CONCLUSION

We conclude that pursuant to NRS 130.207, the Nevada child support order controls. We further conclude that this court has jurisdiction over the challenges to contempt findings and sanctions in the order appealed from in Docket No. 61415, but we need not consider them because Vaile failed to provide cogent arguments or relevant authority in support of his claims. Thus, we affirm the judgments of the district court.

CHERRY, C.J., and GIBBONS, PICKERING, HARDESTY, PARRAGUIRRE, and STIGLICH, JJ., concur.

LUIS GODOREDO PIMENTEL, III, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 68710

June 22, 2017 396 P.3d 759

Appeal from a judgment of conviction, pursuant to a jury verdict, of murder with use of a deadly weapon. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

[Rehearing denied December 19, 2017]

Philip J. Kohn, Public Defender, and *William M. Waters* and *Howard Brooks*, Deputy Public Defenders, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Sandra DiGiacomo* and *Jonathan E. VanBoskerck*, Chief Deputy District Attorneys, Clark County, for Respondent.

Before the Court EN BANC.

OPINION

By the Court, CHERRY, C.J.:

Appellant Luis Pimentel appeals his conviction of first-degree murder. Pimentel and Robert Holland had been shouting at each other throughout the evening, mostly regarding a mutual female friend, before Holland arrived at Pimentel's home to confront him. During the fight, Pimentel shot Holland twice, including once after Holland had already collapsed from the first shot. Holland died from his wounds.

NRS 200.450 provides that if any "person, upon previous concert and agreement, fights with any other person" and "[s]hould death ensue to [the other] person in such a fight," the surviving fighter is guilty of first-degree murder. Pimentel argues that NRS 200.450 is void because it is both unconstitutionally vague and overbroad. We hold that NRS 200.450 is not vague because it provides a person of ordinary intelligence fair notice of what conduct is prohibited and because it sets forth clear standards that prevent arbitrary enforcement. We also hold that NRS 200.450 is not overbroad because it does not criminalize protected speech, but the ensuing fight and potential resulting death.

In *Wilmeth v. State*, 96 Nev. 403, 405-06, 610 P.2d 735, 737 (1980), we held that where a challenge to fight is accepted and the decedent unilaterally escalated the fight with a deadly weapon, the survivor was not entitled to a self-defense jury instruction. Although we noted there could be some cases in which a mutual combatant could be entitled to such an instruction, the factual differences between the instant case and *Wilmeth* are not legally consequential. Therefore, the district court did not abuse its discretion by instructing the jury that although self-defense was available as a defense to first-degree murder under the traditional theory of murder, it was not available as a defense to murder under the challenge-to-fight theory.

We are also asked to consider whether the State's expert witness violated the exclusionary rule by remaining in the courtroom during other witnesses' testimony and whether she exceeded the scope of her purpose by impeaching the defendant's trial testimony with statements he made to her during a court-ordered, independent psychological examination. Due to an insufficient record, we are unable to determine whether the expert's presence violated the exclusionary rule. Regarding her testimony, however, we hold that it was error to allow the expert witness to impeach Pimentel's testimony with statements he made at his court-ordered evaluation, but we conclude that the error does not require reversal, as it was harmless due to the fact that Pimentel's own testimony was enough, in and of itself, to support his conviction.[1]

FACTS AND PROCEDURAL HISTORY

Holland had been in a romantic relationship with Amanda Lowe. Unbeknownst to Holland, Lowe also had a sexual relationship with Pimentel. Pimentel and Lowe were together at a casino when Holland, who found out the two were together, angrily confronted them. Casino security eventually asked Holland to leave. Holland left, and Lowe followed him outside, where Holland slapped Lowe, who

[1]Pimentel has raised other claims of error beyond those discussed in this opinion. We have considered each claim and have concluded that they are without merit.

then reentered the casino. Holland, who remained outside, happened upon two of his friends, Timothy Hildebrand and Shannon Salazar, in the parking lot and asked them to enter the casino to convince Lowe to come back outside to talk. Hildebrand and Salazar were unsuccessful. Holland later asked his father, who came to pick him up, to find Lowe inside the casino to convince her to talk to Holland outside. Holland's father was also unsuccessful.

Eventually, Pimentel and Lowe left the casino. Holland began arguing with them as they walked to Pimentel's hotel room on the property. Pimentel went to his room, but Lowe stayed in the parking lot to talk to Holland. Holland again struck Lowe and security intervened. Pimentel left his room and confronted Holland, and although no punches were thrown at that time, the two shouted back and forth at each other in a manner that could reasonably be interpreted as either a challenge-to-fight and as an acceptance thereof.[2]

After this altercation, Hildebrand and Salazar drove Pimentel and Lowe to Pimentel's apartment. Holland got a ride to Pimentel's apartment from his father. Once at the apartment complex, Holland punched Pimentel, initiating a fistfight. During the altercation, Pimentel shot Holland twice, including once after he had already fallen to the ground.[3] After shooting Holland, Pimentel threw the gun away. Pimentel fled the scene and boarded a bus. The police found Pimentel on the bus not far from the scene of the shooting and arrested him.

In its initial criminal complaint, the State charged Pimentel with murder with use of a deadly weapon under the theory that the murder was committed with malice aforethought, premeditation, and deliberation. *See* NRS 200.010. After the preliminary hearing, the State added a charge of carrying a concealed weapon, *see* NRS 202.350, and a theory of first-degree murder involving a killing as the result of a challenge to fight, *see* NRS 200.450.

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[2]The record does not indicate either which, if any, words the jury determined constituted a challenge or an acceptance. Pimentel's own testimony, however, demonstrated at least two instances where a reasonable juror might have found that he either challenged Holland or accepted Holland's challenge. One example, is when Pimentel learned that Holland struck Lowe, he shouted:

> All right, you know what, that's enough, Dude. I mean, seriously, you want to hit Aman—I mean, you want to hit a woman why don't you just come and hit a man then.

Pimentel also shouted, "[Y]ou know where I be," in response to Holland's direct threats.

[3]The parties dispute how this altercation took place. Pimentel claims that Holland pulled a firearm on him before Pimentel disarmed and shot Holland. The State claims that although Holland approached Pimentel, it was Pimentel who initially drew the firearm. Although the jury convicted Pimentel of first-degree murder, it acquitted him of possession of a concealed firearm, indicating that the jury perhaps believed Pimentel's account of these facts. For the purposes of this opinion, who brought the gun to the fight is unimportant.

Pimentel noticed Dr. Briana Boyd as an expert witness who would testify regarding post-traumatic stress disorder (PTSD). In response, the State filed a motion to compel Pimentel to submit to an independent psychological examination. The State also supplemented its notice of expert witnesses to include Dr. Melissa Piasecki, an expert in forensic psychiatry. The district court granted the State's motion and compelled Pimentel to undergo a psychological evaluation with Dr. Piasecki.

After Pimentel rested, the State called Dr. Piasecki during its rebuttal case. Dr. Piasecki had observed Lowe's, Pimentel's, and Dr. Boyd's testimony prior to taking the stand. Dr. Piasecki answered questions throughout her testimony comparing Pimentel's statements during the evaluation to his statements during trial testimony.

After the close of evidence, Pimentel objected to the district court's instruction regarding self-defense being unavailable under a challenge-to-fight theory. Although the jury acquitted Pimentel of possession of a concealed firearm, it found Pimentel guilty of first-degree murder with the use of a deadly weapon. The jury, however, was not asked to indicate which theory of first-degree murder it used to convict. The district court subsequently entered its judgment of conviction, in which it sentenced Pimentel to 20-50 years for the murder conviction and a consecutive term of 32-144 months for the deadly weapon enhancement.

DISCUSSION

NRS 200.450 is neither vague nor overbroad

Any "person, [who] upon previous concert and agreement, fights with any other person or gives, sends or authorizes any other person to give or send a challenge verbally or in writing to fight any other person, the person giving, sending or accepting the challenge to fight any other person" is guilty of at least a gross misdemeanor under the challenge-to-fight law. NRS 200.450(1). "Should death ensue to a person in such a fight, or should a person die from any injuries received in such a fight, the person causing or having any agency in causing the death . . . is guilty of murder in the first degree . . . ." NRS 200.450(3).

Pimentel argues that NRS 200.450 is unconstitutionally vague because it fails to define its essential terms, such as "previous concert and agreement," "challenge," or "acceptance," and thus, one cannot reasonably conform his or her conduct to avoid criminal liability. He also claims that NRS 200.450's allegedly unascertainable terms allow for arbitrary enforcement. Finally, Pimentel argues that NRS 200.450 is overbroad because it can criminalize speech commonly used in trash-talking or other commonplace uses. We disagree with each claim.

We review the constitutionality of a statute de novo. *Scott v. First Judicial Dist. Court*, 131 Nev. 1015, 1017-18, 363 P.3d 1159, 1161 (2015). However, we begin with the presumption that a statute is constitutional, and the challenging party has the burden to make a "clear showing of invalidity." *State v. Castaneda*, 126 Nev. 478, 481, 245 P.3d 550, 552 (2010) (internal quotation marks omitted). Moreover, we proceed with the understanding that "every reasonable construction must be resorted to, in order to save a statute from unconstitutionality." *Id.* (internal quotation marks omitted).

NRS 200.450 is not unconstitutionally vague

"The void-for-vagueness doctrine is rooted in the Due Process Clauses of the Fifth and Fourteenth Amendments." *Carrigan v. Comm'n on Ethics*, 129 Nev. 894, 899, 313 P.3d 880, 884 (2013). "A criminal statute can be invalidated for vagueness (1) if it fails to provide a person of ordinary intelligence fair notice of what is prohibited; or (2) if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Scott*, 131 Nev. at 1021, 363 P.3d at 1164 (internal quotation marks omitted). The key difference between the two tests is that the first test deals with the person whose conduct is at issue, while the second deals with those who enforce the laws, such as police officers. *Id.* The two tests are independent of one another, and failing either test renders the law unconstitutionally vague. *Castaneda*, 126 Nev. at 481-82, 245 P.3d at 553.

> By requiring notice of prohibited conduct in a statute, the first prong offers citizens the opportunity to conform their own conduct to that law. However, the second prong is more important because absent adequate guidelines, a criminal statute may permit a standardless sweep, which would allow the police, prosecutors, and juries to pursue their personal predilections.

Silvar v. Eighth Judicial Dist. Court, 122 Nev. 289, 293, 129 P.3d 682, 685 (2006) (internal citation and quotation marks omitted).

We have previously held that NRS 200.450 is not void for vagueness. *See Wilmeth v. State*, 96 Nev. 403, 404-05, 610 P.2d 735, 736 (1980). In the context of a fight that escalated to the use of a deadly weapon and a death, we noted:

> In the context of this case, we believe that the statute provided appellant with sufficient warning of the proscribed behavior. The statute proscribes the *conveyance or acceptance of a challenge to fight when such a fight or confrontation results*. The degrees of punishment depend upon whether the fight involves the use of a deadly weapon or results in death. *Here, there was a challenge and an acceptance, a subsequent*

> *confrontation, and the use of a deadly weapon was involved. There was also a resulting death.*

Id. at 405, 610 P.2d at 737 (citation omitted) (emphases added).[4]

Pimentel argues that we limited our holding in *Wilmeth* to the facts of that case.[5] This argument is unpersuasive. Even if we assume the facts of the two cases are legally distinguishable, Pimentel challenges the language of the statute itself, which is the same language that we previously held to be not vague. Although the phrase "previous concert and agreement" is not one commonly used today, when read in context, the statute should be clear to a person of ordinary intelligence that the prohibited act is to engage in a fight after one party issues a challenge to fight and the other party issues an acceptance to that challenge.

