ROSA OLVERA, Appellant, *v.* WYNN LAS VEGAS; and SEDGWICK CMS, Respondents.

No. 85122-COA

September 28, 2023 537 P.3d 138

Appeal from a district court order denying a petition for judicial review in a workers' compensation matter. Eighth Judicial District Court, Clark County; Jessica K. Peterson, Judge.

Affirmed.

GGRM Law Firm and *Lisa M. Anderson*, Las Vegas, for Appellant.

Lewis Brisbois Bisgaard & Smith LLP and *Daniel L. Schwartz* and *Benjamin E. Abbott*, Las Vegas, for Respondents.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Bulla, J.:

One purpose of Nevada's workers' compensation statutes is to provide a vehicle for employees to obtain compensation for work-related injuries. *See Frith v. Harrah S. Shore Corp.*, 92 Nev. 447, 452-53, 552 P.2d 337, 340-41 (1976). In furtherance of this purpose, NRS 616C.390 provides for the reopening of closed workers' compensation claims upon a change of circumstances resulting from the work-related injury. In this opinion, we clarify that, when a claimant seeks to reopen a claim that was accepted for multiple body parts, the claim need be reopened for only those body parts for which a change of circumstances has been demonstrated. Here, although the claimant was previously treated for injuries to several parts of her body, she sought claim reopening due to the worsening condition of her lumbar spine. Because substantial evidence supports the appeals officer's decision that the claim should be reopened for treatment to the lumbar spine only, we affirm.

FACTS AND PROCEDURAL HISTORY

Rosa Olvera, an employee of Wynn Las Vegas (the Wynn), suffered an industrial injury while working at the Wynn in September 2013. She was opening the door of a walk-in refrigerator when the door handle broke, causing her to fall backwards and strike her head and back against a doorframe. Olvera was unconscious for approximately one to two minutes. She sought medical care the same day

and was diagnosed with a head injury, scalp injury, and cervical, lumbar, and thoracic strains. The insurer, Sedgwick CMS, accepted Olvera's claim for a cervical strain; thoracic strain; lumbar strain; contusion of the face, scalp, and neck (except eyes); right hip strain/sprain; and post-concussion syndrome. After receiving treatment for several months, Olvera's injuries were pronounced stable and ratable. In May 2014, Olvera was evaluated by Charles Quaglieri, M.D., for a permanent partial disability (PPD) rating. Dr. Quaglieri found that Olvera suffered a six-percent whole-person impairment for her lumbar spine injury and a three-percent whole-person impairment related to her central nervous system, for a nine-percent whole-person impairment overall. In 2015, Sedgwick CMS offered Olvera a nine-percent PPD award, which she accepted, and her industrial claim was closed.

However, Olvera continued to experience low back pain, prompting her to seek further medical treatment. An MRI taken in May 2020 showed "severe bilateral neural foraminal stenosis from the spondylolisthesis and disk bulging" at L5-S1 in the lumbosacral region. In June 2020, David Dye, D.C., evaluated and diagnosed Olvera with chronic pain syndrome, lumbar radiculopathy, osseous and subluxation stenosis of intervertebral foramina of lumbar region, spondylolisthesis-acute traumatic of lumbosacral region, spinal instabilities of lumbosacral region, and idiopathic peripheral neuropathy. Dr. Dye related these new diagnoses to Olvera's original industrial injury. Further, Dr. Dye determined, within a reasonable degree of medical probability, that Olvera's industrial injuries related to the lumbar region had worsened since the claim closure in 2015. Olvera requested that her claim be reopened, but Sedgwick CMS denied her requests because the medical records she attached to support the reopening of her claim were illegible and ultimately did not demonstrate that her medical condition had worsened. Olvera timely appealed to the hearing officer, who affirmed. Olvera then appealed to the appeals officer.

