

THOMAS LABS, LLC, AN ARIZONA LIMITED LIABILITY COMPANY,
APPELLANT, v. AMBER MARIE DUKES, BY AND THROUGH
THE SPECIAL ADMINISTRATOR OF HER ESTATE, RESPONDENT.

No. 85946

August 22, 2024

555 P.3d 260

Appeal from a district court order denying a motion to substitute a party and dismissing claims pursuant to NRCP 25(a)(1). Eighth Judicial District Court, Clark County; Nancy L. Allf, Judge.

Reversed and remanded.

Gibbs Giden Locher Turner Senet & Wittbrodt LLP and Daniel M. Hansen, Las Vegas, for Appellant.

The Law Offices of Patrick Driscoll, LLC, and Patrick R. Driscoll, Jr., Henderson, for Respondent.

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

OPINION

By the Court, BELL, J.:

This opinion clarifies duties arising when a party dies during litigation. After the death of a party, the decedent's attorney—typically in the best position to identify a successor or representative—bears the burden to ensure litigation continues. The decedent's attorney has a responsibility under NRS 7.075 to file a notice of death and serve the notice on the other parties in the case. Under NRCP 25(a), service of the notice of death also must be made on the decedent's successors or representatives. Full compliance with NRCP 25(a) starts a 180-day deadline to substitute in the proper party. Regardless, under NRS 7.075, the decedent's attorney also has a responsibility to substitute a proper party within 90 days of the client's death.

Below, Amber Dukes's counsel filed a notice of Dukes's death but failed to serve the notice on any nonparty successors or representatives, so the 180-day deadline under NRCP 25 never started. Counsel additionally failed to identify and substitute the appropriate proper party as required by NRS 7.075. Despite these issues, the district court granted a motion to dismiss the case against Dukes. We reverse the district court's order and remand for the district court to substitute a special administrator for Dukes so the case may be adjudicated on the merits.

FACTS AND PROCEDURAL HISTORY

Dukes owned a veterinary supply company that bought and resold products from Thomas Labs, LLC. Thomas Labs sued Dukes and her company for money owed on products delivered. After litigation began, Dukes and her boyfriend, Jason Hilliard, executed “The Hilliard-Dukes Revocable Living Trust.” The Trust held Dukes’s property. Both Dukes and Hilliard served as trustees.

Several years into the litigation, Dukes died. Dukes’s counsel filed a notice of death on the record on January 12, 2021. Counsel served the other parties to the case through the district court’s electronic system but never took any action to identify, notice, or serve any executor, personal representative, or next of kin for Dukes. Counsel also took no action to substitute another party in place of Dukes.

On March 12, 2021, Thomas Labs moved to substitute the Trust and Hilliard, as trustee, for Dukes. Thomas Labs served the motion to substitute on Dukes’s counsel and Hilliard. Neither counsel, Hilliard, nor the Trust opposed Thomas Labs’s motion. The district court granted the unopposed motion and substituted the Trust and Hilliard for Dukes. Thomas Labs then served discovery requests on the Trust and Hilliard and the case proceeded.

Approximately 300 days after the initial notice of death, a different law firm filed Dukes’s will in probate court. The will appointed Dukes’s brother Lynn Hill as personal representative. After the will was filed, Dukes’s counsel in the civil case moved to dismiss Thomas Labs’s causes of action against Hilliard, the Trust, and Dukes. Counsel claimed that neither Hilliard nor the Trust were the proper personal representatives so neither should have been substituted for Dukes. The district court entered an order dismissing Hilliard and the Trust, but the court returned Dukes to the suit.

Before entry of the order dismissing Hilliard and the Trust as representatives, Thomas Labs reached out to the named parties in the will. All named parties disclaimed interest in serving as Dukes’s administrator at the time. Thomas Labs then petitioned the probate court for the appointment of a special administrator, Shara Berry, a paralegal in the law offices representing Thomas Labs. After the probate court granted the motion, Thomas Labs moved in the civil case to substitute the now-appointed special administrator as the proper party to continue the litigation in Dukes’s stead. Two days before the hearing on the motion to substitute, Hill challenged Berry’s appointment as special administrator in probate court and sought to replace Berry. Hill was then appointed as special administrator by the probate court.

Meanwhile, in the civil case, Dukes’s counsel responded to Thomas Labs’s attempt to substitute in the special administrator by moving to dismiss the case against Dukes under NRCP 25. Counsel claimed the 180-day deadline for moving to substitute a personal representative had passed without a motion for substitution of a

proper party. Thomas Labs opposed, arguing that counsel had failed to serve the notice of death on nonparty successors or representatives of Dukes, meaning the 180-day clock never started and the new motion to substitute was timely.

The district court denied Thomas Labs's motion to substitute as untimely and granted the motion to dismiss under NRCP 25. The district court concluded that service of the original notice of death on the parties, only, triggered the 180-day deadline for moving to substitute under NRCP 25 and the deadline had elapsed. The district court decided as a matter of law that Dukes's counsel would have to serve a nonparty successor or representative of Dukes only if such a person existed when the notice of death was filed. Because no court-appointed executor or administrator existed when Dukes's counsel filed the notice of death, the district court found serving the parties alone triggered the 180-day clock. The district court summarily concluded that Thomas Labs failed to demonstrate excusable neglect, and the court declined to enlarge the time to substitute. The district court dismissed all claims against Dukes. Thomas Labs appeals.