Looking to the statute as applied to the facts of the case, Pimentel is unable to distinguish the facts of this case from those of *Wilmeth*. In this case both Pimentel and Holland shouted words, which can reasonably be construed as either a challenge or acceptance to fight, back and forth to each other. Although Holland struck Pimentel first, a fight ensued. Pimentel used a deadly weapon regardless of who initially possessed it. Finally, Holland died as a result of the fight and the use of the deadly weapon. Accordingly, we conclude that a person of reasonable intelligence would be aware that Pimentel's actions in this case constituted either a challenge to fight or an acceptance thereof, and participation in an ensuing fight. Therefore, NRS 200.450 is not vague under the first test.

Regarding the second vagueness test, NRS 200.450 would be vague "if it is so standardless that it authorizes or encourages seriously discriminatory enforcement." *Carrigan*, 129 Nev. at 899, 313 P.3d at 884. Pimentel has put forth no evidence, nor is there anything in the record, to indicate that some fight participants would be more or less likely to be charged under NRS 200.450 than others. The police and prosecutors need only look to find evidence that the fighters agreed to fight beforehand, a fight actually took place, and in the case of murder charges, that one or more of the fighters died as a result. Accordingly, we are not persuaded that NRS 200.450 leads to arbitrary or discriminatory enforcement, and thus, it does

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[4]Due to a printing error, a portion of the quoted language was omitted from Volume 96 of the *Nevada Reports*; the full text of the court's decision in *Wilmeth* was reproduced in the *Pacific Reporter* and is quoted here.

[5]The *Wilmeth* court did not provide much factual detail. What is known, however, is that there "was a challenge and an acceptance, a subsequent confrontation, and the use of a deadly weapon was involved. There was also a resulting death." 610 P.2d at 737. We also know that the appellant in *Wilmeth* argued that he should have been entitled to a self-defense instruction because there was no prior agreement to use weapons, but a deadly weapon was nonetheless involved. *Id.*

not fail the second test. Because NRS 200.450 does not fail either vagueness test, it is not unconstitutionally vague, and we affirm the district court on this ground.

NRS 200.450 is not unconstitutionally overbroad

"Whether or not a statute is overbroad depends upon the extent to which it lends itself to improper application to protected conduct." *Scott v. First Judicial Dist. Court*, 131 Nev. 1015, 1018, 363 P.3d 1159, 1162 (2015) (quoting *N. Nev. Co. v. Menicucci*, 96 Nev. 533, 536, 611 P.2d 1068, 1069 (1980)). A law is overbroad when it has a "seemingly legitimate purpose but [is] worded so broadly that [it] also appl[ies] to" conduct protected by the First Amendment.[6] *Id.* We have held that while even "minor intrusions on First Amendment rights will trigger the overbreadth doctrine[,] . . . a statute should not be void unless it is substantially overbroad in relation to the statute's plainly legitimate sweep." *Id.* (internal quotation marks omitted).

In *Scott*, a police officer pulled over a driver for running a stop sign and suspected the driver was driving under the influence. *Scott*, 131 Nev. at 1017, 363 P.3d at 1161. Scott, a passenger in the car, told the driver that he did not have to do anything the officer said. *Id.* The officer instructed Scott to remain silent, but Scott continued to advise the driver. *Id.* The officer arrested Scott for violating a city ordinance prohibiting interference with an officer performing his or her duties. *Id*. We concluded that the ordinance was unconstitutionally overbroad because it "encompasse[d] protected speech and [was] not narrowly tailored to prohibit only disorderly conduct or fighting words." *Id.* at 1020-21, 363 P.3d at 1163 (internal quotation marks omitted); *see also Silvar v. Eighth Judicial Dist. Court*, 122 Nev. 289, 298, 129 P.3d 682, 688 (2006) (holding that county ordinance designed to punish loitering for purposes of prostitution was overbroad because it punished otherwise protected conduct that could indicate loitering for prostitution, such as engaging in a conversation or waving one's arms); *but see Ford v. State*, 127 Nev. 608, 619, 262 P.3d 1123, 1130 (2011) (holding that for an inchoate crime like solicitation, where "the crime is complete once the words are spoken with the requisite intent," the spoken words are not protected speech when attempting to convince another to engage in an unlawful act, such as prostitution).

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[6]The First Amendment, however, does not protect all types of speech, as "fighting words, or words that by their very utterance . . . tend to incite an immediate breach of the peace" are not constitutionally protected. *Scott*, 131 Nev. at 1019, 363 P.3d at 1162 (2015) (internal quotation marks omitted); *see also Chaplinsky v. New Hampshire*, 315 U.S. 568, 571-72 (1942) (recognizing the fighting words exception to the First Amendment's freedom of speech).

Unlike the city ordinance in *Scott*, NRS 200.450 does not criminalize speech because without an ensuing fight there is no criminal liability. Moreover, without a resulting death, NRS 200.450(3) does not provide for first-degree murder liability. Similarly to the felony-murder rule, which provides "that the intent to commit the [underlying] felony supplies the malice for the murder," *see Nay v. State*, 123 Nev. 326, 332, 167 P.3d 430, 434 (2007), NRS 200.450 relies on a person's intent to fight to satisfy the *mens rea* requirement to prove murder. NRS 200.450, like the felony-murder rule, does not create a strict liability crime because the initial intent to fight must be found to sustain a murder charge under the challenge-to-fight theory. Because NRS 200.450 does not punish speech, but only uses speech to demonstrate *mens rea* for an ensuing fight and resulting death, it is not unconstitutionally overbroad.

The district court properly instructed the jury regarding self-defense and its inapplicability to challenge-to-fight murder theory

The district court instructed the jury that under the challenge-to-fight theory of murder, self-defense was not available "to someone who engages in a challenge to fight and a death results," even though Pimentel presented evidence that Holland escalated the fight by introducing a firearm.[7] Pimentel argues that the district court erred by giving that instruction because it relied upon *Wilmeth v. State*, 96 Nev. 403, 405-06, 610 P.2d 735, 737 (1980), where we did not categorically foreclose upon asserting self-defense against a challenge-to-fight charge. Pimentel does not, however, explain how his case differs from *Wilmeth* to entitle him to assert self-defense under the challenge-to-fight theory. Although we agree that self-defense might not always be unavailable as a defense to the challenge-to-fight theory of murder,[8] we conclude that it was unavailable in the instant case.

The district court has broad discretion to determine whether a jury instruction is correct and proper. NRS 175.161(3); *Crawford v. State*, 121 Nev. 744, 748, 121 P.3d 582, 585 (2005). A district court's decisions in settling jury instructions are reviewed for abuse of discretion or judicial error. *Id*. A district court abuses its discretion if its "decision is arbitrary or capricious or if it exceeds the bounds of law or reason." *Id.* (internal quotation marks omitted). Whether an instruction was an accurate statement of the law, however, is reviewed de novo. *Funderburk v. State*, 125 Nev. 260, 263, 212 P.3d 337, 339 (2009).

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[7]Jury Instruction 19 read: "Under the theory of challenge to fight for First Degree Murder, the right of self defense is not available to someone who engages in a challenge to fight and a death results."

[8]We are not asked to delineate in which cases a challenge-to-fight murder defendant may assert self-defense, and we decline to do so now.

We have previously held that self-defense was not available as a defense to a violation of NRS 200.450 when a defendant voluntarily places himself in a situation where he issues or accepts a challenge to fight and a fight occurs, even if the decedent unilaterally escalated the situation. *Wilmeth*, 96 Nev. at 405-06, 610 P.2d at 737. *Wilmeth* involved a case where, despite a challenge and an acceptance to engage in a fistfight, the decedent allegedly brandished a weapon with no prior agreement to use weapons, and therefore, Wilmeth felt entitled to his proffered instruction on self-defense. *Id.* Although Wilmeth was in fact given a standard self-defense instruction, we concluded that he was not entitled to it, noting that "the instructions given improperly benefitted" him. *Id.* at 407, 610 P.2d at 738.

Some foreign jurisdictions have provided exceptions to the general rule that one cannot assert self-defense when engaged in mutual combat. *See, e.g.*, *State v. O'Bryan*, 123 A.3d 398, 408 (Conn. 2015) (holding that despite a statute precluding mutual combatants from asserting self-defense at all, an escalation exception applied because "the requisite agreement does not exist when one party unilaterally and dangerously escalates the previously equal terms of a fight"); *State v. Friday*, 306 P.3d 265, 277 (Kan. 2013) (recognizing that the rule prohibiting self-defense for mutual combat "does not destroy the right to self-defense in all mutual combat cases; but for self-defense to justify the killing, the defendant must be acting solely for the protection of the defendant's own life, and not to inflict harm upon the defendant's adversary" (internal quotation marks omitted)); *Gill v. State*, 184 S.W. 864, 864 (Tenn. 1916) (disagreeing with an instruction which held "that if one willingly entered into a mutual combat with another without any intent to do great bodily harm, and thereupon his adversary resorted to a deadly weapon and was about to assault him therewith, he would not have the right to defend himself or resort to such a weapon in his necessary self-defense").

Other jurisdictions require that the defendant attempt to stop fighting and clearly indicate that intent to the decedent. *See, e.g.*, *People v. Nguyen*, 354 P.3d 90, 112 (Cal. 2015) ("The right of self-defense is only available to a person who engages in mutual combat if he has done all of the following: [o]ne, he has actually tried in good faith to refuse to continue fighting; two, he has clearly informed his opponent that he wants to stop fighting; three, he has clearly informed his opponent that he has stopped fighting; and, four, he had given his opponent the opportunity to stop fighting."); *see generally* 40 Am. Jur. 2d *Homicide* § 141 (2008) ("One is not justified in using force which is either intended or likely to cause death or great bodily harm if he or she is engaged in mutual combat, unless he or she withdraws and effectively communicates that to the victim.").

Nguyen required facts that are not present in the instant case, i.e., the defendant's intent to stop fighting and his communication of that intent to the decedent. Although the holdings from *O'Bryan*, *Friday*, and *Gill* are not entirely unpersuasive, the fact remains that we have previously held that self-defense does not apply in a challenge-to-fight murder case merely because the decedent unilaterally escalated a fistfight to one using a deadly weapon. *See Wilmeth*, 96 Nev. at 405, 610 P.2d at 737 (holding that one participant in a fight who kills the other may not claim self-defense even if the decedent went beyond the agreed upon terms and introduced a deadly weapon). We hold no differently now. Accordingly, the district court did not abuse its discretion by instructing the jury that self-defense was unavailable under challenge-to-fight theory in this case, and we affirm the district court on this ground.

We are unable to conclude that Dr. Piasecki's presence in the courtroom violated the exclusionary rule

Pimentel argues that allowing Dr. Piasecki to listen to his, Dr. Boyd's, and Lowe's testimony before taking the stand violated the exclusionary rule. The State argues that Pimentel did not object to Dr. Piasecki's presence below, nor does the record indicate that he ever invoked the exclusionary rule. Because the record does not indicate that Pimentel invoked the exclusionary rule, we are unable to grant him relief on this issue.