In September 2021, following a hearing, the appeals officer entered a decision reversing in part the hearing officer's decision and ordering that Olvera's claim be reopened for the lumbar spine, only. Specifically, the appeals officer found that Olvera provided credible medical evidence, including the records from Dr. Dye and the MRI of her lumbar spine, supporting Olvera's contention that her lumbar spine had worsened over time due to her original industrial injury. The appeals officer also found, pursuant to NRS 616C.390(1)(a), that Olvera demonstrated a change in circumstances related to the condition of her lumbar spine when comparing Dr. Dye's diagnoses with Olvera's past treatment records. While the appeals officer reopened Olvera's claim for additional treatment to the lumbar spine, the appeals officer denied Olvera's request to

reopen her claim for other body parts, which, although accepted as part of her initial claim, did not require further treatment. Subsequently, Olvera filed a petition for judicial review on the basis that her workers' compensation claim should have been reopened to cover all accepted body parts related to her 2013 industrial accident, not only the lumbar spine. The district court denied Olvera's petition, and this appeal followed.

ANALYSIS

On appeal, Olvera argues that the appeals officer misapplied NRS 616C.390(1) because she was statutorily entitled to reopen her claim for treatment to all body parts covered under her original claim, and therefore, the appeals officer should not have limited the reopening of her claim to the lumbar spine. Olvera posits that to conclude otherwise results in her claim not being considered reopened under the statutes. Conversely, Sedgwick CMS and the Wynn argue that there is no legal or factual basis for reopening the claim for any other body parts because the medical records Olvera provided only supported reopening her claim for further treatment to the lumbar spine.

Standard of review

This court reviews questions of law, including an administrative officer's construction of statutes, de novo. *Holiday Ret. Corp. v. State, Div. of Indus. Relations*, 128 Nev. 150, 153, 274 P.3d 759, 761 (2012). While this court does not defer to an administrative officer's construction of statutes, "[w]e review an administrative agency's factual findings for clear error or an arbitrary abuse of discretion and will only overturn those findings if they are not supported by substantial evidence." *City of North Las Vegas v. Warburton*, 127 Nev. 682, 686, 262 P.3d 715, 718 (2011) (internal quotation marks and citation omitted). "Substantial evidence exists if a reasonable person could find the evidence adequate to support the agency's conclusion, and [this court] may not reweigh the evidence or revisit an appeals officer's credibility determination." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008).

"When reviewing de novo, [this court] will interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous, the plain meaning would provide an absurd result, or the interpretation clearly was not intended." *Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) (internal quotation marks and citations omitted); *Platte River Ins. Co. v. Jackson*, 137 Nev. 773, 778, 500 P.3d 1257, 1262 (2021) ("We strive to the extent possible to interpret a statute in a matter that avoids unreasonable or absurd results unintended by the Legislature." (alteration and internal quotation marks omitted)). Moreover, when interpreting a statute, "[the appellate courts] consider[ ] the

statute's multiple legislative provisions as a whole." *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

NRS 616C.390(1) does not require reopening a claim for all of the body parts accepted in the original claim

We first briefly address Olvera's argument that, upon reopening a closed claim, NRS 616C.390(1) requires the claim to be reopened for all originally accepted body parts. On this point, her position is belied by the plain language of the statute, as nowhere does the provision require a claim to be reopened for coverage of all body parts accepted in the original claim where there has been no change in circumstances as to those body parts. *Young*, 136 Nev. at 586, 473 P.3d at 1036 (providing that we interpret statutory provisions to avoid unreasonable or absurd results).

In accordance with NRS 616C.390(1), an insurer must reopen a claim more than one year after its closure if:

> (a) A change of circumstances warrants an increase or rearrangement of compensation during the life of the claimant;
> (b) The primary cause of the change of circumstances is the injury for which the claim was originally made; and
> (c) The application is accompanied by the certificate of a physician or a chiropractic physician showing a change of circumstances which would warrant an increase or rearrangement of compensation.

In this case, the appeals officer reopened Olvera's claim for further treatment to the lumbar spine, which as discussed below, is the only body part for which the evidence demonstrated a change in circumstances requiring additional compensation. Therefore, we are not persuaded by Olvera's argument that her claim was not reopened in accordance with the statute.