DISCUSSION

Thomas Labs argues that the district court improperly dismissed Thomas Labs's claims against Dukes and misinterpreted NRCP 25(a), as informed by NRS 7.075. This case turns on the legal interpretation of NRCP 25 and NRS 7.075. This court reviews legal interpretations by the district court de novo. *See Gonor v. Dale*, 134 Nev. 898, 899, 432 P.3d 723, 724 (2018). We first address the requirements for proper service of a notice of death under NRCP 25(a). We next turn to the interrelated statutory obligations of a decedent's attorney under NRS 7.075.

Under NRCP 25(a), when decedent's counsel files a notice of death, in addition to serving the parties, counsel must serve the notice on eligible nonparty successors or representatives to trigger the 180-day deadline for dismissal. Additionally, NRS 7.075 requires the decedent's counsel to file a motion to substitute a proper party for the deceased client within 90 days of the client's death. In this case, the 180-day NRCP 25(a) deadline was never triggered, and the district court erred by dismissing the case based on the running of that deadline. Because we reverse and remand on this issue, we need not reach Thomas Labs's other arguments concerning the amended notice of death or excusable neglect.

When decedent's counsel files a notice of the decedent's death, NRCP 25(a) requires service on nonparty successors or representatives before the 180-day deadline begins to run

In Nevada generally, "no cause of action is lost by reason of the death of any person, but may be maintained by or against the person's executor or administrator." NRS 41.100. To preserve causes of

action after the death of a party, NRCP 25(a) provides that any party or the decedent's successor or representative may move to substitute a "proper party" in the decedent's place. If substitution of the proper party is not sought within 180 days of service of the notice of death, however, the case "must be dismissed." NRCP 25(a)(1). "A motion to substitute must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4," and "[a] statement noting death must be served in the same manner." NRCP 25(a)(3).

NRCP 25 works in tandem with NRS 7.075, which governs counsel's duties upon the death of a client under representation in a pending action. *See* NRCP 25 advisory committee's note to 2019 amendment. Under the tandem operation of NRCP 25(a) and NRS 7.075, while anyone may file the notice of death and move for substitution within the 180-day deadline, the decedent's counsel bears ultimate responsibility to act and faces sanctions for failing to take action. *See* NRS 7.075 ("An attorney at law who represents any person who is a party to an action pending before any court shall . . . file a notice of death and a motion for substitution of a party with the court.").

The issue here is who must be served to trigger the 180-day period for requesting substitution under NRCP 25(a). This court has addressed the NRCP 25(a) service requirement in the past. In *Gonor v. Dale*, we concluded "a plain reading of NRCP 25(a)(1) requires that the [notice] of death . . . be served on parties and/or nonparties before the [time] period is triggered." 134 Nev. at 900, 432 P.3d at 725. *Gonor* followed Ninth Circuit Court of Appeals caselaw in holding that the 180-day deadline in NRCP 25(a)(1) "is triggered by two affirmative actions: (1) 'a party must formally suggest the death of the party upon the record,' and (2) 'the [noticing] party must serve other parties and nonparty successors or representatives of the deceased with a [notice] of death.'" *Id.* at 900-01, 432 P.3d at 725 (quoting *Barlow v. Ground*, 39 F.3d 231, 233 (9th Cir. 1994)). At the same time, a notice of death filed by an opposing party, rather than decedent's counsel, need not be served on decedent's nonparty successors or representatives to trigger the 180-day deadline. *Id.* at 900, 432 P.3d at 725 (citing *Moseley v. Eighth Jud. Dist. Ct.*, 124 Nev. 654, 660-61, 188 P.3d 1136, 1141 (2008)). This relaxed service requirement for notices coming from an opposing party avoids placing the burden on an opposing party of having to speculate as to the identity of a decedent's successors or representatives. *Moseley*, 124 Nev. at 661, 188 P.3d at 1141.

We now clarify that when a decedent's attorney notices their client's death, nonparty successors or representatives must be served to start the 180-day clock for dismissal. Unlike an opposing party, a decedent's counsel typically is in an excellent position to identify the decedent's successors or representatives. If no clear successors

or representatives exist at the time of a party's death, the decedent's attorney—who bears the ultimate responsibility to file and serve the notice of death and ensure a representative is properly substituted—may work through probate to appoint a special administrator to serve as the decedent's representative and facilitate proper service. See NRS 139.040(1)(j) (allowing “any person or persons legally qualified” to administer an estate once all other persons with priority have declined); NRCP 25(a) (requiring participation from the decedent's “successor or representative”). A decedent's attorney who files the notice of death must serve the other parties and also nonparty successors or representatives of the deceased. Until these service conditions are met, the 180-day deadline does not start.

The district court here erroneously concluded a decedent's attorney was not required to serve nonparty successors or representatives with the notice of death when no clear representative was known at the time the notice was filed. In dismissing the case against Dukes, the district court relied heavily on *McNamee v. Eighth Judicial District Court*. 135 Nev. 392, 450 P.3d 906 (2019). *McNamee* held that a notice of death need not identify the deceased's successor or representative on the face of the notice to trigger the 180-day deadline because NRCP 25(a)(1) did not require the representative to be named in the notice. *Id.* at 395-96, 450 P.3d at 909-10. The logic of *McNamee* does not assist when examining the service requirement for nonparties. While no rule requires naming a successor in a notice of death, the service of nonparties is explicitly contemplated by the text of the rule. See NRCP 25(a)(3) (“A motion to substitute must be served on the parties as provided in Rule 5 and on nonparties as provided in Rule 4. A statement noting death must be served in the same manner.” (emphases added)).