Nevada's exclusionary rule requires, "*at the request of a party*," all witnesses to leave the courtroom "so that they cannot hear the testimony of other witnesses." NRS 50.155(1) (emphasis added). Parties or persons whose presence is essential to the party's cause are exempted from the exclusionary rule. NRS 50.155(2).

The record lacks any indication that Pimentel invoked the exclusionary rule at trial. At oral argument, Pimentel asserted that the district court informed him, 15 minutes into trial, that it was too late to request the bench conferences to be recorded. He also indicated that because the bench conferences were not recorded, he was unsure whether trial counsel invoked the exclusionary rule. The State confirmed that this particular district court department requires parties to request recorded bench conferences prior to trial and claimed that Pimentel did not, in fact, invoke the exclusionary rule.

We have previously held that a district court commits error when it fails to record bench conferences in a criminal trial. *See Preciado v. State*, 130 Nev. 40, 43, 318 P.3d 176, 178 (2014) ("Due process requires us to extend our reasoning [requiring all bench conferences to be recorded in capital cases] to defendants in noncapital cases, because regardless of the type of case, it is crucial for a district court to memorialize all bench conferences, either contemporaneously or by

allowing the attorneys to make a record afterward."). We need not reverse the conviction due to this error, however, because Pimentel has not demonstrated that the missing record is "so significant that [its] absence precludes this court from conducting a meaningful review of the alleged errors . . . *and the prejudicial effect of any error*." *See id.* (emphasis added).

At trial, Pimentel testified that he challenged Holland to hit him, rather than Lowe. Pimentel also testified that after Holland threatened him, he responded "you know where I be." As a result, Pimentel's own testimony provided enough evidence that he either challenged Holland to fight or accepted Holland's challenge to fight before they actually fought and Holland died. Therefore, any harm done by allowing Dr. Piasecki to remain in the courtroom prior to her own testimony was not prejudicial because Pimentel provided enough evidence, in and of itself, to support his conviction under the challenge-to-fight murder theory. Moreover, the totality of the admissible evidence presented was sufficient to convict Pimentel under either theory of murder. Because Pimentel both failed to demonstrate that he invoked the exclusionary rule at trial or that the missing record precluded us from reviewing the prejudicial effect of the alleged exclusionary error, we affirm the district court on those grounds.

Dr. Piasecki's testimony impermissibly exceeded her scope as an expert witness, but the error was harmless

Pimentel claims that Dr. Piasecki's testimony was supposed to focus on Pimentel's psychological diagnoses and how they related to Pimentel's actions on the night of the incident, but instead she compared his trial testimony with his statements made to her during the psychiatric interview. He adds that Dr. Piasecki served less as an expert and more as an unfair impeachment tool. We agree with Pimentel, but nevertheless conclude that the error is harmless.

Generally, the State may not use a healthcare provider to introduce a defendant's un-*Mirandized* statements from a court-ordered psychiatric evaluation. *Mitchell v. State*, 124 Nev. 807, 819-20, 192 P.3d 721, 729 (2008). The State may, however, introduce rebuttal evidence through a healthcare provider if it "(1) is relevant to undermining a defendant's insanity defense, and (2) does not relate to the defendant's culpability with respect to the charged crimes." *Id.* at 820, 192 P.3d at 729. Furthermore, an expert may not opine as to the ultimate question of any element of a charged offense because to do so usurps the jury's function. *Winiarz v. State*, 104 Nev. 43, 51, 752 P.2d 761, 766 (1988).

Error of this nature must be reversed unless this court can declare that it "was harmless beyond a reasonable doubt." *Id.* at 50, 752 P.2d

at 766. Harmless error is "[a]ny error, defect, irregularity or variance which does not affect substantial rights." NRS 178.598.

Dr. Piasecki testified about what, if any, factor Pimentel's PTSD played on the night of the shooting and refrained from opining as to the ultimate question of any element of a charged offense, including whether Pimentel intended to fight or intended to kill. However, her testimony exceeded the allowable scope when she compared Pimentel's prior un-*Mirandized* statements from the psychiatric evaluation with Pimentel's trial testimony. *See Winiarz*, 104 Nev. at 51, 752 P.2d at 766; *Mitchell*, 124 Nev. at 819-20, 192 P.3d at 729. Dr. Piasecki's testimony, however, was ultimately harmless beyond a reasonable doubt for the same reason that her presence in the courtroom during other witnesses' testimony was harmless, i.e., because the other evidence presented at trial, including Pimentel's own testimony, was sufficient to sustain a first-degree murder conviction under either theory of murder as charged.

CONCLUSION

After considering all of Pimentel's claims on appeal, we conclude that there are no instances of reversible error. Accordingly, we order the judgment of conviction affirmed.

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

KEN NGUYEN, Appellant, *v.*
ROBERT BOYNES, Respondent.

No. 69166

June 22, 2017 396 P.3d 774

Appeal from a district court order establishing paternity and child custody. Eighth Judicial District Court, Family Court Division, Clark County; Bill Henderson, Judge.

Affirmed.

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

Pecos Law Group and *Bruce I. Shapiro* and *Jack W. Fleeman*, Henderson, for Respondent.

Before the Court En Banc.

OPINION

By the Court, PARRAGUIRRE, J.:

In this case, we consider whether the district court erred in granting respondent Robert Boynes (Rob) paternity over a child adopted by appellant Ken Nguyen. We hold that the district court did not err in granting Rob paternity under the equitable adoption doctrine. In addition, we consider whether the district court's order violated the United States and Nevada Constitutions' equal protection clauses and conclude that it does not. Lastly, we hold that there is substantial evidence to support the district court's order granting Rob joint legal and physical custody. Accordingly, we affirm the district court's order granting Rob paternity and joint legal and physical custody over the child.

FACTS AND PROCEDURAL HISTORY

Ken and Rob dated from November 2009 to May 2013. At some point during the relationship, a decision was made to adopt a child. In 2012, the parties sought adoption services from Catholic Charities of Southern Nevada (Catholic Charities). At the time, Catholic Charities disallowed joint adoptions for same-sex couples, and as such, Rob testified that Ken would adopt the child first and Rob would later also adopt the child.

In July 2012, Rob and Ken attended an orientation at Catholic Charities, and Rob used his personal email address to sign up for an adoption account with Catholic Charities. Both parties participated in every step of the adoption process, including the background check, post-placement visits, and adoption classes. Ken paid for the adoption fees. In February 2013, Catholic Charities notified Ken that it was placing a child with him for adoption. Both parties were present to receive the newborn child.

In March 2013, Ken's coworkers threw him a baby shower, which was held at Rob's house. Most of the congratulatory cards from the guests were addressed to both Rob and Ken. Two months later, the child was baptized at the Desert Spring United Methodist Church. Pastor David Devereaux performed the baptism with both parties present. The baptism certificate lists both parties as the fathers of the child.

In May 2013, the parties ended their relationship. Around this time, Rob asked Ken to add his name to the child's birth certificate, and Ken refused. In October 2013, Ken formally adopted the child. Both parties sat at the plaintiff's table during the adoption hearing, and Ken reiterated once again that he would not place Rob's name on the child's birth certificate, nor would he allow a second-parent adoption.

Since the child's first day of placement with Ken, he has primarily been under Rob's care. The child stayed overnight at Rob's house during the first night of placement and continued to do so for more than a month. Thereafter, the child would stay with Rob during the weekdays and with Ken during the weekends. After two months of placement, Ken decided to hire a neighbor to act as a full-time babysitter for the child. The neighbor took care of the child for two to four weeks before the parties returned to their previous arrangement for the child, which continued until May 2014, when Ken enrolled the child in daycare. Rob primarily took the child for doctor visits and provided most of the baby supplies. Additionally, in November 2013, Rob took the child to North Carolina to visit Rob's sister during Thanksgiving.

In May 2014, Rob filed a petition for paternity and custody. The district court issued an order holding, *inter alia*, that (1) Rob was entitled to a presumption of paternity under NRS 126.051(1)(d), and (2) Rob and Ken were to have joint legal and physical custody of the child. Ken now appeals the district court's order.

DISCUSSION

On appeal, Ken argues, *inter alia*, that (1) the district court erred in granting Rob paternity under the equitable adoption doctrine, (2) the district court's order violated the United States and Nevada Constitutions' equal protection clauses, and (3) the district court erred in granting Rob joint legal and physical custody.

The district court did not err in granting Rob paternity

The district court applied the doctrine of equitable adoption and held that Rob is the adoptive father of the child. Ken argues that the district court erred in applying the doctrine to the present matter because this court has limited the application of the doctrine to child support disputes, and that even if the doctrine does apply in this context, there was no clear intent for Rob to adopt the child to support an equitable adoption. We disagree.

The doctrine of equitable adoption applies in this case

A district court's application of the equitable adoption doctrine is a question of law that we review de novo. *See Rennels v. Rennels*, 127 Nev. 564, 569, 257 P.3d 396, 399 (2011) ("[W]e will review a purely legal question de novo." (internal quotation marks omitted)).

In *Frye v. Frye*, this court defined equitable adoption as an equitable remedy to enforce an adoption agreement under circumstances "where there is a promise to adopt, and in reasonable, foreseeable reliance on that promise a child is placed in a position where harm will result if repudiation is permitted." 103 Nev. 301, 303, 738 P.2d 505, 506 (1987). In that case, a husband promised to adopt his wife's

daughter from a previous marriage. *Id.* at 301-02, 738 P.2d at 505-06. In doing so, the husband filed a petition to terminate the parental rights of the child's natural father, which the district court granted. *Id.* at 302, 738 P.2d at 505. The wife joined in the petition "but testified that she would not have done so had [the husband] not promised to adopt the child." *Id.* Thereafter, the husband and wife's "marriage deteriorated and the legal adoption was not finalized." *Id.* The husband filed for divorce, and although he never formally adopted the child, the district court held that child support "was justified on a theory of equitable adoption." *Id.*

This court affirmed the district court and held that the husband clearly evinced an intent to adopt the child, which "was accompanied by a promise." *Id.* at 302, 738 P.2d at 506. Indeed, we explained that "[i]f [the husband] were allowed to renege with impunity, it would be to the probable detriment of an innocent child, whose present situation is the result of justifiable reliance on the promise that a new father would replace the old." *Id.*

However, we have since declined to extend the application of the equitable adoption doctrine to the facts of two cases. *See Russo v. Gardner*, 114 Nev. 283, 956 P.2d 98 (1998); *Hermanson v. Hermanson*, 110 Nev. 1400, 887 P.2d 1241 (1994). In *Hermanson*, the parties married when the wife was six months pregnant. 110 Nev. at 1401, 887 P.2d at 1242. Eventually, the wife filed for divorce, and the husband subsequently filed a motion requesting to be the child's de facto father, even if he was not biologically related. *Id*. at 1402, 887 P.2d at 1243. Thereafter, the parties disputed whether the husband was the biological father of the child, and the district court "referred the parties to a paternity hearing master with direction to order blood tests." *Id.* The blood tests revealed that the husband was not the biological father of the child. *Id.*

Despite the blood test result, the district court granted the husband's motion, and held that the doctrine of equitable estoppel barred the wife from denying that the husband was the child's father. *Id.* This court reversed, holding that equitable estoppel did not apply to the facts of that case. *Id.* at 1406, 887 P.2d at 1245. In particular, this court explained "that the doctrine of estoppel is grounded in principles of fairness" but was used by the district court "to unjustly deprive [the wife] from disputing *the presumption of paternity*." *Id.* (emphasis added). Moreover, this court concluded that "the doctrine of equitable adoption enunciated in *Frye* . . . [was] inapplicable" to determine paternity. *Id.*

Similarly, in *Russo*, the respondent petitioned for joint legal and primary physical custody of his girlfriend's son, despite having no biological relation to the child. 114 Nev. at 285, 956 P.2d at 99. The district court granted the petition and concluded that the respondent had equitably adopted the child as a putative father pursuant to *Frye*. *Id*. at 286, 956 P.2d at 100. This court reversed the district

court's order and reiterated that the equitable adoption doctrine was "inapplicable for determining legal parentage in a custody proceeding." *Id*. at 288, 956 P.2d at 101. Instead, this court examined the Nevada Uniform Parentage Act and held that the paternity statutes were controlling in "determining legal parentage in a custody dispute between biological and non-biological parents" under the facts of that case. *Id.* at 289, 956 P.2d at 102.