Olvera failed to demonstrate by a preponderance of the evidence that her claim should be reopened as to body parts other than the lumbar spine

An employee has the burden of proof to demonstrate that a claim should be reopened by a preponderance of the evidence. *State Indus. Ins. Sys. v. Hicks*, 100 Nev. 567, 569, 688 P.2d 324, 325 (1984). Reopening a claim necessitates more than "possibilities and speculative testimony"; instead, it requires that "[a] testifying physician [ ] state to a degree of reasonable medical probability that the condition in question was caused by the industrial injury." *See United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424-25, 851 P.2d 423, 425 (1993); *see also Horne v. State Indus. Ins. Sys.*, 113 Nev. 532, 539, 936 P.2d 839, 843 (1997) ("[M]ere speculation and belief does not rise to the level of reasonable medical probability of

a firm causal connection." (internal quotation marks and citation omitted)). Recently, this court recognized that NRS 616C.390 "permits the reopening of a claim and expanding the scope of coverage where, for example, an injury to a body part manifests after a claim has been closed but is medically related to the original industrial accident." *See Gilman v. Clark Cty. Sch. Dist.*, 139 Nev. 61, 66, 527 P.3d 624, 628 (Ct. App. 2023).

Here, the appeals officer considered the factors set forth in NRS 616C.390(1) and made factual findings to support the reopening of Olvera's claim to provide coverage for further treatment to the lumbar spine. Specifically, the appeals officer considered Olvera's medical records from Dr. Dye and the MRI of her lumbar spine and concluded that this evidence supported a conclusion that a change in circumstances occurred necessitating future treatment to her lumbar spine, thereby warranting the reopening of her original claim for an increase or rearrangement of compensation. This conclusion is supported by substantial evidence in the record. However, the record on appeal is devoid of medical records or other evidence demonstrating a change in circumstances related to the other body parts that were previously accepted. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (recognizing that substantial evidence may be inferred from the lack of certain evidence).

This court will not substitute its judgment for that of the appeals officer who, after weighing the evidence, determined that Olvera's claim should be reopened for treatment to the lumbar spine. The appeals officer also determined that the evidence failed to support that further treatment was required for the other body parts. *See Day v. Washoe Cty. Sch. Dist.*, 121 Nev. 387, 389, 116 P.3d 68, 69 (2005).[1] We conclude that the appeals officer properly determined that the reopening of Olvera's claim was warranted only as to the lumbar spine.

CONCLUSION

In this case, Olvera was able to reopen her claim pursuant to NRS 616C.390(1)(a) for further treatment to her lumbar spine based on the medical evidence presented. However, Olvera failed to present

[1]Respondents argue that NRS 616C.390(5) precluded Olvera's claim from being reopened for body parts other than the lumbar spine because her request was made more than one year after the claim closed, and she only received a PPD award for the lumbar spine and central nervous system. However, based on our disposition and because the appeals officer did not reach this issue, we need not address the applicability of NRS 616C.390(5) on appeal. *See Langman v. Nev. Adm'rs, Inc.*, 114 Nev. 203, 206-07, 955 P.2d 188, 190 (1998) (recognizing that this court's role in reviewing an administrative decision is to determine the propriety of the agency's decision in light of the evidence presented to the agency).

evidence to support treatment of other body parts covered in her initial claim. The reopening of Olvera's claim for the lumbar spine only is within the statutory purpose of permitting the reopening of a claim where there has been a change of circumstances necessitating an increase or rearrangement of compensation. Therefore, the appeals officer properly limited the reopening of the claim to the lumbar spine, and we affirm the district court's order denying Olvera's petition for judicial review.

Gibbons, C.J., and Westbrook, J., concur.

ANTONIO CRUZ ALDAPE, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 83622

September 28, 2023 535 P.3d 1184

Appeal from a judgment of conviction, entered pursuant to a guilty plea, of two counts of attempted lewdness with a child under 14. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed in part, reversed in part, and remanded.

Darin Imlay, Public Defender, and *Katherine E. Sitsis* and *Nadia Hojjat Wood*, Chief Deputy Public Defenders, Clark County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan VanBoskerck*, Chief Deputy District Attorney, and *Elan Adam Eldar*, Deputy District Attorney, Clark County, for Respondent.

Christopher M. Peterson, Las Vegas, and *Randolph M. Fiedler*, Las Vegas, for Amici Curiae American Civil Liberties Union of Nevada and Nevada Attorneys for Criminal Justice.