McNamee also did not overrule *Gonor*. We reaffirm the holdings of both cases. While *McNamee* focuses on the requirements for the notice itself, the case only briefly mentions service: “once the [notice] of death is filed on the record and served upon the appropriate parties, the deadline in NRCP 25(a)(1) for filing a motion to substitute is triggered.” 135 Nev. at 396, 450 P.3d at 910 (emphasis added). *McNamee* never explains what is meant by “the appropriate parties,” but the analysis from *Gonor* provides the answer. While a notice of death need not identify the deceased's successor or representative on its face to be sufficient per *McNamee*, the notice of death filed by the decedent's attorney must still be served on a nonparty successor or representative to meet the service requirement of NRCP 25(a)(1) per *Gonor*.

In this case, the 180-day deadline to move for substitution never started. After filing the notice of death, Dukes's counsel failed to serve the nonparty successors or representatives of Dukes in order to trigger the 180-day deadline for dismissal. *Gonor*, 134 Nev. at

900-01, 432 P.3d at 725. Counsel filed the notice of death through the district court's e-filing system, which electronically served the other parties to the case. Counsel never served any successors or representatives of Dukes. Because service on a representative or successor is required by *Gonor*, the NRCP 25(a)(1) 180-day deadline never started, and the case should not have been dismissed. The failures of decedent's counsel should not provide a tactical advantage in litigation because, as we discuss next, responsibility in this matter ultimately rests with decedent's counsel.

NRS 7.075 requires decedent's counsel to substitute an eligible party within 90 days

The burden of substitution also rests with the decedent's counsel under statute. If a party to an action dies, the decedent's attorney "shall, within 90 days after the death of that person, file a notice of death and a motion for substitution of a party with the court and cause a copy of that notice and motion to be served upon every other party to the action." NRS 7.075. The court may impose sanctions on a decedent's attorney who fails to meet this obligation, including attorney fees and costs. *Id.* The substitution requirement imposed by NRS 7.075 operates in conjunction with the notice and service rules established by NRCP 25(a). NRCP 25 advisory committee's note to 2019 amendment.

"When a statute's language is clear and unambiguous, it must be given its plain meaning, unless doing so violates the spirit of the act." *D.R. Horton, Inc. v. Eighth Jud. Dist. Ct.*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007) (internal quotation marks omitted). NRS 7.075 clearly and unambiguously requires decedent's counsel to move to substitute someone who can continue representing their client's interests within 90 days of the client's death. Nothing in this opinion, however, should be taken to suggest this responsibility precludes any other individual from acting to substitute a proper party for a decedent consistent with applicable law. If another party or the decedent's successor or representative acts faster and moves to substitute a proper party within those 90 days, the decedent's attorney would be relieved of this duty.

Here, Dukes's counsel neglected his statutory obligations under NRS 7.075. Counsel failed to file a motion to substitute a party capable of representing his deceased client's interest within 90 days of her death. Thomas Labs's motion to substitute Hilliard and the Trust did not relieve Dukes's counsel of these statutory obligations because Hilliard and the Trust, as agreed by all concerned, were improper parties to represent Dukes's interest. Ultimate responsibility to ensure that a motion to substitute a party capable of representing the decedent's interest remains with the decedent's attorney. Because 90 days from Dukes's death passed and no motion

to substitute a proper party was before the court, Dukes's counsel violated the clear and unambiguous requirements of NRS 7.075.

CONCLUSION

Decedent's counsel failed to serve nonparty successors or representatives after filing a notice of death. Because the nonparty successors or representatives were never served, the NRCP 25(a) deadline never started running. The district court erred by determining that counsel did not need to serve nonparty successors or representatives and by dismissing the case because no proper motion for substitution had been filed within the 180-day deadline under NRCP 25(e). As a result, we reverse the district court's order dismissing the case and remand for the district court to substitute a special administrator for Dukes so the case may be adjudicated on the merits.

HERNDON and LEE, JJ., concur.

YUMILA CARDENAS-GARCIA, PETITIONER, v. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE STEPHANIE CHARTER, DISTRICT JUDGE, RESPONDENTS, AND CLARK COUNTY DEPARTMENT OF FAMILY SERVICES; AND Z.K., A MINOR, REAL PARTIES IN INTEREST.

No. 87414

August 22, 2024

554 P.3d 231

Original petition for a writ of mandamus challenging a district court order denying petitioner’s motion to determine application of a statutory presumption against reunification in a child protection matter.

Petition denied.

[En banc reconsideration denied October 29, 2024]

BELL, J., dissented.

Resch Law, PLLC, dba *Conviction Solutions*, and *Jamie J. Resch*, Las Vegas, for Petitioner.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Donella M. Rowe*, Chief Deputy District Attorney, Clark County, for Real Party in Interest Clark County Department of Family Services.

Legal Aid Center of Southern Nevada, Inc., and *Kimberly M. Abbott*, Las Vegas, for Real Party in Interest Z.K.