Thus, in *Hermanson* and *Russo*, this court declined to extend the equitable adoption doctrine to determine legal parentage between a biological and nonbiological parent, specifically where a putative father's biological relation with a child is in dispute. *Russo*, 114 Nev. at 287-89, 956 P.2d at 101-02; *Hermanson*, 110 Nev. at 1405, 887 P.2d at 1245. Instead, this court held that a determination of parentage as to whether a putative parent is the natural parent of the child falls within the purview of Nevada's Uniform Parentage Act. *Russo*, 114 Nev. at 288-89, 956 P.2d at 101-02; *Hermanson*, 110 Nev. at 1406, 887 P.2d at 1245.

Unlike *Hermanson* and *Russo*, this case concerns whether there was an agreement by the parties to adopt the child together that was formed at the beginning of the adoption process, and whether accompanying that agreement was an intent and promise by Ken to allow Rob to adopt the child second due to Catholic Charities' policy disallowing joint adoptions for same-sex couples. The parties do not dispute their nonbiological relations with the child, and Nevada's Uniform Parentage Act is not implicated. We thus conclude that the equitable adoption doctrine is applicable to enforce an adoption agreement under the unique factual circumstances of this case. *See St. Mary v. Damon*, 129 Nev. 647, 655, 309 P.3d 1027, 1033 (2013) ("Ultimately, the preservation and strengthening of family life is a part of the public policy of this State." (internal quotation marks omitted)).

The district court did not abuse its discretion in granting Rob paternity under the equitable adoption doctrine

We further conclude that the district court did not err in granting Rob paternity through equitable adoption of the child. In particular, the district court held that the facts of this case satisfy the four elements in *Frye*, which are: (1) intent to adopt, (2) promise to adopt, (3) justifiable reliance, and (4) harm resulting from repudiation. 103 Nev. at 302, 738 P.2d at 506. We agree and review each element in turn.

This court reviews matters of parentage for an abuse of discretion. *See id.* at 303, 738 P.2d at 506. "The district court's factual findings . . . will be upheld if not clearly erroneous and if supported by substantial evidence." *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). "Substantial evidence is evidence that a rea-

sonable mind might accept as adequate to support a conclusion." *In re Estate of Bethurem*, 129 Nev. 869, 876, 313 P.3d 237, 242 (2013) (internal quotation marks omitted).

First, substantial evidence supports the district court's finding that the parties intended for Ken to adopt the child first and Rob second, and that intent was accompanied by a promise from Ken to allow Rob to do so. Rob was an integral factor in the child's adoption and was intimately involved with the adoption process.[1] Nikolos Hulet, the then-manager of adoption services for Catholic Charities, and Brad Singletary, the then-director of adoption services for Catholic Charities, both testified that they believed the parties were participating in the adoption process together. Nikolos also testified that Rob participated in every step of the adoption process, including the background check, post-placement visits, orientation, and adoption classes. Additionally, Rob drafted the birth mother letter,[2] which contained pictures of him and his family. The letter stated that "we go to bed each night dreaming of the day we awake as fathers."

Moreover, Ken treated Rob as a second parent to the child before the commencement of the underlying suit. Both parties were present to receive the child for placement, and the child stayed at Rob's house during the first night. Further evidence of Ken's treatment of Rob as a second parent include: numerous text messages sent by Ken that referred to Rob as a dad, the child's middle name is Rob's surname, and the certificate of baptism for the child listed Rob as one of the parents. Rob was also regarded as a father to the child by others. Zhanna Killian, a nurse practitioner, testified that Rob brought the child to his medical appointments without Ken during a majority of the visits and that he appeared to be a loving father. Pastor Devereaux of the United Methodist Church also testified that both parties were acting as the child's parents. Additionally, a majority of the baby shower cards received during the child's baby shower were designated to both parties.

Second, substantial evidence supports the district court's finding that Rob justifiably relied on Ken's promise to allow him to adopt second and that Rob acted upon the promise to his detriment. *See Lubbe v. Barba*, 91 Nev. 596, 600, 540 P.2d 115, 118 (1975) (providing that in the context of tort law, justifiable reliance must result in the "inducement of the plaintiff to act, or to refrain from act-

[1]Although Rob was not included on the child's birth certificate during the finalization of his adoption, Catholic Charities did not allow same-sex couples to participate in joint adoptions and required separate adoptions for each parent. Furthermore, the district court found that the deterioration of Ken and Rob's relationship during the summer of 2013 seemed to be the driving factor in Ken's decision to not follow through with the second adoption for Rob. We conclude that substantial evidence supports this finding.

[2]A birth mother letter serves to inform and assist birth parents with the selection of adoptive families.

ing, to his detriment" (internal quotation marks omitted)). As discussed above, Rob dedicated a substantial amount of his time to the adoption process. Moreover, Rob primarily cared for the child post-placement. The child primarily stayed at Rob's house during placement and post-adoption, and Rob provided most of the baby supplies. Rob also made substantial changes to his house and lifestyle to accommodate the child's needs, which included changing one of the rooms in his house to a nursery.

Finally, the resulting harm from Ken's repudiation would be the deprivation of Rob's emotional and financial support to the child. *See St. Mary*, 129 Nev. at 655, 309 P.3d at 1033 ("Both the Legislature and this court have acknowledged that, generally, a child's best interest is served by maintaining two actively involved parents."). As such, "[i]f [Ken] were allowed to renege with impunity, it would be to the probable detriment of an innocent child," and "[e]quity cannot allow such a result." *Frye*, 103 Nev. at 302, 738 P.2d at 506. Accordingly, we affirm the district court's application of the equitable adoption doctrine and grant of paternity to Rob.[3]

The district court's order did not violate the United States and Nevada Constitutions' equal protection clauses

Ken argues that the district court granted Rob parental rights because the parties were a same-sex couple, and a court has never granted parental rights to a heterosexual person similarly situated to the facts of this case. "The right[ ] to equal protection . . . [is] guaranteed by the Fourteenth Amendment of the United States Constitution and . . . Article 4, Section 21 of the Nevada Constitution." *Rico v. Rodriguez*, 121 Nev. 695, 702-03, 120 P.3d 812, 817 (2005).

"The threshold question in [an] equal protection analysis is whether a statute effectuates dissimilar treatment of similarly situated persons." *Id*. at 703, 120 P.3d at 817. "In analyzing alleged equal protection violations, the level of scrutiny that applies varies according to the type of classification created." *Id.* However, "where a law contains no classification or a neutral classification and is applied

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[3]Ken also argues that the district court erred by granting Rob paternity pursuant to NRS 126.051 or ordering third-party visitation rights in the alternative. However, because we affirm the district court's order granting Rob paternity, we decline to address these arguments. *See First Nat'l Bank of Nev. v. Ron Rudin Realty Co.*, 97 Nev. 20, 24, 623 P.2d 558, 560 (1981) ("In that our determination of the first issue is dispositive of this case, we do not reach the second issue.").

In addition, Ken argues that the district court's factual findings in this matter are predominately contrary to the evidence presented and clearly erroneous. We hold that substantial evidence supports the district court's material, factual findings, and to the extent there was error, it was harmless error. *See* NRCP 61; *see also Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) (providing that "the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached").

evenhandedly, it may nevertheless be challenged as in reality constituting a device designed to impose different burdens on different classes of persons." *Id.*

Here, Ken does not challenge the constitutionality of a particular statute; rather, he alleges generally that the district court treated the parties differently than it would have a heterosexual couple. However, "[c]hild custody determinations are by necessity made on a case-by-case basis," and, here, "there is nothing to indicate that the ultimate decision of the district court turned on [the couple's sexual orientation]." *Id.* at 704, 120 P.3d at 817. Thus, we hold that the district court did not violate the United States and Nevada Constitutions' equal protection clauses in granting its order of paternity and child custody.

The district court did not abuse its discretion in granting Rob joint legal and physical custody

Ken argues that the district court erred in awarding Rob joint legal and physical custody of the child because, in determining the best interest of the child pursuant to NRS 125.480(4),[4] the district court failed to properly consider Rob's mental health.[5] During trial, both parties testified to receiving harassing emails and handwritten notes from a stalker before and after the child's adoption. However, Ken now alleges that Rob was the stalker, and that, since stalking is domestic violence pursuant to NRS 33.018(1)(e)(1),[6] there is a presumption against perpetrators of domestic violence having custody pursuant to NRS 125.480(5).[7] For the reasons set forth below, we conclude that Ken's argument is without merit.

"This court reviews the district court's decisions regarding custody . . . for an abuse of discretion." *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). "It is presumed that a trial court

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[4]NRS 125.480(4)(f) provided that "[i]n determining the best interest of the child, the court shall consider and set forth its specific findings concerning, among other things . . . [, t]he mental . . . health of the parents." NRS 125.480 was repealed in 2015, 2015 Nev. Stat., ch. 445, § 19, at 2591, and reenacted in substance at NRS 125C.0035, 2015 Nev. Stat., ch. 445, § 8, at 2583-85.

[5]Although the district court considered all the enumerated factors of a child's best interest pursuant to NRS 125.480(4), Ken only challenges the district court's findings regarding Rob's mental health on appeal.

[6]NRS 33.018(1)(e)(1) provides that "[d]omestic violence occurs when a person commits one of the following acts against . . . any other person with whom the person has had or is having a dating relationship[:] . . . [s]talking."

[7]NRS 125.480(5) provided that "a determination by the court after an evidentiary hearing and finding by clear and convincing evidence that either parent or any other person seeking custody has engaged in one or more acts of domestic violence against . . . a parent of the child or any other person residing with the child creates a rebuttable presumption that sole or joint custody of the child by the perpetrator of the domestic violence is not in the best interest of the child." *See* NRS 125C.0035(5).

has properly exercised its discretion in determining a child's best interest." *Wallace v. Wallace*, 112 Nev. 1015, 1019, 922 P.2d 541, 543 (1996). Furthermore, the district court's factual findings will be upheld if not clearly erroneous and if supported by substantial evidence. *Ogawa*, 125 Nev. at 668, 221 P.3d at 704.

