or prohibition challenging the district court’s exercise of home state jurisdiction in this case.

³The court advised the parties it was not deciding whether domestic violence had, in fact, occurred; rather, that issue would be determined at a subsequent hearing when the court addressed the children’s custody status.

ANALYSIS

We elect to entertain the writ petition

A writ of mandamus is appropriate to “compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion.” *Nev. Yellow Cab Corp. v. Eighth Jud. Dist. Ct.*, 123 Nev. 44, 49, 152 P.3d 737, 740 (2007). Alternatively, a writ of prohibition may issue to “arrest[] the proceedings of any tribunal . . . when such proceedings are without or in excess of the jurisdiction of such tribunal.” NRS 34.320. Writs of mandamus and prohibition are proper vehicles to control a district court’s alleged unauthorized exercise of jurisdiction during child custody proceedings. *See Friedman v. Eighth Jud. Dist. Ct.*, 127 Nev. 842, 854, 264 P.3d 1161, 1169 (2011) (“And, while discretionary, issuing writs [of prohibition and mandamus] to ensure that courts comply with the subject matter jurisdiction laws embodied by the UCCJEA is proper.”). This court may also exercise its discretion to consider a writ petition when “an important issue of law needs clarification.” *Int’l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 559 (2008).

Erika contends that the district court lacks jurisdiction over child custody matters in this case. She argues that California, rather than Nevada, has home state jurisdiction because the children only lived in Nevada from August 4 until their departure on January 31—less than six consecutive months. *Cf.* NRS 125A.085(1). Michael responds that the district court properly exercised jurisdiction because the children’s absence from Nevada between January 31 and February 26 was temporary, such that they resided in Nevada from August 4 to February 26—more than six consecutive months. We elect to entertain Erika’s extraordinary writ petition to clarify an important and unsettled issue of law: how Nevada’s district courts should evaluate whether a child’s absence from the state is “temporary” under the UCCJEA. In doing so, we conclude that the district court properly assumed home state jurisdiction.

The district court correctly found that Nevada has home state jurisdiction

Subject matter jurisdiction over child custody issues is governed by the UCCJEA. NRS 125A.305. The UCCJEA elevates the “home state” to principal importance in child custody determinations. *Id.*; *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). “Home state” is defined as “[t]he state in which a child lived with a parent . . . for at least 6 consecutive months, *including any temporary absence from the state*, immediately before the commencement of a child custody proceeding.” NRS 125A.085(1) (emphasis added).

“Thus, the definition ‘permits a period of temporary absence during the six-month time frame necessary to establish home-state residency.’” *Ogawa*, 125 Nev. at 668, 221 P.3d at 704 (quoting *Felty v. Felty*, 882 N.Y.S.2d 504, 508 (App. Div. 2009)). If Nevada either is the child’s home state on the date that custody proceedings commence, or if Nevada was the child’s home state within six months before the proceedings commenced and the child is absent from the state but a parent continues to live in Nevada, then Nevada courts have jurisdictional priority to make initial child custody determinations. NRS 125A.305(1)(a).

Subject matter jurisdiction, including home state jurisdiction under the UCCJEA, is a question of law subject to de novo review. *Ogawa*, 125 Nev. at 667, 221 P.3d at 704. “Although de novo, our review properly includes decisions from other UCCJEA states so as to harmonize our law with theirs.” *Friedman*, 127 Nev. at 847, 264 P.3d at 1165 (citing NRS 125A.605). The district court’s factual findings are given deference and will be upheld so long as “they are supported by substantial evidence, which is evidence that a reasonable person may accept as adequate to sustain a judgment.” *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007) (footnote omitted).

Neither the UCCJEA nor other Nevada statutes define “temporary absence,” and there is no single uniform test or definition that all UCCJEA states apply when evaluating whether an absence is temporary for purposes of determining home state jurisdiction. However, in *Antonetti v. Westerhausen*, the Arizona Court of Appeals examined how other jurisdictions evaluate whether an absence is “temporary” and found that states generally use one of three tests: (1) the duration test, (2) the intent test, or (3) the totality of the circumstances test. 523 P.3d 969, 973-74 (Ariz. Ct. App. 2023).