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

OPINION

By the Court, LEE, J.:

When interpreting a statute, this court aims to effectuate the plain meaning of every word. The statute at issue, NRS 432B.555, requires parents in child protection proceedings who have “ever been convicted” of felony child abuse, neglect, or endangerment to prove by clear and convincing evidence that the child subject to the proceedings will not be harmed by reunification before the child can be released to the parent. Petitioner Yumila Cardenas-Garcia pleaded guilty to felony child abuse but was later allowed to withdraw that plea after the successful completion of probation. Cardenas-Garcia now seeks extraordinary writ relief directing the

district court to find that NRS 432B.555's presumption against reunification does not apply to her since her felony conviction has been voided. Because we conclude NRS 432B.555 applies to anyone who has ever previously been convicted of felony child abuse, regardless of the legal status of that conviction, we decline to issue the writ.

FACTS AND PROCEDURAL HISTORY

Real party in interest, six-year-old Z.K., was removed from Cardenas-Garcia's custody when conditions in her home were determined to be unlivable. Z.K. was placed in protective custody, and Cardenas-Garcia was charged with felony child abuse, neglect, or endangerment under NRS 200.508. Cardenas-Garcia pleaded no contest at the original custody hearing, and Z.K. remained in protective custody. As to the separate criminal case, Cardenas-Garcia pleaded guilty to the felony as part of a drop-down plea agreement.¹ A judgment of conviction was entered. Still, the terms of this drop-down agreement allowed Cardenas-Garcia to withdraw the felony guilty plea after successful completion of the terms of her probation and instead enter a plea of guilty to contributing to the delinquency of a minor, a misdemeanor.

After the criminal court entered the judgment of conviction but before she had completed probation, Cardenas-Garcia requested that the district court grant a hearing in the protective custody action to determine whether she had rebutted NRS 432B.555's presumption against reunification for parents who have "ever been convicted" of felony child abuse, neglect, or endangerment. The court conducted an evidentiary hearing and determined Cardenas-Garcia had not proven by clear and convincing evidence that Z.K. would not suffer physical or psychological harm if allowed to return to the home. The district court further noted that the statute would continue to bar reunification until Cardenas-Garcia could satisfy her burden of proof.

Several months later, Cardenas-Garcia successfully completed probation and was allowed to withdraw the felony guilty plea. With the felony conviction now vacated, Cardenas-Garcia again moved the district court for a determination regarding the continuing application of NRS 432B.555. The court noted that because of the withdrawn plea, "mother does not have a conviction[;] however, at the 555 presumption hearing[,] mother did not overcome the presumption." The court's written order confirms the court's reasoning

¹A drop-down plea agreement refers to a plea that allows a defendant to plead guilty to a felony, complete probation, then withdraw the guilty felony plea and instead plead guilty to an associated misdemeanor. *See, e.g., Ames v. State*, No. 69640-COA, 2016 WL 4070215 (Nev. Ct. App. July 26, 2016) (Order of Affirmance).

that because NRS 432B.555's presumption clearly applied at the prior hearing on the matter, Cardenas-Garcia failed to rebut the presumption. Cardenas-Garcia now petitions this court for a writ of mandamus instructing the district court to find that she does not have a felony conviction and need not meet the standard set under NRS 432B.555 to be eligible for possible reunification with Z.K.

DISCUSSION

A writ of mandamus is available to compel the performance of an act that the law requires or to control an arbitrary or capricious exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Jud. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). This court retains sole discretion on whether to grant extraordinary relief, and petitioners bear the burden of proving such intervention is necessary. *Smith v. Eighth Jud. Dist. Ct.*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991); *Pan v. Eighth Jud. Dist. Ct.*, 120 Nev. 222, 228, 88 P.3d 840, 844 (2004). We elect to consider the merits of this petition because it offers the opportunity, not otherwise available through appeal, to review an important statute regarding child custody in the first instance. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558. But because we determine NRS 432B.555 is properly applied to parents previously convicted of felony child abuse, neglect, or endangerment who have later had that conviction withdrawn, we decline to issue the requested relief.

We review questions of statutory interpretation de novo. *See id.* at 198, 179 P.3d at 559 (“Statutory interpretation is a question of law that we review de novo, even in the context of a writ petition.”). “Where a statute is clear and unambiguous, this court gives effect to the ordinary meaning of the plain language of the text without turning to other rules of construction.” *Chandra v. Schulte*, 135 Nev. 499, 501, 454 P.3d 740, 743 (2019). “In interpreting the plain language of a statute, we presume that the Legislature intended to use words in their usual and natural meaning.” *McGrath v. State, Dep’t of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007). Importantly, plain text analysis “should not render any part of a statute meaningless, and a statute’s language should not be read to produce absurd or unreasonable results.” *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (internal quotation marks omitted).

At issue is NRS 432B.555, which states, in relevant part, that in matters of child custody,

if the court determines that a custodial parent or guardian of a child has ever been convicted of a violation of NRS 200.508 [felony child abuse, neglect, or endangerment] or the law of another jurisdiction that prohibits the same or similar conduct, the court shall not release the child . . . to that custodial parent or guardian unless the court finds by clear and convincing

evidence presented at the proceeding that no physical or psychological harm to the child will result from the release of the child to that parent or guardian.

The plain text of NRS 432B.555, specifically the Legislature's use of the word "ever," persuades us that NRS 432B.555 does not provide an exception for parents who have had their convictions voided for certain legal purposes.