Before the Supreme Court, En Banc.[1]

OPINION

By the Court, Pickering, J.:

Appellant Antonio Aldape pleaded no contest to two counts of attempted lewdness with a child. The district court placed him on probation and imposed the special condition mandated by NRS 176A.410(1)(q), which prohibits any defendant who is on probation for a sexual offense from accessing the internet or possessing a device capable of accessing the internet without their probation officer's permission. On appeal, Aldape challenges the mandatory internet ban on First Amendment grounds. He argues that it fails intermediate scrutiny because a categorical prohibition on internet access by any probationer convicted of a sex offense is not narrowly tailored to the risk of online predatory behavior the individual probationer may pose. We agree and reverse the judgment as to the probation condition banning access to the internet. We otherwise affirm and, in doing so, reject Aldape's separate challenge to the

[1]The Honorable Douglas W. Herndon, Justice, is disqualified from participation in the decision of this matter.

additional probation condition forbidding him from visiting places such as playgrounds and schools that primarily cater to children.

I.

Aldape pleaded guilty pursuant to *North Carolina v. Alford*, 400 U.S. 25 (1970), to two counts of attempted lewdness with a child under 14 for interactions with his step-granddaughter, V.I. The interactions occurred at Aldape's home and did not involve other children or the internet. The plea agreement permitted Aldape to substitute a guilty plea to two counts of sexually motivated coercion upon successful completion of probation and waived Aldape's right to a "direct appeal of [the] conviction." When the district court canvassed Aldape before accepting his plea, it asked Aldape if he understood that he was "waiving, that is giving up[,] your right to a jury trial and all the other rights I've just discussed and the rights that are set out and mentioned in your Guilty Plea Agreement[.]" The court did not ask any questions specific to the appeal waiver.

Aldape was adjudged guilty and given a suspended aggregate prison term of 8 to 20 years, with probation not to exceed 5 years. His judgment of conviction imposed the two probation conditions he now challenges: special condition 15, which prohibits Aldape from accessing the internet or possessing a device that can access the internet; and special condition 11, which prohibits Aldape from being "in or near" playgrounds, parks, schools, and businesses that primarily cater to children. Aldape challenged both conditions in district court on substantially the same grounds he raises on appeal. The district court rejected Aldape's challenges, and this appeal timely followed.

II.

As a threshold issue, the State argues that Aldape waived his right to appeal the conditions of his probation pursuant to the section of his plea agreement waiving his "right to a direct appeal of this conviction." In evaluating appeal waiver claims, courts consider "whether: (1) the appeal falls within the scope of the waiver; (2) both the waiver and plea agreement were entered into knowingly and voluntarily; and (3) enforcing the waiver would . . . result in a miscarriage of justice." *United States v. Adams*, 12 F.4th 883, 888 (8th Cir. 2021); *United States v. Hahn*, 359 F.3d 1315, 1325 (10th Cir. 2004) (en banc); *see Burns v. State*, 137 Nev. 494, 499-500, 495 P.3d 1091, 1099-1100 (2021). Although the parties address all three criteria, we only need to discuss the first—the scope of the waiver. In the plea agreement, Aldape waived the right to appeal his conviction, not his sentence or the probation conditions associated with his sentence. We therefore conclude that Aldape's appeal may proceed because his challenges to his probation conditions fall outside

the scope of the appeal waiver. *See Garza v. Idaho*, 586 U.S. 232, 238 (2019) ("As courts widely agree, a valid and enforceable appeal waiver only precludes challenges that fall within its scope.") (internal quotations omitted).

Contract principles apply to plea agreements, *Burns*, 137 Nev. at 496, 495 P.3d at 1097, and to appeal waivers in plea agreements, *see Garza*, 586 U.S. at 238. A plea agreement is enforced as written, *Burns*, 137 Nev. at 497, 495 P.3d at 1097, "according to what the defendant reasonably understood when he or she entered the plea," *Sullivan v. State*, 115 Nev. 383, 387, 990 P.2d 1258, 1260 (1999). In the appeal waiver context, given the important rights at stake, the State "bears the burden of proving that the plea agreement clearly and unambiguously waives a defendant's right to appeal." *Adams*, 12 F.4th at 888. Ambiguities as to the scope of the waiver are construed against the State as the drafter of the plea agreement. *Id.*; *see Burns*, 137 Nev. at 497, 495 P.3d at 1098.