The duration test “focuses strictly on the length of the child’s absence,” and shorter absences are more likely to be considered temporary than longer ones. *Id.* at 974. However, this test fails to account for either longer absences intended to be temporary or shorter absences that later become permanent. *See, e.g., Ogawa*, 125 Nev. at 663, 221 P.3d at 701 (noting that the children left Nevada for a temporary three-month vacation before the children’s father refused to return them). The intent test, on the other hand, “requires courts to consider the parents’ purpose for an absence to determine whether it should be deemed temporary.” *Antonetti*, 523 P.3d at 974. One drawback to this approach is “the general difficulty of divining parties’ intent,” which may change over time. *Id.* Further, the parties’ intentions may be conflicting or disputed, as they were in this case.

The last approach is the totality of the circumstances test. “As the name indicates, the test looks at all the surrounding circumstances of a purported temporary absence, including intent of the parties and duration of the absence, to assess whether the absence should

be treated as a temporary departure from a putative home state.” *In re Marriage of Schwartz & Battini*, 410 P.3d 319, 325 (Or. Ct. App. 2017). Other relevant considerations may include a parent’s wrongful withholding of a child, *see Ogawa*, 125 Nev. at 668, 221 P.3d at 704; “under what circumstances the child came to and remained in the state,” *In re Marriage of Richardson & Richardson*, 625 N.E.2d 1122, 1124 (Ill. App. Ct. 1993); and when the nonmoving parent “had reason to recognize that the child’s relocation was permanent,” *Antonetti*, 523 P.3d at 975.

The totality of the circumstances test is the most commonly used approach among other jurisdictions that adopted the UCCJEA. *Antonetti*, 523 P.3d at 974. Having considered the various approaches, we too adopt the totality of the circumstances test, which offers the greatest flexibility for the district courts to consider a wide array of relevant factors. *See* NRS 125A.605; *see also Kemp v. Turqueza*, No. 86347, 2024 WL 396207, at *3 (Nev. Jan. 31, 2024) (Order of Affirmance) (affirming the district court’s application of the totality of the circumstances test to evaluate whether a child’s absence from their home country was temporary).

In this case, although the district court did not expressly reference the “totality of the circumstances” test in its decision and order, the court nonetheless addressed the pertinent factors to conclude that Nevada was the children’s home state notwithstanding their temporary absence from January 31 to February 26. Further, the court’s findings were supported by substantial evidence in the record and reflect its credibility determinations, which we do not reweigh on appeal. *See Ellis*, 123 Nev. at 152, 161 P.3d at 244 (“[W]e leave witness credibility determinations to the district court and will not reweigh credibility on appeal.”).

First, the district court addressed the parties’ intent. *See Antonetti*, 523 P.3d at 974. The court considered Erika’s testimony that she left Nevada because of domestic violence, as well as Michael’s testimony that he believed Erika would return with the children, and concluded that Michael was “more credible” than Erika when it came to the parties’ intentions. Although a moving parent’s relocation is generally not weighed against them when the move is to protect the parent or child from domestic violence, *see Felty*, 882 N.Y.S.2d at 509, the court expressly found that Erika did not remove the children from Nevada to protect them from domestic violence, but rather did so to defeat home state jurisdiction. The district court reasoned that Erika could have timely sought a protection order in Nevada if she feared for her safety; but instead, she waited until after Michael filed for divorce to apply for a restraining order in California.

The district court also noted that Erika did not inform Michael beforehand that she was taking their children to San Diego, nor did

she obtain his permission to leave with the children. *See Ogawa*, 125 Nev. at 668-69, 221 P.3d at 704-05 (affirming the district court's decision that the time from one parent's wrongful withholding of the children to the point when the other parent filed an emergency motion for the children's return was a temporary absence). The court further took into account Erika's participation in therapy with Michael during the month of February, which gave rise to an expectation that she and the children would return to Nevada.

Next, the district court considered the duration of the children's absence from Nevada and the timing of their departure. *See Antonetti*, 523 P.3d at 974. In this regard, the court specifically recognized that, up to the point that Erika unilaterally removed the children, they had resided in Nevada for just four days less than six consecutive months. Thus, the timing of the children's removal further supported the district court's conclusion that Erika's intent in leaving was to defeat home state jurisdiction and not to escape domestic violence.⁴

Finally, the district court evaluated the reasons why the children came to and remained in Nevada, *see In re Marriage of Richardson*, 625 N.E.2d at 1124, crediting Michael's testimony that the children's private school in Nevada was superior to the one they attended in San Diego. The court acknowledged that until the end of February, the children were still enrolled in their Nevada school, and it found that the children's continued enrollment gave the expectation they would return to Nevada.