The district court's order of paternity and child custody found that (1) "[t]here was nothing noteworthy" in regards to the mental and physical health of both parties, (2) the single harassing email sent by Rob was not sufficient to create a showing of "obsessed stalking behavior," and (3) both parties "parented with no major incident even during the so-called cyber stalking period." We conclude that the district court's findings are supported by substantial evidence.

During trial, Ken's expert witness connected two email addresses to Rob's IP address, one of which was linked to an email that was sent to Ken's mom. Rob confessed to sending the email, and he explained that he had received the email from the stalker and forwarded it to Ken's mom under a different email address to hide his identity. Rob testified that he did this because he was upset with Ken at the time, and when Ken's mom called Rob to praise her son, he wanted her to see the stalker's email, which contained disparaging contents about Ken's promiscuity. No further emails were presented during trial. Furthermore, the testimonies of Ken and Rob indicate that both parties were able to adequately take care of the child in a joint effort despite the alleged harassing emails. Thus, we hold that substantial evidence supports the district court's determination that both parents were mentally fit to take care of the child and that it was unable to make a "huge logical leap" in determining that Rob stalked Ken based on nonexistent emails.

Ken also argues that Rob intentionally destroyed his computer and lied about the date of its destruction to avoid disclosing evidence of his stalking behavior contained on the computer, and that the district court should have found such evidence willfully suppressed and deemed adverse to Rob. *See* NRS 47.250(3) (providing a rebuttable presumption "[t]hat evidence willfully suppressed would be adverse if produced"); *see also Bass-Davis v. Davis*, 122 Nev. 442, 448, 134 P.3d 103, 106 (2006) (providing that a party seeking the benefit of NRS 47.250(3)'s presumption must demonstrate "willful or intentional spoliation of evidence [with] the intent to harm another party through the destruction and not simply the intent to destroy evidence"). In particular, Ken argues that Rob's thumb drives contained photos that were transferred after Rob claims to have destroyed his computer,[8] and a photo of the child next to a monitor indicates that the computer was still in use after the discovery request date. The district court found that there was inconclusive evidence

[8]Rob claims to have destroyed the computer on or about August 5, 2014.

to support a spoliation claim against Rob. We conclude that substantial evidence supports the district court's findings.

First, Ken's expert witness examined two thumb drives owned by Rob and found folders containing photos. The metadata of the photos indicate that they were transferred around August 28, 2014, from a Windows-based personal computer. However, Rob testified that the thumb drives were used to transfer photos from his friends' computers to collect evidence in preparation of trial, which is why the metadata showed that the pictures were transferred from Windows-based personal computers. Furthermore, the dates in the metadata of the photos still precede the date of the discovery request, which was September 11, 2014.

Second, Ken provided a photo of the child allegedly next to the monitor of Rob's computer. The parties attempted to calculate the date of the photo based on the child's approximated age. However, Rob testified that the child was around six months to a year old at the latest, which would indicate that the photo was taken around a year to six months before the discovery request.[9] Furthermore, the parties were unable to extract any useful information from the photo besides the fact that it is a picture of the child next to a monitor. Thus, we hold that the district court's finding that the two thumb drives and photo of the child were inconclusive evidence to support Ken's spoliation claim against Rob was not clearly erroneous and that the custody decision fell within the district court's sound discretion. Accordingly, we affirm the district court's order granting Rob joint legal and physical custody of the child.

CONCLUSION

We hold that the district court did not err in granting Rob paternity under the equitable adoption doctrine. Furthermore, we hold that the district court's order did not violate the United States and Nevada Constitutions' equal protection clauses. Lastly, we hold that the district court did not abuse its discretion in granting Rob joint legal and physical custody. Accordingly, we affirm the district court's order granting Rob paternity and joint legal and physical custody over the child.

DOUGLAS, GIBBONS, and PICKERING, JJ., concur.

STIGLICH, J., with whom CHERRY, C.J., and HARDESTY, J., agree, concurring:

I agree with the majority that the district court did not err in granting Rob paternity in the instant matter. However, I believe that the

[9]The child was born in February 2013, and the discovery request regarding the preservation of emails was sent on September 11, 2014. Thus, if the child is one year old in the photo, then the photo would have been taken around February of 2014, which is approximately seven months before the discovery request.

Nevada Parentage Act provides a more appropriate analysis in this case than the doctrine of equitable adoption.

In *St. Mary v. Damon*, this court clearly concluded that Nevada law does not preclude a child from having two mothers under the Nevada Parentage Act. 129 Nev. 647, 654, 309 P.3d 1027, 1033 (2013). This court noted that "the Legislature has recognized that the children of same-sex domestic partners bear no lesser rights to the enjoyment and support of two parents than children born to married heterosexual parents." *Id.* at 655, 309 P.3d at 1033. Similarly, "the Legislature has not instructed that children born to unregistered domestic partners bear any less rights . . . than children born to registered domestic partners, married persons, and unmarried persons." *Id.* Accordingly, this court held that maternity could be proved by: (1) offering proof to establish that the appellant is the child's legal mother, such as giving birth to the child pursuant to NRS 126.041(1)(a); or (2) applying paternity statutes "insofar as practicable" under NRS 126.051. *Id.* at 653, 309 P.3d at 1032 (quoting NRS 126.231); *see also Love v. Love*, 114 Nev. 572, 578, 959 P.2d 523, 527 (1998) (concluding that the lack of a genetic relationship does not preclude a finding of paternity, as NRS 126.051 "clearly reflects the legislature's intent to allow nonbiological factors to become critical in a paternity determination").

Pursuant to *St. Mary*, if a presumption of parentage can apply to a woman in a same-sex relationship, there appears no reason why the provisions of NRS 126.051 cannot apply to a man in a same-sex relationship. Because Rob submitted ample evidence to support the presumption of parentage under NRS 126.051(1), I concur with the majority's holding affirming the decision of the district court, but on different grounds.

LARRY L. BERTSCH; AND LARRY L. BERTSCH CPA & ASSOCIATES, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE KENNETH C. CORY, DISTRICT JUDGE, RESPONDENTS, AND JAY BLOOM, REAL PARTY IN INTEREST.

No. 69381

June 22, 2017 396 P.3d 769

Original petition for a writ of mandamus challenging a district court order denying petitioners' motion to dismiss.

Petition granted.

Adam Paul Laxalt, Attorney General, and *Frederick J. Perdomo*, Senior Deputy Attorney General, Carson City; *Pico Rosenberger* and *James R. Rosenberger*, Las Vegas, for Petitioners.

Maier Gutierrez Ayon PLLC and *Joseph A. Gutierrez* and *Luis A. Ayon*, Las Vegas, for Real Party in Interest.

Before PICKERING, HARDESTY and PARRAGUIRRE, JJ.

OPINION

By the Court, HARDESTY, J.:

Real party in interest Jay Bloom sued petitioners Larry L. Bertsch and Larry L. Bertsch CPA & Associates (collectively, Bertsch) for Bertsch's actions as a court-appointed special master in a lawsuit in which Bloom was a party. The district court rejected Bertsch's defense of absolute quasi-judicial immunity and denied his motion to dismiss Bloom's complaint.

In this original petition for a writ of mandamus, we consider whether a person must seek leave of the appointing court prior to filing suit in a non-appointing court against a court-appointed accountant in his capacity as special master.

Because we extend the *Barton* doctrine[1] to a court-appointed accountant in the capacity of special master, we require an individual to seek leave of the appointing court prior to filing suit in a non-appointing court against a court-appointed special master for actions taken in the scope of his court-derived authority. Thus, we grant the petition.

[1]*Barton v. Barbour*, 104 U.S. 126, 127 (1881).

FACTS AND PROCEDURAL HISTORY

On October 11, 2011, Bertsch was appointed as special master by the district court in a lawsuit between Vion Operations, LLC, and Bloom (the Vion litigation). The order stated that Bertsch was to provide forensic accounting services, but would not be personally liable for acts performed as a special master, except in the event of gross negligence, fraud, or willful misconduct.

After Bertsch filed his preliminary report, but before he filed his final report, Vion's counsel, Lionel Sawyer & Collins (LSC), disclosed to the district court, on August 29, 2012, that it had also represented Bertsch "during the second half of 2011." On October 18, 2012, Bertsch filed his final report. Included in this report were statements relating to how certain companies associated with Bloom had the "earmarks of a Ponzi scheme."

Approximately two hours after Bertsch filed his final report, Bloom filed a motion to disqualify LSC as counsel for the plaintiffs, alleging a conflict of interest with Bertsch. On the next day, October 19, 2012, Bloom issued a *subpoena duces tecum* to Bertsch seeking "any and all documents, emails, and communications with any and all parties to this litigation." Bloom also noticed a deposition of Bertsch for November 20, 2012.

Bertsch moved for a protective order to prevent disclosure of document information and to quash the notice of deposition. The district court granted Bertsch's motion for a protective order in part, finding that Bertsch was not to be treated as an expert witness, but ordered that Bertsch and LSC produce all communications in the matter "for the period between August 1, 2011 and December 17, 2012." The district court reserved ruling on whether to quash the notice of deposition directed at Bertsch.

Pursuant to the district court's order, Bertsch produced documents related to his communications with LSC. Based on the content of these documents, Bloom filed a motion to disqualify Bertsch on February 12, 2013. In this motion, Bloom requested that the district court strike Bertsch's report, and for sanctions, arguing that Bertsch's final report was not truly independent because, prior to its submission, 18 versions of the report were exchanged between Bertsch and counsel for Vion with no copies provided to, and therefore no input from, Bloom or any other party. Bloom further argued that Bertsch and LSC worked in concert for the purpose of building a case against Bloom and the other defendants. Bloom's motion contained various emails allegedly supporting his claims that Bertsch acted improperly. Notably, Bloom argued that "[t]he pattern and practice of egregious unethical conduct by LSC [and] Mr. Bertsch . . . has created a private right of action against them individually."

Bertsch opposed the motion, arguing that Bloom failed to show that Bertsch's report was influenced in any way by his former connection with LSC, and the one-on-one communications without the participation of other parties was a procedure known to and accepted by Bloom, and a procedure in which he engaged on dozens of occasions. Bertsch also filed a motion for an order discharging him as special master and accepting his final report, noting that neither party filed a timely objection to the report.

After a hearing on the motion, the district court denied Bloom's motion and discharged Bertsch from his duties as special master on May 13, 2013. With respect to Bloom's arguments for disqualification, the district court found that, pursuant to NCJC 2.11(C), Bertsch should have disclosed his prior attorney-client relationship with LSC; however, the district court also found that Bertsch's undisclosed conflict did not merit disqualification because the alleged conflict no longer existed at the time Bloom raised the issue to the court. The court noted that LSC disclosed the former attorney-client relationship in August 2012, and Bloom failed to take any action to prevent Bertsch from issuing a final report until October 18, 2012, the same day Bertsch issued his final report. The court further determined that the failure to disclose the former attorney-client relationship did not render the report invalid or erroneous and it accepted the report as written. The court, however, declined to adopt the report as findings of fact or conclusions of law and thus declined to analyze whether the report's findings were clearly erroneous or conduct a de novo review of its conclusions. The court noted that the parties may use it as they see fit and that it may be challenged at trial.