The appeal waiver clause in Aldape's plea agreement did not refer to his sentence or probation conditions. It stated that he waived his right to appeal his conviction:

> By entering my plea of guilty, I understand that I am waiving and forever giving up the following rights and privileges:
>
> . . . .
>
> (6) *The right to appeal the conviction* with the assistance of an attorney, either appointed or retained, unless specifically reserved in writing and agreed upon as provided in NRS 174.035(3). *I understand this means I am unconditionally waiving my right to a direct appeal of this conviction*, including any challenge based upon reasonable constitutional, jurisdictional or other grounds that challenge the legality of the proceedings as stated in NRS 177.015(4). However, I remain free to challenge my conviction through other post-conviction remedies including a habeas corpus petition pursuant to NRS Chapter 34.

(emphases added). As Aldape argues, the words "conviction" and "sentence" mean two different things. "Conviction" denotes guilt: "The act or process of judicially finding someone guilty of a crime; the state of having been proved guilty" or "[t]he judgment (as by a jury verdict) that a person is guilty of a crime." *Conviction*, *Black's Law Dictionary* (11th ed. 2019). "Sentence," by contrast, means "[t]he judgment that a court formally pronounces after finding a criminal defendant guilty; the punishment imposed on a criminal wrongdoer." *Sentence*, *id.*

The State argues that Aldape's appeal waiver covers the probation conditions imposed at time of sentencing, citing *United States v. Wells*, 29 F.4th 580 (9th Cir. 2022), and *United States v. Holzer*, 32 F.4th 875 (10th Cir. 2022), as support. But on close reading,

Wells and *Holzer* support Aldape's position, not the State's. Unlike Aldape's appeal waiver, which only referenced his conviction, the waivers in *Wells* and *Holzer* applied to *both* the conviction *and* the sentence. Thus, in *Wells*, the waiver stated: "I agree to give up my right to appeal the judgment and all orders of the court. *I also agree to give up my right to appeal any aspect of my sentence*," 29 F.4th at 584 (emphasis added), while in *Holzer*, the defendant waived "the right to appeal any matter in connection with this prosecution, conviction, *or sentence*," 32 F.4th at 880 (emphasis added). The defendants in *Wells* and *Holzer* could not appeal their supervised release conditions because the conditions are an aspect of sentencing, which their appeal waivers covered. *Wells*, 29 F.4th at 584 (noting that an appeal waiver's "reference to 'any aspect of the sentence' unambiguously encompassed supervised release terms") (internal quotation omitted); *see Holzer*, 32 F.4th at 882; *accord United States v. Andis*, 333 F.3d 886, 893 n.7 (8th Cir. 2003).

Most reported cases consider appeal waivers that, like those in *Wells* and *Holzer*, apply to both conviction and sentence. But in cases where the appeal waiver is not specific, or only references the conviction, courts have held that appeals challenging the sentence or conditions of supervised release fall outside the appeal waiver and can proceed. *See, e.g.*, *Williams v. Indiana*, 164 N.E.3d 724, 725 (Ind. 2021) (allowing the defendant to appeal his sentence where the appeal waiver did not specifically preclude it and noting that "the plea agreement, guilty plea and sentencing hearing colloquy, and sentencing order must be clear and consistent as to whether the defendant waives only the right to appeal the conviction or the right to appeal the conviction and sentence"); *Kansas v. Patton*, 195 P.3d 753, 771 (Kan. 2008) (declining to construe an appeal waiver as precluding an appeal of a sentencing decision where the waiver did not explicitly refer to the sentence); *cf. Garza*, 586 U.S. at 238 & n.5, (citing *Patton* and referencing other examples of appeal waivers that allowed challenges to the sentence); *United States v. Pam*, 867 F.3d 1191, 1201 (10th Cir. 2017) (holding that a waiver of collateral attack to the conviction does not include attacks on the sentence), *abrogated on other grounds by Borden v. United States*, 593 U.S. 420 (2021). And this is only fair. Given the difference in meaning between "conviction" and "sentence," a defendant signing an agreement that waives the right to appeal the conviction would not logically understand it to preclude appeal of probation conditions imposed later, at time of sentencing. *See Williams*, 164 N.E.3d at 725. This is especially true where, as here, the plea agreement did not bind the district court to a particular sentence and the defendant was not canvassed about the appeal waiver's scope. *See Sullivan*, 115 Nev. at 387, 990 P.2d at 1260 (construing plea agreement according to what a defendant reading it would reasonably understand).