In this case, substantial evidence in the record supports the district court's finding that Nevada was the children's home state, notwithstanding the children's temporary absence from January 31 to February 26. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704 (noting that "testimony and other evidence in the record substantially supports the district court's finding" that the children's absence was intended to be temporary). Therefore, the children effectively resided in Nevada from August 4, 2022, until February 26, 2023—a period of 206 days, or 6 months and 22 days. Because the children

⁴Erika argues that the district court erred in referencing her "unjustifiable conduct" in removing the children from Nevada without notice or permission to find that Nevada was the children's home state under NRS 125A.375(1). While the plain language of NRS 125A.375(1) permits a court to *decline* jurisdiction in certain circumstances based on a parent's unjustifiable conduct, this statute does not establish grounds for a court to *assert* jurisdiction. To the extent the district court relied on this statute as an independent basis to assert jurisdiction, this was error. Nevertheless, because the totality of the circumstances supports the district court's finding that Nevada was the children's home state as defined in NRS 125A.085(1), we conclude that any error by the district court in referencing "unjustifiable conduct" was harmless. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (noting this court will affirm a district court's order if the right result is reached, albeit for the wrong reason).

resided here for more than six consecutive months, Nevada was the children's home state on the day that proceedings commenced, and Nevada has jurisdiction over the child custody issues in this case.⁵ NRS 125A.305(1)(a).

CONCLUSION

District courts should consider all relevant information under the totality of the circumstances when evaluating whether a child's absence from a state is temporary for purposes of determining home state jurisdiction under the UCCJEA. In this case, the district court considered the parties' intent, the duration of the children's absence, and several other pertinent factors to find that Erika's removal of the children from Nevada did not defeat home state jurisdiction. This finding is supported by substantial evidence in the record, and so we conclude that the district court correctly assumed home state jurisdiction over the child custody issues. Accordingly, we deny Erika's writ petition.

GIBBONS, C.J., and BULLA, J., concur.

⁵Erika further argues that this case should be reassigned to a different judge on remand. Judges are presumed to be impartial, and the burden is on the party asserting bias to show otherwise. *See Ybarra v. State*, 127 Nev. 47, 51, 247 P.3d 269, 272 (2011); *see also Roe v. Roe*, 139 Nev. 163, 180, 535 P.3d 274, 291 (Ct. App. 2023). We conclude that Erika failed to establish that the judge was biased or that reassignment is necessary. Insofar as Erika raised other issues not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

FAHD MASHIN DAYANI, PETITIONER, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ERIC JOHNSON, DISTRICT JUDGE, RESPONDENTS, AND THE STATE OF NEVADA, REAL PARTY IN INTEREST.

No. 86847

August 22, 2024

554 P.3d 222

Original petition for a writ of mandamus or prohibition challenging a district court order denying a motion to dismiss a criminal indictment.

Petition granted.

Clark Hill PLLC and Dominic P. Gentile, Austin T. Barnum, and Tiffany Solari, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; Steven B. Wolfson, District Attorney, Christopher J. Lalli, Assistant District Attorney, and Jonathan E. VanBoskerck, Chief Deputy District Attorney, Clark County, for Real Party in Interest.

Before the Supreme Court, STIGLICH, PICKERING, and PARRAGUIRRE, JJ.

OPINION

By the Court, PARRAGUIRRE, J.:

This original petition for a writ of mandamus or prohibition challenges a district court order denying a motion to dismiss an indictment based on alleged violations of NRS 172.145(2). We clarify that a challenge under NRS 172.145(2) may properly be brought through a motion to dismiss. Here, because the district court had a duty to hear Dayani's motion on its merits, we grant the petition.

FACTS AND PROCEDURAL HISTORY

Petitioner Fahd Dayani was on house arrest pending an unrelated trial. Pursuant to the terms of his house arrest, officers conducted a warrantless compliance check on his residence and found methamphetamine and heroin in a hallway bathroom. Dayani was arrested and charged with two counts of trafficking in a controlled substance. On the same day as Dayani's arrest, his cousin, Alina Jagshi, made incriminating statements to police officers indicating that the drugs belonged to her rather than Dayani. Leading up to the grand jury proceedings regarding Dayani's trafficking charges, Dayani's counsel sent emails to the district attorney's office bringing their attention

to Jagshi's apparent third-party confession, which he claimed was recorded on an officer's body-worn camera.