The district court also found that

> [Bertsch] is a fair, impartial, unbiased and highly skilled forensic accountant, and the matters in this case to which the [c]ourt made its reference are in his area of his expertise. The reference to [s]pecial [m]aster in this case was proper.

Following the district court's May 13, 2013, order denying Bloom's motion to disqualify Bertsch, Bloom filed a motion to conduct discovery on Bertsch. On September 11, 2013, the district court denied Bloom's motion to conduct discovery, finding that Bertsch (1) was not to be treated as an expert witness for any purpose in the case; (2) was appointed as a special master under NRCP 53, and by accepting appointment, he assumed the duties and obligations of a judicial officer; and (3) enjoyed the same immunities from discovery as a judge, making his decision-making processes generally undiscoverable. The court reasoned, however, that non-privileged communications that occurred between Bertsch and any third party regarding his report, including specific requests to put anything into the report, were not protected from inquiry and were discoverable.

The district court permitted Bloom to conduct a one-hour deposition of Bertsch limited to non-privileged communications between Bertsch and LSC.

However, prior to any deposition of Bertsch, the Vion litigation was removed to the United States Bankruptcy Court for the District of Nevada. The bankruptcy case was subsequently settled, and the Vion litigation was dismissed with prejudice on October 14, 2014. As a result, Bertsch's deposition was never taken.

After the Vion litigation was dismissed, Bloom filed the underlying complaint against Bertsch alleging gross negligence, fraudulent concealment, willful misconduct, and defamation based on Bertsch's alleged actions in the Vion litigation. In response, Bertsch filed a motion to dismiss, arguing in part that he was entitled to absolute quasi-judicial immunity from suit. The district court denied the motion, finding that Bertsch was only entitled to qualified immunity based on the appointment order in the Vion litigation, which stated that Bertsch could be held personally liable for acts performed pursuant to his special mastership that constituted gross negligence, fraud, or willful misconduct.

Bertsch now petitions this court for a writ of mandamus, arguing that dismissal is required because he is entitled to absolute quasi-judicial immunity and such immunity is not waived by language contained in the order appointing him special master or because his alleged intentional, wrongful conduct fell outside the scope of his duties of special master. Bertsch also argues that Bloom's complaint is jurisdictionally improper, as Bloom did not first seek leave of the appointing court before instituting the underlying action.

Standard for writ relief

This court has original jurisdiction to grant extraordinary writ relief. *MountainView Hosp., Inc. v. Eighth Judicial Dist. Court*, 128 Nev. 180, 184, 273 P.3d 861, 864 (2012). Furthermore, writ relief is generally available only "where there is not a plain, speedy and adequate remedy in the ordinary course of law." NRS 34.170; *see also Halverson v. Miller*, 124 Nev. 484, 487, 186 P.3d 893, 896 (2008).

This court generally "decline[s] to consider writ petitions challenging district court orders denying motions to dismiss because such petitions rarely have merit, often disrupt district court case processing, and consume an enormous amount of this court's resources." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558-59 (2008) (internal quotations omitted). Nevertheless, this court has discretionary authority to consider a petition denying a motion to dismiss when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *Id.* at 197-98, 179 P.3d at 559. And, we have recognized that a pretrial

claim of judicial or quasi-judicial immunity may merit extraordinary writ relief. *State v. Second Judicial Dist. Court*, 118 Nev. 609, 614, 55 P.3d 420, 423 (2002).

Because Bertsch's petition raises important issues of law in need of clarification—whether one must seek leave of the appointing court prior to filing suit in a non-appointing court against a court-appointed accountant in his capacity as a special master—and involves a claim of quasi-judicial immunity, we exercise our discretion and entertain this petition.

Bloom was required to seek leave of the appointing court prior to filing a separate complaint against Bertsch

Bertsch argues that Bloom's underlying complaint was jurisdictionally improper because Bloom failed to seek leave of the appointing district court before filing a separate action against him. Although Bertsch raises this issue for the first time in his reply brief, consideration of this issue is in the interest of justice. *See Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) (holding that "[i]ssues not raised in an appellant's opening brief are deemed waived" unless this court, in its discretion, determines that consideration of those issues "is in the interests of justice"). We also note that although Bertsch did not explicitly address this issue during oral argument, he did infer that the issues raised in the action should have been determined by the appointing court.

Bertsch's argument touches on the rule known as the *Barton* doctrine. *See Carter v. Rodgers*, 220 F.3d 1249, 1252 (11th Cir. 2000). The *Barton* doctrine is a federal common law rule that requires a party to obtain leave of the bankruptcy court before bringing suit in a non-appointing court against a trustee for acts done in his or her official capacity. *Id*. The doctrine was first articulated by the United States Supreme Court in *Barton v. Barbour*, where the Court held that "[i]t is a general rule that before suit is brought against a receiver [in state court,] leave of the court by which he was appointed must be obtained." 104 U.S. 126, 127 (1881). Over time, circuit courts analogized the position of a receiver in equity to that of a bankruptcy trustee and extended the doctrine accordingly. *Carter*, 220 F.3d at 1252. Going even further, it has been suggested that the doctrine applies more broadly to all court-appointed officers, *Blixseth v. Brown*, 470 B.R. 562, 567 (Bankr. D. Mont. 2012) (stating that the rule generally applies to court "appointed" officers), and has been applied outside the context of bankruptcy proceedings, *see Considine v. Murphy*, 773 S.E.2d 176, 177, 179 (Ga. 2015).

One purpose of the *Barton* doctrine is to prevent dissatisfied parties from freely suing the trustee in another court for discretionary decisions made while performing their court-derived duties. *See In re Linton*, 136 F.3d 544, 546 (7th Cir. 1998). Another purpose of the

Barton doctrine is to prevent "the creation of disincentives for performing a [court-appointed official's] necessary duties and keeping the [court-appointed official] from being burdened with defending against unnecessary or frivolous litigation in distant forums." *In re Ridley Owens, Inc.*, 391 B.R. 867, 871-72 (Bankr. N.D. Fla. 2008); *see also Lehal Realty Assocs. v. Scheffel*, 101 F.3d 272, 277 (2d Cir. 1996).

Extending the *Barton* doctrine to an accountant in his capacity as special master makes sense, where the duties and responsibilities were designated by the appointing court, and where the purposes underlying the doctrine also apply. In the context of a receiver, this court has recognized the doctrine, holding that "[g]enerally, a receiver cannot be sued without leave of the appointing court" when the receiver acts within "the scope of its court-derived authority." *Anes v. Crown Partnership, Inc*., 113 Nev. 195, 200, 932 P.2d 1067, 1070 (1997). Here, Bertsch was appointed special master by the district court, and the court tasked him with investigating and preparing a preliminary and final report concerning all transactions related to cash flow, assets, and capital investments of a third-party defendant in the Vion litigation. The district court instructed that:

> The Special Master may direct any of [the third-party defendant's] current or former managers or members to produce any business records he deems necessary to carry out his responsibilities, and shall have authority to issue subpoenas to any person or entity to obtain information which he deems relevant or necessary to perform his duties as [s]pecial [m]aster.

In executing his duties, Bertsch was required to use discretionary judgment to obtain and evaluate records related to the transactions outlined in the order. His subsequent analysis of those records in a written report consisting of findings related to the legitimacy and veracity of these business transactions was prepared to assist the district court in making determinations of law and fact. Therefore, although the district court did not adopt the final report, Bertsch was appointed as a person with expertise to evaluate and report on accounting issues to assist the district court in its neutral analysis of the legal issues presented in the case. Accordingly, we determine that Bertsch played an integral role in the judicial process and performed duties sufficiently similar to other court-appointed officials who have benefited from the *Barton* doctrine. *See Hawaii Ventures, LLC v. Otaka, Inc.*, 164 P.3d 696, 716 (Haw. 2007) (defining the position of receiver and the duties associated therewith as beneficial to both parties and as "an officer of the court, deriv[ing] her authority wholly from the orders of the appointing court"); *Lawrence v. Goldberg*, 573 F.3d 1265, 1269 (11th Cir. 2009) (holding that "the *Barton* doctrine applies to actions against officers approved

by the . . . court, when those officers function as the equivalent of court-appointed officers" (internal quotations omitted)).

We have previously recognized that "[e]xposure to liability could deter [a court-appointed professional's] acceptance of court appointments or color their recommendations." *Duff v. Lewis*, 114 Nev. 564, 568, 958 P.2d 82, 86 (1998) (internal quotations omitted). As the United States Supreme Court explained in *Butz v. Economou*, "controversies sufficiently intense to erupt in litigation are not easily capped by a judicial decree. The loser in one forum will frequently seek another, charging the participants in the first with [unlawful] animus." 438 U.S. 478, 512 (1978).

Because the purposes expressed in *Barton* extend similarly to court-appointed officials such as Bertsch, we hold that the *Barton* doctrine applies to court-appointed accountants in the capacity of special master, and that an individual must seek leave of the appointing court when suing a court-appointed special master in a non-appointing court for actions taken within the scope of the court-derived authority. *See Anes*, 113 Nev. at 200, 932 P.2d at 1070.

The appointing court determined that Bertsch did not act outside the scope of his court-derived duties

The district court denied Bloom's disqualification motion on May 13, 2013, and found as follows:

> Based on NCJC 2.11(C), [Bertsch] should have made a disclosure of his prior attorney-client relationship with [LSC]. The [c]ourt does not find that non-disclosure of such relationship constitutes grounds for disqualification. . . . [*Bertsch*] *is a fair, impartial, unbiased and highly skilled forensic accountant, and the matters in this case to which the* [*c*]*ourt made its reference are in his area of his expertise. The reference to* [*s*]*pecial* [*m*]*aster in this case was proper*.
>
> . . . .
>
> *The* [*district*] [*c*]*ourt finds that* [*Bertsch*] *has complied in all respects with the* [*order of appointment*].

(Emphasis added.)

Therefore, the district court, upon being presented with the evidence, implicitly rejected Bloom's contention and found that Bertsch had not acted beyond the scope of his court-derived duties. To the extent that Bloom's motion can be seen as seeking leave of court to sue Bertsch, the district court did not explicitly permit it.

Accordingly, Bloom must first have filed a motion with the appointing court in order to sue Bertsch personally. We, therefore, grant the petition and direct the clerk of this court to issue a writ

of mandamus directing the district court to dismiss the underlying complaint against Bertsch.[2]

PICKERING and PARRAGUIRRE, JJ., concur.

NATIONSTAR MORTGAGE, LLC, A DELAWARE LIMITED LIABILITY COMPANY, APPELLANT, *v.* SFR INVESTMENTS POOL 1, LLC, A NEVADA LIMITED LIABILITY COMPANY, RESPONDENT.

No. 69400

June 22, 2017 396 P.3d 754

Appeal from a district court order granting a motion for summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; James M. Bixler, Senior Judge.

Reversed and remanded.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Akerman LLP* and *Darren T. Brenner, Allison R. Schmidt*, and *Ariel E. Stern*, Las Vegas, for Appellant.

Kim Gilbert Ebron and *Jacqueline A. Gilbert, Howard C. Kim*, and *Zachary D. Clayton*, Las Vegas, for Respondent.