Shifting focus, the State argues that Aldape gave up his right to appeal his probation conditions because he waived the right to challenge the legality of the proceedings in the appeal waiver. But in making this argument, the State misquotes the text of the appeal waiver clause—Aldape waived his "right to a direct appeal *of this conviction, including* any challenge based upon reasonable constitutional . . . grounds that challenge the legality of the proceedings." (emphasis added). The State omits the italicized language—"*of this conviction, including*"—which grammatically ties what follows the word "including" to its antecedent, "this conviction." The appeal waiver's reference to "the legality of the proceedings" does not expand the word "conviction" to include sentencing and release conditions. *Cf. People v. DeVaughn*, 558 P.2d 872, 875 (Cal. 1977) (construing the phrase to mean "the legality of the proceedings resulting in the plea"). At best, the phrase introduces an ambiguity, which is resolved against the State. *See Burns*, 137 Nev. at 497, 495 P.3d at 1098. The State's final point—that we should construe "conviction" to include "sentence" because NRS 176.105 requires both for a "judgment of conviction"—also fails as a matter of contract construction. The appeal waiver used the word "conviction," not the phrase "judgment of conviction." As the drafter of the plea agreement, the State is bound by the plain meaning of the words it used, and those words do not preclude this appeal.

III.

If a district court grants probation to a defendant convicted of a sexual offense as defined in NRS 179D.097, it must impose the probation conditions enumerated in NRS 176A.410(1), including subsection (q), which requires that the defendant "[n]ot possess any electronic device capable of accessing the Internet and not access the Internet through any such device or any other means, unless possession of such a device or such access is approved by the [defendant's] probation officer." The district court incorporated subsection (q) verbatim as special condition 15 of Aldape's probation. On appeal, Aldape challenges the constitutionality of subsection (q) and special condition 15 under the First Amendment. Although we review a district court's discretionary imposition of a probation condition for an abuse of discretion, *Igbinovia v. State*, 111 Nev. 699, 707, 895 P.2d 1304, 1309 (1995), the constitutionality of a statutorily mandated probation condition presents a question of law to which de novo review applies, *see Mangarella v. State*, 117 Nev. 130, 133-36, 17 P.3d 989, 991-93 (2001).

A.

The internet affords a First Amendment forum of historically unimaginable reach. "A fundamental principle of the First Amend-

ment is that all persons have access to places where they can speak and listen, and then, after reflection, speak and listen once more." *Packingham v. North Carolina*, 582 U.S. 98, 104 (2017). Today, that place is "cyberspace—the vast democratic forums of the Internet." *Id*. (internal quotation omitted).

In *Packingham*, the Supreme Court struck down a North Carolina statute that made it a felony for a registered sex offender to access social media sites like Facebook that children frequent. *Packingham* recognized for the first time a broad First Amendment right to internet access, inclusive of individuals who had been convicted of and served their sentences for serious sex offenses. *Id.* at 108. While that right could be abridged by "specific, narrowly tailored laws" aimed at "conduct that often presages a sexual crime," it could not be snuffed out by North Carolina's "sweeping" statute without a showing that its breadth was necessary to "keep[ ] convicted sex offenders away from vulnerable victims." *Id.* at 107.

The State would limit the rights recognized in *Packingham* to people who, unlike Aldape, have completed their sentence and are no longer under court-supervised release. Probationers "do not enjoy the absolute liberty to which every citizen is entitled," *Griffin v. Wisconsin*, 483 U.S. 868, 874 (1987) (internal quotations omitted), and "[j]ust as other punishments for criminal convictions curtail an offender's freedoms, a court granting probation may impose reasonable conditions that deprive the offender of some freedoms enjoyed by law-abiding citizens," *United States v. Knights*, 534 U.S. 112, 119 (2001). For these reasons, on a continuum ranging from incarceration to release following completion of sentence, defendants on probation "enjoy less freedom than those who have finished serving their sentences." *United States v. Holena*, 906 F.3d 288, 295 (3d Cir. 2018). But that does not mean that the First Amendment right to internet access recognized in *Packingham* has no application to probationers. While a probationer's First Amendment rights may be restricted, under *Packingham* those restrictions must be narrowly tailored with a view to the goals of supervised release—"deterring crime, protecting the public, [and] rehabilitating the defendant." *Id*.; *see United States v. Eaglin*, 913 F.3d 88, 97 (2d Cir. 2019) (applying *Packingham* and holding that "the imposition of a total Internet ban as a condition of supervised release inflicts a severe deprivation of liberty" that can only be justified in "highly unusual circumstances"); *People v. Morger*, 160 N.E.3d 53, 69 (Ill. 2019) (invalidating a statutorily mandated probation condition banning social media access under *Packingham*).