Prosecutors brought the charges before a grand jury in July 2022. The State did not provide the grand jury with the video recording of Jagshi's confession but did briefly recount what Dayani's counsel had stated in the email correspondence about Jagshi's confession. There was also testimony from two officers present during the search of Dayani's residence, both of whom testified that the bathroom in which the drugs were found was the only bathroom in the house. The prosecution did not question the officers' statements even though there was, in fact, a second bathroom attached to the room in which Dayani stayed, and Dayani mentioned the second bathroom to officers when he was arrested. The grand jury indicted Dayani on both counts, and he was arraigned on the indictment on July 14, 2022. Over 200 days later, on February 2, 2023, Dayani filed what was titled, "Defendant Fahd Mohsin Dayani's Motion to Dismiss." The motion argued that the State violated NRS 172.145(2) by failing to introduce exculpatory evidence, namely, the video recording of Jagshi's confession, other evidence that may have corroborated the confession, and the existence of a second bathroom.

The district court construed the motion as a pretrial petition for a writ of habeas corpus and denied it as untimely pursuant to NRS 34.700(1)(a)'s 21-day deadline. Dayani then filed the instant petition for a writ of mandamus or prohibition with this court, arguing that the district court improperly construed the motion as an untimely pretrial habeas petition. He asserts that his arguments were properly brought as a motion to dismiss and, thus, the 21-day time limit for filing a pretrial habeas petition does not apply to his motion and the district court should have considered the motion on its merits.

DISCUSSION

This court may issue a writ of mandamus "to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station." *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); NRS 34.160.¹ Writ relief is an extraordinary remedy, and it is therefore "within the discretion of this court to determine if a petition will be considered." *Clay v. Eighth Jud. Dist. Ct.*, 129 Nev. 445, 450, 305 P.3d 898, 901 (2013). This court will exercise its discretion to consider petitions for extraordinary writs "where there is not a plain, speedy and adequate remedy in the ordinary course of law," NRS 34.170, especially where "there are either urgent circumstances or important

¹Dayani filed a petition for a writ of mandamus or, alternatively, prohibition. Mandamus is the appropriate procedure here because Dayani does not allege that the district court lacked jurisdiction to hear his motion. See NRS 34.320. Thus, this opinion addresses only mandamus.

legal issues that need clarification in order to promote judicial economy and administration,” *Cheung v. Eighth Jud. Dist. Ct.*, 121 Nev. 867, 869, 124 P.3d 550, 552 (2005).

We exercise our jurisdictional discretion to review this mandamus petition because it presents an important legal issue requiring clarification to promote judicial economy and administration: the proper procedure for bringing challenges under NRS 172.145(2). Challenges under NRS 172.145(2) have come before this court through both motions to dismiss and pretrial habeas petitions, and we have not previously addressed the proper vehicle by which to bring such a challenge. Further, Dayani’s underlying motion was based on an alleged error in the grand jury proceeding, and “any error in the grand-jury proceeding is likely to be harmless after a conviction.” *Clay*, 129 Nev. at 450, 305 P.3d at 901. Thus, Dayani may not have an adequate remedy in the ordinary course of law. *Id.* at 449-50, 305 P.3d at 901.

NRS 172.145(2) states, “If the district attorney is aware of any evidence which will explain away the charge, the district attorney shall submit it to the grand jury.” There is no Nevada caselaw directly discussing whether a challenge under this statute should be brought via a habeas petition or a motion to dismiss, though the answer to that question significantly impacts the available time frame for bringing such a challenge. In fact, our caselaw is somewhat supportive of both methods. For example, in *State v. Babayan*, we upheld the granting of a motion to dismiss partially based on violations of NRS 172.145(2). 106 Nev. 155, 787 P.2d 805 (1990); *see also King v. State*, 116 Nev. 349, 358-59, 998 P.2d 1172, 1178 (2000) (reviewing, but not commenting on the propriety of, a motion to dismiss partly based on alleged violations of NRS 172.145(2)). But we have also reviewed decisions on pretrial petitions for a writ of habeas corpus alleging violations of NRS 172.145(2) without commenting on whether those challenges were brought through the correct procedural vehicle. *See, e.g., Moran v. Schwarz*, 108 Nev. 200, 202, 826 P.2d 952, 953 (1992); *Sheriff v. Harrington*, 108 Nev. 869, 871, 840 P.2d 588, 588-89 (1992); *Ostman v. Eighth Jud. Dist. Ct.*, 107 Nev. 563, 565, 816 P.2d 458, 459 (1991).