"Ever" means "always," "at any time," "in any way." *Ever*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2011). Cardenas-Garcia cannot dispute the clear fact that at one point, the court entered a judgment of conviction on the underlying felony. Giving effect to the term "ever" in the statute, Cardenas-Garcia's previous conviction is all NRS 432B.555 requires. Unlike our dissenting colleague, we do not construe our existing caselaw to mandate a different result. In *Standen v. State*, this court addressed whether a legally withdrawn or judicially invalidated guilty plea is admissible evidence at the subsequent trial where the jury will determine the defendant's guilt to the same crime that was the subject of the withdrawn or invalidated plea. 101 Nev. 725, 728, 710 P.2d 718, 720 (1985). This court held that where a jury is tasked with determining the guilt of a defendant, the jury cannot be allowed to hear evidence of the defendant's withdrawn or invalidated guilty plea. *Id.* The facts of *Standen* go no further than this basic proposition and do not otherwise speak to the collateral consequences of a guilty plea.

Likewise, we do not construe our precedent regarding withdrawn pleas to require this court to ignore the judgment of conviction entered prior to the withdrawn plea where the Legislature unambiguously intended all possible convictions be considered by including the word "ever" in the statute. In *In re Tiffie*, this court noted that after a guilty plea is withdrawn, the conviction based upon the withdrawn plea "no longer exist[s]." 137 Nev. 224, 226, 485 P.3d 1249, 1252 (2021). Nonetheless, NRS 432B.555's use of the word "ever" unambiguously directs courts to look backwards and beyond the legal fiction of a withdrawn guilty plea. Given the statute's instruction to look at any conviction of felony child abuse, neglect, or endangerment "ever" sustained, we simply cannot ignore the entry of a judgment of conviction to the underlying felony on the record here. Thus, we conclude NRS 432B.555 applies to those who later have their felony conviction vacated.

Standen and *In re Tiffie* are further distinguishable, as both reference criminal proceedings where the issue is confined to the impact on the criminal defendant of a withdrawn guilty plea. However, in the context of the child welfare statutes, priority is placed, as it should be, on the impact on minor children, specifically, avoiding harm to minor children, and we are convinced the plain text of NRS 432B.555 references all possible convictions of felony child abuse,

neglect, or endangerment. While the plain text is determinative, the policy rationales underpinning our interpretation of NRS 432B.555 are consistent with the overarching intent of the Legislature to structure child custody matters around the child's best interest. When a parent has been adjudicated guilty of felony child abuse, there are valid reasons to create a higher burden of proof before reunification regardless of any subsequent status change as a result of a withdrawn plea. We perceive no undue burden when parents remain free to present evidence to rebut the presumption reasonably put in place by the statute.

We note that NRS 432B.555 recognizes a parent's continued ability to attempt to rebut the presumption. Cardenas-Garcia has now successfully completed probation, and while that does not categorically remove her from the statute's purview, the district court can hear further evidence on whether she has, in fact, rebutted NRS 432B.555's presumption along with her progress in the criminal justice system. A parent does not have only one opportunity to rebut the NRS 432B.555 presumption. A district court should ensure the higher burden of proof imposed by the statute does not become, in practice, an insurmountable bar to reunification based on a prior conviction, particularly when that conviction has been vacated. Thus, a court should freely grant leave to present evidence relevant to the NRS 432B.555 determination throughout the protective custody proceedings when requested by a party who demonstrates a significant change in circumstances.

CONCLUSION

NRS 432B.555 imposes a higher burden of proof on reunification for parents who have "ever" been convicted of felony child abuse, neglect, or endangerment. A voided conviction does not alter the fact that Cardenas-Garcia was at one point convicted of the underlying offense, so we give effect to the Legislature's use of "ever" in the statute, confirming the NRS 432B.555 presumption unambiguously applies here. We therefore decline to issue the extraordinary relief sought and order this petition denied.

HERNDON, J., concurs.

BELL, J., dissenting:

Until today, this court has never considered a judgment based on a withdrawn plea to have any legal effect and, in fact, has consistently held the opposite. The majority relies exclusively on the legislature's use of the word "ever" in NRS 432B.555 to contradict this court's clear precedent. Yet, by exercise of law, Cardenas-Garcia never had a conviction for felony child abuse, neglect, or endangerment, and the statute cannot apply. For this reason, I dissent.

Nevada caselaw has consistently held the withdrawal of a guilty plea voids the underlying judgment as if the plea never existed. In *Standen v. State*, a criminal defendant pleaded guilty to murder. 99 Nev. 76, 77, 657 P.2d 1159, 1159 (1983). This court vacated the judgment and set aside the guilty plea. *Id.* at 80, 657 P.2d at 1162. At trial on remand, the jury was allowed to hear evidence that the defendant had previously pleaded guilty. *Standen v. State*, 101 Nev. 725, 727, 710 P.2d 718, 719 (1985). This court, reversing the subsequent judgment, held “[a] prior guilty plea that has been legally withdrawn or judicially invalidated is deemed never to have existed.” *Id.* at 728, 710 P.2d at 720.