Fennemore Craig P.C. and *Leslie L. Bryan-Hart* and *John D. Tennert*, Reno; *Arnold & Porter Kaye Scholer LLP* and *Michael A.F. Johnson*, Washington, D.C., for Amicus Curiae.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

Fannie Mae and Freddie Mac are government-sponsored entities that purchase and securitize residential mortgages. On September 6, 2008, the Director of the Federal Housing Finance Agency (FHFA)

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[2]Because this issue is dispositive, we need not address the remaining issues in Bertsch's petition. Furthermore, the parties do not argue, and this court need not reach, whether the removal of the Vion litigation to the United States Bankruptcy Court for the District of Nevada, and its subsequent settlement, foreclosed further action by the parties in this case. *See Muratore v. Darr*, 375 F.3d 140, 147 (1st Cir. 2004) (holding that the *Barton* doctrine applies even after the case closes).

placed Fannie Mae and Freddie Mac (hereinafter, the regulated entities) into conservatorships. As conservator, the FHFA is authorized to take over and preserve the assets of the regulated entities. Under federal law, when the FHFA is acting as conservator, its property is not subject to "levy, attachment, garnishment, foreclosure, or sale" without its consent, "nor shall any involuntary lien attach" to the property. 12 U.S.C. § 4617(j)(3) (2012) (hereinafter, the Federal Foreclosure Bar).

In this appeal, we must determine whether the servicer of a loan owned by a regulated entity has standing to assert the Federal Foreclosure Bar in a quiet title action. We answer in the affirmative. Because the district court did not determine whether a regulated entity owned the loan in this matter, we reverse the district court's order and remand the matter for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Nonparty Ignacio Gutierrez took out a $271,638 loan with lender KB Home Mortgage Company (KB) to purchase property located in Henderson, Nevada. KB's loan was secured by a deed of trust on the property, and the property was governed by a homeowners' association's (HOA) covenants, conditions, and restrictions. The deed of trust designated Mortgage Electronic Registration Systems, Inc. (MERS) as a beneficiary and as a nominee for KB and KB's successors and assigns. Subsequently, MERS assigned the deed of trust to nonparty Bank of America, N.A., who then assigned the deed of trust to appellant Nationstar Mortgage, LLC (Nationstar).

Eventually, Gutierrez failed to pay his HOA dues, and the HOA foreclosed on the property. Respondent SFR Investments Pool 1, LLC (SFR) purchased the property at the foreclosure sale for $11,000. Gutierrez filed suit against SFR, and SFR filed a third-party complaint against Nationstar. However, the district court ultimately dismissed Gutierrez's action after Gutierrez stipulated that his interest in the property was extinguished by the foreclosure sale, and that he would not contest the validity of the foreclosure deed.

Thereafter, SFR and Nationstar filed motions for summary judgment on SFR's third-party complaint. SFR argued, among other things, that Nationstar's security interest was extinguished by the foreclosure sale pursuant to this court's decision in *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014). Nationstar argued that its security interest survived the sale pursuant to the Federal Foreclosure Bar. Specifically, Nationstar claimed (1) Freddie Mac had purchased the loan, (2) the FHFA had placed Freddie Mac under conservatorship prior to the HOA's sale, (3) the FHFA's property was not subject to foreclosure or sale without its consent pursuant to the Federal Foreclosure Bar, (4) the FHFA had

issued a statement on its website declaring that it had not consented to the extinguishment of any Freddie Mac lien or other property interest in connection with HOA foreclosures, and (5) the Federal Foreclosure Bar therefore preempted NRS Chapter 116 to the extent state law would have extinguished the FHFA's security interest.

The district court acknowledged that there was "a dispute as to whether Freddie Mac or [the] FHFA [had] an interest in the Deed of Trust"; however, the district court declined to address this factual dispute because it believed Nationstar lacked standing to assert the Federal Foreclosure Bar on behalf of Freddie Mac or the FHFA. Given that decision and because neither Freddie Mac nor the FHFA were parties to the action, the district court declined to address whether the Federal Foreclosure Bar preempted NRS Chapter 116. Therefore, the district court denied Nationstar's motion for summary judgment and granted SFR's motion for summary judgment. Nationstar now appeals the district court's order.

DISCUSSION

On appeal, Nationstar argues that it has standing to assert the Federal Foreclosure Bar on the FHFA's behalf as its contractually authorized agent and servicer.[1] SFR contends Nationstar lacks standing to assert the Federal Foreclosure Bar because (1) the Housing and Economic Recovery Act of 2008 (HERA) exclusively authorizes the FHFA to enforce the Federal Foreclosure Bar; and (2) *Armstrong v. Exceptional Child Center, Inc.*, 135 S. Ct. 1378 (2015), states that private litigants may not use the Supremacy Clause to displace state law. We hold that neither HERA nor *Armstrong* prohibit the servicer of a loan owned by a regulated entity from arguing the Federal Foreclosure Bar preempts NRS 116.3116. Therefore, we reverse the district court's order and remand the matter for further proceedings.

"Standing is a question of law reviewed de novo." *Arguello v. Sunset Station, Inc.*, 127 Nev. 365, 368, 252 P.3d 206, 208 (2011).

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[1]Nationstar also argues that (1) the HOA did not provide it notice of the foreclosure sale in violation of its due process rights, and (2) the HOA's foreclosure sale was not commercially reasonable. As to the former, we reject Nationstar's argument according to our decision in *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. 28, 32, 388 P.3d 970, 974 (2017) (holding that "Nevada's superpriority lien statutes do not implicate due process").

As to the latter, the district court's order was issued prior to this court's decision in *Shadow Wood Homeowner's Ass'n Inc. v. New York Community Bancorp Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016). As such, it is unclear whether the district court recognized that Nationstar's claim was equitable in nature, or that the foreclosure deed's recitals did not prohibit Nationstar from introducing evidence to support its equitable claim. Although the district court may reach the same result, we conclude that remand is appropriate so that the district court may consider Nationstar's equitable argument in light of *Shadow Wood*.

To have standing, "the party seeking relief [must have] a sufficient interest in the litigation," so as to ensure "the litigant will vigorously and effectively present his or her case against an adverse party." *Schwartz v. Lopez*, 132 Nev. 732, 743, 382 P.3d 886, 894 (2016). We have previously stated that "[a] mortgage may be enforced only by, *or in behalf of*, a person who is entitled to enforce the obligation the mortgage secures." *In re Montierth*, 131 Nev. 543, 548, 354 P.3d 648, 651 (2015) (emphasis added) (quoting Restatement (Third) of Prop.: Mortgages § 5.4(c) (1997)). A loan servicer administers a mortgage on behalf of the loan owner, and the rights and obligations of the loan servicer are typically established in a servicing agreement. Jason H.P. Kravitt & Robert E. Gordon, *Securitization of Financial Assets* § 16.05 (3d ed. 2012).

As such, several courts have recognized that a contractually authorized loan servicer is entitled to take action to protect the loan owner's interests. *See, e.g.*, *J.E. Robert Co., Inc. v. Signature Props., LLC*, 71 A.3d 492, 504 (Conn. 2013) (holding "a loan servicer need not be the owner or holder of the note and mortgage in order to have standing to bring a foreclosure action if it otherwise has established the right to enforce those instruments"); *see also BAC Home Loans Servicing, LP v. Tex. Realty Holdings, LLC*, 901 F. Supp. 2d 884, 905 (S.D. Tex. 2012) (holding a servicer had standing to bring a lawsuit to administer a loan when the Pooling and Servicing Agreement granted the servicer "a percentage of the proceeds of the loans it services and [the] defendants' alleged actions deprived [the servicer] of the opportunity to maximize recovery of those proceeds").

However, SFR contends that HERA permits only the FHFA to enforce the Federal Foreclosure Bar. In particular, HERA states that "[t]he Agency may, as conservator, take such action as may be . . . appropriate to carry on the business of the regulated entity and preserve and conserve the assets and property of the regulated entity." 12 U.S.C. § 4617(b)(2)(D) (2012).

We must afford the statute its plain meaning if its language is clear and unambiguous. *Carcieri v. Salazar*, 555 U.S. 379, 387 (2009); *see also D.R. Horton, Inc. v. Eighth Judicial Dist. Court*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). The statute's plain language empowers the FHFA to "take such action" as it deems necessary to carry on the business of Freddie Mac. The phrase "such action" is broad and may encompass (1) contracting with private entities to service its loans, or (2) relying on Freddie Mac's existing contractual relationships with authorized servicers. Indeed, another provision of HERA states that the FHFA may "provide by contract for assistance in fulfilling any function, activity, action, or duty of the Agency as conservator or receiver." 12 U.S.C. § 4617(b)(2)(B)(v).

SFR also contends that 12 C.F.R. § 1237.3(a)(7) (2013) supports its interpretation of HERA. This regulation states that the FHFA

may "[p]reserve and conserve the assets and property of the regulated entity (*including the exclusive authority to investigate and prosecute claims of any type on behalf of the regulated entity*, or to delegate to management of the regulated entity the authority to investigate and prosecute claims)." 12 C.F.R. § 1237.3(a)(7) (emphasis added). However, this same regulation also envisions that the FHFA will seek the assistance of third parties in administering a regulated entity's loans. *See* 12 C.F.R. § 1237.3(a)(8) (reiterating 12 U.S.C. § 4617(b)(2)(B)(v)). As such, HERA explicitly allows the FHFA to authorize a loan servicer to administer FHFA loans on FHFA's behalf.

Finally, we conclude that SFR's reliance on *Armstrong* is misplaced. In *Armstrong*, the United States Supreme Court held that the Supremacy Clause did not create a cause of action, and therefore, private individuals do not have an implied right to sue state officials for perceived violations of federal law. 135 S. Ct. at 1383-84. However, the Court clarified: "To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law. *For once a case or controversy properly comes before a court, judges are bound by federal law*." *Armstrong*, 135 S. Ct. at 1384 (emphasis added).

Here, Nationstar is not attempting to use the Supremacy Clause to assert a cause of action against SFR. Rather, SFR asserted a quiet title claim against Nationstar, and Nationstar has merely argued that Freddie Mac's property is not subject to foreclosure while it is in conservatorship under federal law. Neither party has argued that SFR's quiet title claim was not properly before the district court. Therefore, *Armstrong* is not implicated in this matter.

This conclusion is consistent with this court's precedent, in which we have implicitly recognized that private parties may argue federal law preempts state law. *See, e.g.*, *Munoz v. Branch Banking & Trust Co., Inc.*, 131 Nev. 185, 187, 348 P.3d 689, 690 (2015) (holding that NRS 40.459 was preempted by the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (FIRREA), notwithstanding the fact that the Federal Deposit Insurance Corporation (FDIC) was not a party to the case). Likewise, federal district courts have recognized that private parties may raise preemption arguments in related contexts. *See, e.g.*, *Beal Bank, SSB v. Nassau Cty.*, 973 F. Supp. 130, 133-34 (E.D.N.Y. 1997) (holding that FIRREA's version of the Federal Foreclosure Bar rendered a foreclosure sale invalid, even though the FDIC was not a party to the litigation). Therefore, we hold that the servicer of a loan owned by a regulated entity may argue that the Federal Foreclosure Bar preempts NRS 116.3116, and that neither Freddie Mac nor the FHFA need be joined as a party.