Our lack of discussion regarding the correct method by which to bring NRS 172.145(2) challenges merely reflects a lack of procedural challenges brought by the parties in such cases. Nonetheless, we recognize that this silence may have led to confusion among courts and practitioners as to the proper vehicle through which a challenge of this nature may be brought. *See, e.g., Schuster v. Eighth Jud. Dist. Ct.*, 123 Nev. 187, 188, 160 P.3d 873, 874 (2007) (noting that the defendant filed a “pretrial petition for a writ of habeas corpus *and/or* motion to dismiss a grand jury indictment” implicating questions under NRS 172.145(2), presumably because

the defendant's attorney was unsure which was the correct procedure (emphasis added)). Thus, we turn to statutory interpretation to resolve the matter at hand.

"Statutory interpretation is a question of law subject to de novo review." *State v. Catanio*, 120 Nev. 1030, 1033, 102 P.3d 588, 590 (2004). NRS 172.155(2) states, "The defendant may object to the *sufficiency of the evidence* to sustain the indictment *only* by application for a writ of habeas corpus." (Emphases added.) Pretrial habeas petitions must be brought "within 21 days after the first appearance [by the defendant] in the district court." NRS 34.700(1)(a). On the other hand, NRS 174.105(1) states, "Defenses and objections based on defects in the institution of the prosecution, *other than insufficiency of the evidence* to warrant an indictment, . . . may be raised only by motion before trial." (Emphasis added.) The only statutory time limit for bringing such a motion to dismiss is "before trial."² *Id.* Based on the plain language of these statutes, the question a district court must answer in deciding whether the 21-day time limit applies is whether the motion or petition challenges the sufficiency of the evidence to sustain the indictment. *Cf. Smith v. Zilverberg*, 137 Nev. 65, 72, 481 P.3d 1222, 1230 (2021) ("If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction.").

Turning back to NRS 172.145(2), we hold that a challenge alleging a failure to submit exculpatory evidence under this statute is not a challenge to the sufficiency of the evidence to sustain the indictment. Rather, in cases in which we have concluded that the State violated NRS 172.145(2), we have considered whether the violation "irreparably impaired the independent function of the grand jury," *Ostman*, 107 Nev. at 565, 816 P.2d at 459, which is a distinct inquiry from whether the State submitted sufficient evidence to sustain the indictment. A challenge under NRS 172.145(2) goes to the heart of the grand jury proceeding and asks whether the State has lived up to its mandate to ensure a fundamentally fair grand jury process. It is therefore a challenge "based on defects in the institution of the prosecution, other than insufficiency of the evidence to warrant an indictment." NRS 174.105(1). Thus, challenges alleging a failure of the State to submit exculpatory evidence may be properly brought through a motion to dismiss.³

Here, Dayani's motion to dismiss argued that the State violated NRS 172.145(2) by failing to present evidence of Jagshi's confession,

²However, local courts often prescribe their own deadlines for bringing a motion to dismiss an indictment.

³While issues involving exculpatory evidence under NRS 172.145(2) may be raised by motion to dismiss, nothing in this opinion should be read as limiting pretrial habeas petitions to arguments challenging the sufficiency of the evidence.

other evidence that may have corroborated the confession, and evidence of the existence of a second bathroom within Dayani's residence. In essence, Dayani challenged the fairness of his grand jury proceedings, not whether the State's submitted inculpatory evidence was sufficient to sustain the indictment. Consequently, the district court had a duty to review the allegations and dismiss the indictment if it concluded that the State did, in fact, violate NRS 172.145(2) in a manner requiring dismissal. *See Ostman*, 107 Nev. at 565, 816 P.2d at 459 (noting the district court "had a duty to dismiss [the] indictment" where the prosecutor failed to present exculpatory evidence). By declining to consider the motion on its merits, the district court neglected its duty.

CONCLUSION

Challenges alleging violations of NRS 172.145(2) may be properly brought via a motion to dismiss and are not confined by the time limits NRS 34.700(1)(a) imposes for pretrial habeas petitions. Here, the district court had a duty to consider Dayani's motion on the merits. We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order denying Dayani's motion to dismiss and to consider the motion on the merits.

STIGLICH and PICKERING, JJ., concur.