Just three years ago, in *In re Tiffie*, this court reaffirmed that a withdrawn plea must be treated, in all respects, as a nullity. 137 Nev. 224, 226, 485 P.3d 1249, 1252 (2021). *Tiffie* concerns facts similar to this case. There, a criminal defendant pleaded guilty to the felony of luring children. After completing probation, the defendant was allowed to withdraw the felony plea and enter a plea of guilty to a misdemeanor. *Id.* at 225, 485 P.3d at 1251. The defendant then sought to seal his criminal record. *Id.* The State opposed because a statute prohibits the sealing of criminal records of an individual with a conviction for felony luring. *Id.* This court found that the district court erroneously applied the statute to bar sealing because, after successfully withdrawing the initial guilty plea, the defendant “legally and factually returned to the situation he occupied before he entered the initial guilty plea, subject to the subsequent guilty plea.” *Id.* at 226, 485 P.3d at 1252. This court prevented the district court from considering the luring conviction when deciding whether to seal Tiffie’s records because the conviction did not exist. *Id.*

Likewise, based on this court’s binding precedent, after Cardenas-Garcia legally withdrew the felony guilty plea, she is deemed to have never been convicted of the requisite offense to trigger NRS 432B.555. Because Cardenas-Garcia’s felony conviction does not exist, I would issue the requested writ. The majority attempts to distinguish *Tiffie* on the basis of the term “ever” in NRS 432B.555; yet, as a matter of clear law, we must consider Cardenas-Garcia to have never been convicted of felony child abuse, neglect, or endangerment. “Ever” is entirely inapplicable to the current dispute. I would apply *Tiffie* directly here and issue the requested writ; the district court erred in considering a voided conviction to apply NRS 432B.555. The statute contemplates burdening only those who have a conviction of child abuse, neglect, or endangerment. No such conviction exists here, and so Cardenas-Garcia falls outside the plain language of NRS 432B.555.

By reading “ever” in NRS 432B.555 to reach a legally voided conviction, the majority suggests the presumption is appropriately applied to Cardenas-Garcia because, as a matter of fact,

Cardenas-Garcia committed acts that constitute felony child abuse. I cannot accept this reading of NRS 432B.555. The legislature has indicated elsewhere in NRS Chapter 432B an intent to recognize certain acts defined by criminal statute without requiring a legal conviction but has not done so here. *See, e.g.*, NRS 432B.157 (imposing a rebuttable presumption when the court determines that the party seeking custody of a child has committed acts of domestic violence); *see also Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) (explaining that this court reads a statutory scheme as a whole to harmonize its provisions and to prevent unreasonable results); *cf. Clover Valley Land & Stock Co. v. Lamb*, 43 Nev. 375, 380-81, 187 P. 723, 725 (1920) (recognizing that courts should take notice of differences within closely related statutory provisions).

The majority contravenes our precedent on withdrawn pleas to hold Cardenas-Garcia's voided judgment is not, in fact, void, seemingly because it is convinced, in the context of child welfare, that protectionary interests weigh out. Yet consistent application of our caselaw does not entitle Cardenas-Garcia to custody, nor prevent the Department of Family Services from raising the underlying substantive protectionary concerns as a compelling reason reunification is not appropriate; it merely removes a single barrier to reunification. *See* NRS 432B.530(5); NRS 432B.550; NRS 432B.590. The district court remains free to prevent reunification on the basis of Z.K.'s best interests.

Finally, I note concern with the majority's contention that the fact a parent can rebut the application of NRS 432B.555 prevents its harm. While Cardenas-Garcia did not cogently argue a constitutional violation, the possibility of rebutting a presumption unfairly imposed does not appropriately preserve the parental interest, especially when the statute at issue concerns a parent's fundamental right to the care, custody, and management of their child. *See Santosky v. Kramer*, 455 U.S. 745, 753 (1982). Cardenas-Garcia has demonstrated extraordinary relief is warranted to prevent the erroneous application of NRS 432B.555 to a party with no relevant prior conviction. Respectfully, I dissent.

PHWLV, LLC, DBA PLANET HOLLYWOOD RESORT AND CASINO, AKA PLANET HOLLYWOOD LAS VEGAS RESORT AND CASINO, APPELLANT, v. HOUSE OF CB USA, LLC; AND CHINESE LAUNDRY LIFESTYLE, LLC, RESPONDENTS.

No. 85413

August 22, 2024

554 P.3d 715

Appeal from a judgment and post-judgment orders after a jury trial in a tort action for property damage. Eighth Judicial District Court, Clark County; Joanna Kishner, Judge.

Reversed in part, vacated in part, and remanded.

Lemons, Grundy & Eisenberg and Robert L. Eisenberg, Reno; Wood, Smith, Henning & Berman and Joel D. Odou and Susana Santana, Las Vegas, for Appellant PHWLV, LLC.

Marquis Aurbach Chtd. and Christian T. Balducci and Jordan W. Montet, Las Vegas, for Respondent House of CB USA, LLC.

Marquiz Law Office, P.C., and Craig A. Marquiz, Henderson, for Respondent Chinese Laundry Lifestyle, LLC.

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

OPINION

By the Court, HERNDON, J.:

This appeal requires us to consider the duty owed by a commercial property owner to tenants in that commercial property, specifically with respect to the maintenance of the property owner's internal fire-suppression system and the property owner's response to issues arising from a failure within that system. Appellant PHWLV, LLC, operates Planet Hollywood Resort and Casino and the Miracle Mile Shops in Las Vegas. Respondents, retailers House of CB USA, LLC, and Chinese Laundry Lifestyle, LLC, leased commercial space at the Miracle Mile Shops. After sustaining damage to their stores and inventories when a water pipe in PHWLV's fire-suppression system burst, the retailers sued PHWLV for negligence in maintaining the fire-suppression system. Before trial, the district court granted partial summary judgment on the elements of duty and breach, concluding that property owners have a duty to prevent items on their property from damaging another's property, which duty PHWLV had breached. The case proceeded to a jury trial solely on causation

and damages, and the jury ultimately returned a verdict in favor of the retailers.