However, the district court did not determine whether Freddie Mac owned the loan in question, or whether Nationstar had a contract with Freddie Mac or the FHFA to service the loan in question. Rather, the district court held that Nationstar lacked standing in either case. Therefore, we conclude that remand is appropriate so the district court may address these factual inquiries in the first instance.[2] *See Liu v. Christopher Homes, LLC*, 130 Nev. 147, 156, 321 P.3d 875, 881 (2014) (stating this court does not resolve factual matters that the district court declined to reach). If the district court concludes on remand that Nationstar has standing to assert the Federal Foreclosure Bar, then it should determine whether the Federal Foreclosure Bar preempts NRS 116.3116.[3]

CONCLUSION

We hold that the servicer of a loan owned by a regulated entity has standing to argue that the Federal Foreclosure Bar preempts NRS 116.3116. However, the district court did not determine whether Nationstar is such a servicer. In addition, the district court erroneously held that Nationstar could not introduce evidence to support its equitable claim if such evidence negated the foreclosure deed's recitals. Accordingly, we reverse the district court's order and remand the matter for further proceedings consistent with this opinion.

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, and HARDESTY, JJ., concur.

STIGLICH, J., concurring:

I agree with the majority's conclusion that the servicer of a loan owned by a regulated entity has standing to assert the Federal Foreclosure Bar in a quiet title action. I write separately because I believe that the district court may have erred in finding a factual dispute regarding whether Freddie Mac or the FHFA had an interest in the deed of trust.

"Summary judgment is appropriate" when, viewed "in a light most favorable to the nonmoving party," the pleadings and other evidence demonstrate no genuine issue of material fact, such that the moving party is entitled to judgment as a matter of law. *Wood v. Safeway*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). To avoid the entry of summary judgment, the nonmoving party may not rest

[2]Nationstar argues that a deposition shows Freddie Mac owns the loan in question. Although the parties dispute this point on appeal, it appears the district court did not consider this evidence, as it declined to reach the issue.

[3]Because the district court did not address the merits of Nationstar's preemption argument, and the parties have not briefed this issue on appeal, we decline to address it at this time.

on general allegations or conclusions, but "must, by affidavit or otherwise, set forth specific facts demonstrating the existence of a genuine issue for trial." *Id*. at 732, 121 P.3d at 1031 (internal quotation marks omitted).

In this case, Nationstar presented deposition testimony from a witness, pursuant to NRCP 30(b)(6), who testified that Freddie Mac was the owner of the note at issue, and that Nationstar was the servicer of the loan. SFR argued that these assertions were incorrect. However, beyond this blanket denial, SFR presented no evidence to dispute Nationstar's allegations. Notably, argument is not evidence. Given SFR's failure to present any actual evidence to support its position, I would instruct the district court to consider on remand whether Nationstar was entitled to summary judgment on the issue of Freddie Mac's ownership and Nationstar's contract to service the loan.

Therefore, I concur.

THE BOARD OF REVIEW, NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION, EMPLOYMENT SECURITY DIVISION; AND THE ADMINISTRATOR OF THE NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION, EMPLOYMENT SECURITY DIVISION, PETITIONERS, *v*. THE SECOND JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF WASHOE; AND THE HONORABLE SCOTT N. FREEMAN, DISTRICT JUDGE, RESPONDENTS, AND McDONALD'S OF KEYSTONE, REAL PARTY IN INTEREST.

No. 69499

June 22, 2017 396 P.3d 795

Original petition for a writ of mandamus or prohibition challenging a district court order refusing to dismiss, for lack of jurisdiction, a petition for judicial review of an unemployment benefits decision.

Petition granted.

Nevada Department of Employment, Training and Rehabilitation, Employment Security Division, Division of Senior Legal Counsel, and *Laurie L. Trotter* and *Joseph L. Ward., Jr.*, Carson City, for Petitioners.

The Law Offices of Charles R. Zeh, Esq., and *Charles R. Zeh*, Reno, for Real Party in Interest.

Before the Court EN BANC.[1]

OPINION

By the Court, DOUGLAS, J.:

In this original writ petition, we are asked to consider whether the district court should be prevented from hearing real party in interest McDonald's of Keystone's petition for judicial review of an unemployment benefits matter, initially decided by petitioners the Board of Review and the Administrator of the Nevada Department of Employment, Training and Rehabilitation, Employment Security Division (the ESD). We conclude that pursuant to the plain language of NRS 612.530(1), the district court lacked jurisdiction to hear McDonald's petition for judicial review. Thus, we grant the petition for extraordinary relief.

FACTS AND PROCEDURAL HISTORY

Jessica Gerry is a former employee of McDonald's. In March 2015, the Board of Review upheld a decision that awarded Gerry unemployment compensation benefits. In April 2015, McDonald's filed a petition for judicial review of the Board's decision with the district court. However, Gerry was not personally named as a defendant either in the caption or in the body of the petition for judicial review, although her full name and address were included within an attachment to the petition for judicial review.

The ESD filed a motion to dismiss on the ground that the caption failed to identify Gerry as a defendant, rendering the petition for judicial review defective under NRS 612.530(1). The ESD argued that because Gerry was a party to the proceedings before the Board of Review, she should have been included as a defendant in the petition. McDonald's subsequently filed an opposition to the ESD's motion to dismiss, as well as a motion to amend its petition for judicial review to add Gerry as a defendant.

Ultimately, the district court decided that the naming of all relevant parties as defendants, pursuant to NRS 612.530(1), was not a jurisdictional requirement. As a result, the district court denied the ESD's motion to dismiss and granted McDonald's motion to amend. The ESD now seeks extraordinary relief, claiming that the district court lacks jurisdiction to proceed.

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

[1]THE HONORABLE LIDIA S. STIGLICH, Justice, did not participate in the decision of this matter.

exercise of discretion. NRS 34.160; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Further, a writ of prohibition may be warranted when a district court acts without or in excess of its jurisdiction. NRS 34.320; *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. NRS 34.170; NRS 34.330; *Smith*, 107 Nev. at 677, 818 P.2d at 851. Whether a writ of mandamus or prohibition will be considered is within this court's sole discretion. *Smith*, 107 Nev. at 677, 818 P.2d at 851. This case presents an issue of subject matter jurisdiction, necessitating our immediate consideration, and warrants discussion based on the merits. Therefore, this petition for extraordinary relief is properly before us.

Statutory construction is a matter for de novo review. *J.D. Constr., Inc. v. IBEX Int'l Grp., LLC*, 126 Nev. 366, 375, 240 P.3d 1033, 1039 (2010). If a statute is clear and unambiguous, this court gives effect to the plain and ordinary meaning of its language without examining the other rules of construction. *Id.* at 375, 240 P.3d at 1039-40. The statute at issue, NRS 612.530(1), states:

> Within 11 days after the decision of the Board of Review has become final, any party aggrieved thereby or the Administrator may secure judicial review thereof by commencing an action in the district court of the county where the employment which is the basis of the claim was performed for the review of the decision, in which action any other party to the proceedings before the Board of Review must be made a defendant.

For decades, this court has required parties to follow the express language of NRS 612.530(1). *See Caruso v. Nev. Emp't Sec. Dep't*, 103 Nev. 75, 76, 734 P.2d 224, 225 (1987). We have consistently held that the requirements of the statute are jurisdictional and mandatory. *See Kame v. Emp't Sec. Dep't*, 105 Nev. 22, 24, 769 P.2d 66, 68 (1989) (holding that the time limit for filing a petition for judicial review is jurisdictional and mandatory); *Scott v. Nev. Emp't Sec. Dep't*, 70 Nev. 555, 559, 278 P.2d 602, 604 (1954) (affirming dismissal of a petition for judicial review where petitioner had failed to file in the proper district court).

Based on the plain language of the statute, we conclude that the naming requirement must be completed as timely as the rest of the petition. On its face, this statute indicates that the action must commence in a specific district court, and that the action must include as a defendant "any other party." NRS 612.530(1). Further, the entire section begins with: "Within 11 days after the decision of the Board of Review has become final." *Id.* This clause indicates that each requirement of NRS 612.530(1) must be completed within those 11 days.

Here, in McDonald's original petition for judicial review, Gerry was not named. She was not made a defendant in the action, nor was she named in the body of the petition for judicial review. Further, the Certificate of Service does not indicate that Gerry received a copy of the petition. Her name and address were not indicated in the petition itself but merely listed within an attachment to the petition for judicial review. She was not named as a defendant in an amended petition until months after McDonald's filed its original petition for judicial review, which defeats the expedited nature of the court's review. Accordingly, McDonald's failed to follow the statutory requirements of NRS 612.530(1), thus depriving the district court of jurisdiction to hear its petition for judicial review.

CONCLUSION

Based on the foregoing, we grant the ESD's petition for extraordinary relief. The clerk of this court shall issue a writ of prohibition directing the district court to grant the ESD's motion to dismiss the proceeding for lack of jurisdiction.

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

Pickering, J., concurring:

I concur in the decision to grant writ relief. The employer filed a petition for judicial review of an adverse unemployment benefits decision. The employee, who was a party to the agency proceedings, was not named in either the caption or the body of the petition; she has never been served, whether by the Administrator, *see* NRS 612.530(2), or the employer; and, the time for effecting service has passed. The district court should have dismissed the petition under NRS 612.530(1), which provides that, "[w]ithin 11 days after the [agency] decision . . . has become final, any party aggrieved thereby . . . may secure judicial review thereof by commencing an action in the district court . . . , *in which action any other party to the proceedings before the Board of Review must be made a defendant*." (Emphasis added.)

I write separately only to note that the employer did not argue, and so we do not have occasion to decide, whether the failure to name a person who was a party to an agency proceeding in the caption of a petition for judicial review is jurisdictionally fatal. In that regard, I note that the rules of procedure for reviewing an administrative decision are the same as in civil cases, unless expressly provided otherwise or the civil rules conflict with the state's administrative procedure act. 2 Am. Jur. 2d *Administrative Law* § 516 (2014); 73A C.J.S. *Public Administrative Law and Procedure* § 430 (2014); *see* NRCP 81(a). If the body of a civil complaint "correctly identifies the

party being sued or if the proper person actually has been served," the defendant is adequately identified as a party to the litigation. 5A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1321, at 391-92 (3d ed. 2004); *see also* NRCP 10(c) ("Statements in a pleading may be adopted by reference in a different part of the same pleading . . . . A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes."). It follows that a defendant not named in the caption of a petition for judicial review may still be a party to the action if named in the petition or its exhibits and properly served.

Many petitions for judicial review of adverse agency actions are filed by individuals who do not have a lawyer. I do not want to foreclose our consideration, in an appropriate case, of the holding in *Green v. Iowa Department of Job Services*, 299 N.W.2d 651, 654 (Iowa 1980), which allowed a petition for judicial review to proceed—even though the employee did not name the employer in the caption of the petition—where the employee timely served the employer and the petition incorporated and attached the agency decision, which did name the employer. *See Sink v. Am. Furniture Co*., No. 1160-88-3, 1989 WL 641960, at *1-2 (Va. Ct. App. 1989) (concluding that a failure to name a respondent in the caption did not invalidate the petition because respondent was mentioned in body of the petition and the prayer for relief).