The State cites *United States v. Carson*, 924 F.3d 467, 473 (8th Cir. 2019), *United States v. Halverson*, 897 F.3d 645, 658 (5th Cir. 2018), and *United States v. Rock*, 863 F.3d 827, 831 (D.C. Cir. 2017), as support for limiting *Packingham* to people who have finished

serving their sentences. These opinions evaluated internet restrictions discretionarily imposed by the sentencing court as conditions of their court-supervised release. Since the defendants in the cited cases did not raise their First Amendment challenges in district court, their appeals were decided on plain error review, a deferential standard requiring that the district court commit a legal error that is "clear or obvious, rather than subject to reasonable dispute." *Halverson*, 897 F.3d at 657; *see Carson*, 924 F.3d at 473, *Rock*, 863 F.3d at 831. By contrast, Aldape preserved his First Amendment challenge to subsection (q) and special condition 15 in district court, so our review is de novo, not for plain error. While the difference in the defendants' supervision status sufficiently distinguished *Packingham* to prevent reversal for plain error in *Carson*, *Halverson*, and *Rock*, that difference does not limit *Packingham*'s application on de novo review.

Finally, and most importantly, in applying the First Amendment to 21st century norms, *Packingham* formalized an undeniable truth—there is simply no way to participate in modern society without internet access or a "device capable of accessing the Internet." That fact does not change, and perhaps becomes even more salient, when applied to people under active court supervision. It would, for example, be hopelessly difficult to meet with one's probation officer without using a cell phone to make the appointment, get directions, arrange transportation, and set reminders. Then there are the rehabilitative steps: finding a job, renting a home, communicating with family and friends, and civic participation all often require an internet connection. *See Packingham*, 582 U.S. at 108 ("Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives."). And one could avoid interactions with "internet-connected devices" only by never leaving the home—but even there, the television, phone, speakers, and appliances all pose a threat. It makes little sense to differentiate by supervision status a constitutionally protected right to access these everyday necessities when modern life makes no such distinctions.

Packingham therefore assists us in holding that the First Amendment protects the right of court supervisees, including Aldape, to access the internet.

B.

When a government imposes a content-neutral restriction on speech or conduct protected by the First Amendment, we apply intermediate scrutiny to evaluate whether the restriction is "narrowly tailored to serve a significant government interest" and "leaves open ample alternative channels for communication." *Ward*

v. Rock Against Racism, 491 U.S. 781, 791 (1989); *see Packingham*, 582 U.S. at 105-06. Because NRS 176A.410(1)(q) restricts the time, place, and manner of a probationer's access to the internet and is otherwise neutral as to the content of any expressions made therein, intermediate scrutiny applies. *See Ward*, 491 U.S. at 791 (noting that "a regulation that serves purposes unrelated to the content of expression is deemed neutral," including time, place, or manner restrictions). In such circumstances, the State "bears the burden of proving the constitutionality of its actions." *Watchtower Bible & Tract Soc'y of N.Y., Inc. v. Village of Stratton*, 536 U.S. 150, 170 (2002) (Breyer, J., concurring) (quoting *United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816 (2000)).

The State undoubtedly has a significant interest in protecting the public from online conduct that constitutes or "presages a sexual crime." *Packingham*, 582 U.S. at 107.[2] The parties agree on that much but diverge as to whether and how narrowly subsection (q) is tailored to that goal.

The State argues that subsection (q) is necessary to prevent every person convicted of a sexual offense from getting online because they are both more likely to recidivate than other offenders and more likely to do so online. But even assuming the State's data to that effect are true, subsection (q) does not "alleviate th[o]se harms in a direct and material way," as is required by narrow tailoring. *Turner Broad. Sys., Inc. v. Fed. Commc'ns Comm'n*, 512 U.S. 622, 664 (1994). The category of "sexual offenses" includes everything from public indecency to violent assaults to production of pornography. NRS 176A.410(7), NRS 179D.097. It is illogical that each sexual offender, regardless of crime, rehabilitative needs, history of internet usage, or victim, poses an equally grave threat online, and the State cannot enact such a sweeping prohibition based on generalizations. *See Packingham*, 582 U.S. at 108 (concluding that North Carolina failed to show the "sweeping law" at issue was necessary or legitimate to serve "its preventative purpose of keeping convicted sex offenders away from vulnerable victims"); *Morger*, 160 N.E.3d at 69 (addressing *Packingham*'s conclusion that "[t]he broad ban of the law could not be sustained solely on the ground that it protected the public against sex offenders").