We conclude that the district court erred in its formulation of PHWLV's duty at the summary-judgment stage. Under the facts of this case, the appropriate standard of care for PHWLV is the duty to use reasonable care in servicing and inspecting the fire-suppression system, and in responding to issues arising from failures within the system. We therefore reverse the district court's judgment on the jury verdict and order denying a new trial, vacate the district court's post-judgment orders awarding attorney fees and prejudgment interest, and remand for proceedings consistent with this opinion.

BACKGROUND

PHWLV owns and operates the Planet Hollywood Resort and Casino, a resort on the Las Vegas Strip. It also operates the Miracle Mile Shops, a retail shopping mall adjacent to the resort. The mall leased space to Chinese Laundry, a footwear retailer, and House of CB, a clothing retailer. PHWLV maintained a fire-suppression system above the retailers' stores and the rest of the mall.

Witnesses at trial testified to the following events: On July 8, 2017, a pressurized fire-suppression pipe separated from another pipe at its coupling. Water escaped the system through that separation and flooded a service corridor within Planet Hollywood before leaking into the resort and mall. About two hours after the pipe separation, PHWLV's employees and contractors were able to shut off the flow of water. The water caused immense damage to the resort, mall, and the retailers' physical store space and inventory.

The retailers sued PHWLV for negligence. After discovery, they moved for partial summary judgment on their claims against PHWLV. The district court granted the motion, finding that there was no genuine dispute over the elements of duty or breach. It found "a legal duty imposed on property owners to ensure that whatever is on a person's property does not invade or otherwise damage the property of another." It also found that PHWLV breached that duty, as the water on its property invaded and damaged the retailers' property. The parties proceeded to a jury trial on the elements of causation and damages. At the close of evidence, the retailers moved for a directed verdict on the element of causation, which the district court granted. The jury decided only the extent of damages suffered by the retailers. It awarded House of CB \$3,133,755.56 and Chinese Laundry \$411,581.41. Thereafter, PHWLV moved for a new trial or, alternatively, for remittitur of the jury award. The district court denied the motion and entered judgment on the jury verdict. It also granted in part House of CB's motion for attorney fees and prejudgment interest. PHWLV appeals each of the district court's orders.

DISCUSSION

The district court erred in granting summary judgment to the retailers

PHWLTV challenges the district court's award of partial summary judgment to the retailers. It argues that the district court imposed a strict-liability standard by improperly defining PHWLTV's duty and finding breach as a matter of law.

As an initial matter, the retailers argue that PHWLTV failed to assert these arguments before the district court. "A point not urged in the trial court, unless it goes to the jurisdiction of that court, is deemed to have been waived and will not be considered on appeal." *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). We conclude that PHWLTV did not waive its arguments with respect to the grant of partial summary judgment. PHWLTV opposed the retailers' motion for partial summary judgment on the same substantive grounds that it pursues on appeal. It also used the language of strict liability in its supplemental briefing. Therefore, PHWLTV adequately raised its arguments in the trial court such that they are not waived on appeal.

We review the district court's decision to grant summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "A claim for negligence in Nevada requires that the plaintiff satisfy four elements: (1) an existing duty of care, (2) breach, (3) legal causation, and (4) damages." *Turner v. Mandalay Sports Ent., LLC*, 124 Nev. 213, 217, 180 P.3d 1172, 1175 (2008). In this case, we must consider whether PHWLTV owed a duty to the retailers, the scope of any such duty, and whether PHWLTV breached the duty owed to the retailers.

We begin with the first issue: whether PHWLTV owed a duty to the retailers. In doing so, we consider "whether 'such a relation exists between the parties that the community will impose a legal obligation upon one for the benefit of the other.'" *Lee v. GNLV Corp.*, 117 Nev. 291, 295, 22 P.3d 209, 212 (2001) (quoting W. Page Keeton et al., *Prosser and Keeton on the Law of Torts*, § 37, at 236 (5th ed. 1984)). We have adopted the principle that "landowners bear a general duty of reasonable care to all entrants." *Foster v. Costco Wholesale Corp.*, 128 Nev. 773, 781, 291 P.3d 150, 156 (2012); see also *Moody v. Manny's Auto Repair*, 110 Nev. 320, 333, 871 P.2d 935, 943 (1994) ("[D]eterminations of liability should primarily depend upon whether the owner or occupier of land acted reasonably under the circumstances.").

We hold that PHWLTV and the retailers had such a relation that the community imposes a legal obligation on PHWLTV for the benefit of the retailers. This is because PHWLTV owned and occupied the land, while the retailers were entrants on that land. PHWLTV controlled

the fire-suppression system, the premises on which the system was located, and the mall itself. The system under its control malfunctioned, creating a risk of damage to the retailers in the mall. This approach accords with the modern trend of defining a landowner's duty of reasonable care under the circumstances. *See* Restatement (Third) of Torts: Phys. & Emot. Harm § 51 cmt. heading (Am. Law Inst. 2012) (stating that "a land possessor owes a duty of reasonable care to entrants on the land" regarding either its own conduct or "artificial conditions on the land," when such conduct poses risk to the entrants). Therefore, PHWLTV owed a duty to exercise reasonable care under the circumstances to the retailers.

Second, we must determine the scope of the duty that PHWLTV owed to the retailers. "The law is clear that if a legal duty exists, reasonable care under the circumstances must be exercised." *Lee*, 117 Nev. at 296, 22 P.3d at 212. "The duty issue must be analyzed with regard to foreseeability and gravity of harm, and the feasibility and availability of alternative conduct that would have prevented the harm." *Foster*, 128 Nev. at 781, 291 P.3d at 156 (internal quotation marks omitted). PHWLTV owed the retailers the duty to exercise reasonable care under the circumstances. This duty extends to multiple sets of circumstances. The duty extends to the servicing, maintenance, and inspection of the fire-suppression system. The duty extends to the implementation of procedures that govern failures within the system, like a possible pipe separation. And the duty extends to PHWLTV's reaction to the pipe separation on July 8, 2017.

Because we limit the scope of PHWLTV's duty to the use of reasonable care, we conclude that the district court erred by describing PHWLTV's duty in absolute terms. Its formulation of PHWLTV's duty lacks the crucial principles underlying our negligence jurisprudence: either the exercise of reasonable care or the consideration of the circumstances necessitating reasonable care. Instead, the district court seemed to impose strict liability on property owners to control what is on their property. An absolute standard omits the inquiry as to whether the property owner exercised reasonable care in their control of what is on their property. But Nevada law requires such an inquiry. *See id.* We thus hold that PHWLTV owed the duty to exercise reasonable care under the circumstances and that the district court erred by expanding that duty.

Third, we cannot determine whether PHWLTV exercised reasonable care under the circumstances (i.e., whether it breached its duty). This case-specific determination should be determined by the jury. *See Lee*, 117 Nev. at 296, 22 P.3d at 212 ("Whether a defendant's conduct was reasonable under a given set of facts is generally an issue for the jury to decide." (internal quotation marks omitted)). In so determining, the jury must resolve two questions: first, whether PHWLTV breached its duty of reasonable care by not properly

maintaining the system; and second, whether PHWLTV breached its duty when responding to the incident.

We conclude that the retailers were not entitled to partial summary judgment under the district court's erroneous theory of PHWLTV's duty. As a result, we conclude that the district court erred in granting partial summary judgment in favor of the retailers.

The district court's error marred the subsequent proceedings

The district court's error in granting partial summary judgment to the retailers manifested itself throughout the remainder of the litigation. As counsel for House of CB conceded at oral argument before this court, any error in the district court's formulation of PHWLTV's duty would contaminate the trial proceedings and jury verdict.

For example, the district court granted the retailers' motion for a directed verdict on the element of causation. But it found causation based on the incorrect description of PHWLTV's duty. It is clear the water that escaped from PHWLTV's fire-suppression system caused damage to the retailers. However, as the parties did not have to address whether PHWLTV exercised reasonable care under the circumstances, causation became indisputable. Similarly, the jury found damages resulting from that imposition of causation, and the district court awarded attorney fees resulting from the jury verdict. When a negligence case is built upon an incorrect formulation of the defendant's duty, everything that occurs thereafter will necessarily be tainted. Based on the errors described above, we reverse the district court's judgment and vacate the district court's post-judgment order granting attorney fees and prejudgment interest.¹

The district court erred by denying PHWLTV's motion for a new trial

PHWLTV argues that the district court erred by denying its motion for a new trial pursuant to NRCP 59. We review a district court's decision on a motion for a new trial for an abuse of discretion. *Nelson v. Heer*, 123 Nev. 217, 223, 163 P.3d 420, 424-25 (2007). "While review for abuse of discretion is ordinarily deferential, deference is not owed to legal error." *AA Primo Builders, LLC v. Washington*, 126 Nev. 578, 589, 245 P.3d 1190, 1197 (2010). A district court may grant a new trial when an error in law occurred at the trial and that error was objected to by the party making the motion for the new trial. NRCP 59(a)(1)(G).

For the reasons we have stated above, the district court's error in defining PHWLTV's duty constituted an error in law. PHWLTV objected to that error during its opposition to the retailers' motions for summary judgment and adequately demonstrated grounds for

¹Given our conclusion, we need not address the issue of damages.

a new trial. Therefore, we conclude that the district court erred in denying PHWLV's motion for a new trial and reverse its order.

PHWLV has not shown that reassignment is necessary

PHWLV requests that this case be transferred from the assigned judge to a different judicial department upon remand. Reassignment may be appropriate when a trial court, whether consciously or unconsciously, "undermined [the] plaintiff's case and cannot fairly deal with the matters involved." *Wickliffe v. Sunrise Hosp., Inc.*, 104 Nev. 777, 783, 766 P.2d 1322, 1326 (1988). PHWLV argues that the assigned judge undermined its case by making multiple adverse rulings against it. It also argues that the assigned judge heard inadmissible or inappropriate evidence regarding the retailers' damages calculations. But PHWLV does not identify any specific evidence that the assigned judge heard that should have been excluded. Nor does PHWLV explain how adverse rulings—all of which seemingly flow from a single error regarding the scope of the duty owed—constitute a display of partiality. As a result, we deny PHWLV's request to reassign this case to a different judicial department.

CONCLUSION

The district court erroneously described the breadth of the duty that PHWLV owed to the retailers. This error was compounded as the court applied that duty to the other elements of negligence. We hold that PHWLV owed the retailers the duty to use reasonable care, both in maintaining the fire-suppression system and in responding to the events caused by the system. Accordingly, we reverse the district court judgment on the jury verdict, reverse the district court order denying the motion for a new trial, vacate the district court order awarding attorney fees and interest, and remand this matter for a new trial.

LEE and BELL, JJ., concur.