This is not to say that a court cannot, in an appropriate case, limit internet access by a person convicted of a sexual offense. Broad restrictions on internet access may be justified "where (1) the defen-

[2]This court has long recognized an equally significant government interest in the defendant's rehabilitation. *See Mangarella*, 117 Nev. at 137, 17 P.3d at 993 (stating that probation conditions must be "reasonably related to rehabilitation or the health, safety or welfare of the community"); *Seim v. State*, 95 Nev. 89, 93, 590 P.2d 1152, 1154 (1979) ("[T]he broad objective of probation is rehabilitation with incidental public safety, and . . . the conditions of probation should further provide this objective.").

dant used the internet in the underlying offense; (2) the defendant had a history of improperly using the internet to engage in illegal conduct; or (3) particular and identifiable characteristics of the defendant suggested that such a restriction was warranted." *United States v. Perazza-Mercado*, 553 F.3d 65, 71 (1st Cir. 2009) (collecting cases); *see United States v. Albertson*, 645 F.3d 191, 197 (3d Cir. 2011) (noting that a complete ban "will rarely be sufficiently tailored"). In these scenarios, a broad internet ban is necessary because the supervisee's individual traits pose an equally broad threat. *See, e.g.*, *Albertson*, 645 F.3d at 197-200 (noting that a broad ban may be "imposed temporarily on those offenders who have used or have clearly demonstrated a willingness to use the internet as a direct instrument of physical harm" and invalidating the imposition of such a ban on a supervisee convicted of possessing child pornography); *United States v. Johnson*, 446 F.3d 272, 282-83 (2d Cir. 2006) (concluding that a complete ban was justified by a supervisee's "sophisticated computer us[age]" and skills in "circumventing the software needed for monitoring" after his conviction for using the internet to contact and lure minors); *Holena*, 906 F.3d at 292 (invalidating a blanket internet ban imposed as a condition of supervised release but noting that, where a defendant used the internet to solicit a child for sex, "it is almost certainly appropriate to prevent [them] from using social media, chat rooms, peer-to-peer file-sharing services, and any site where he could interact with a child" and to "consider the efficacy of filtering and monitoring software"). The problem with subsection (q) is not that an internet ban can never be applied; it is that it cannot mandatorily be applied to every person convicted of a sexual offense without the sentencing court considering the individualized factors that would justify such a ban.

Nor does subsection (q) permit the sentencing court to tailor internet restrictions to prevent only that "First Amendment activity [that is] necessary to protect anyone from misconduct that is a consequence of internet use." *Mutter v. Ross*, 811 S.E.2d 866, 871 (W. Va. 2018) (invalidating a condition of parole similar to the probation condition mandated by subsection (q)). Tailoring a condition of supervision to the individual empowers the sentencing court to serve the government's interests in supervision while respecting the supervisee's extant constitutional rights. The court thereby restricts only those aspects of the defendant's First Amendment rights implicated by their crime of conviction and threat to the community, rather than "treat[ing] all individuals who commit a sex offense as though they are highly sophisticated, online extortionists" or prohibiting economic, political, or interpersonal speech online that poses no threat of sexual misconduct. Jacob Hutt, *Offline: Challenging Internet and Social Media Bans for Individuals on Supervision for Sex Offenses*, 43 N.Y.U. Rev. L. & Soc. Change 663, 677-86 (2019)

(noting that internet restrictions run afoul of the First Amendment when they target the "wrong people" or the "wrong speech"). Our sister courts and the federal government have solved this problem by imposing statutory or common law guidelines for tailoring internet restrictions on supervisees. *See, e.g.*, 18 U.S.C. §§ 3553(a)(1), (a)(2)(B), (a)(2)(C), (a)(2)(D) (requiring that conditions of supervised release be "reasonably related" to the defendant's offense and rehabilitation, need for deterrence, and community safety); 18 U.S.C. § 3583(d) (requiring that conditions "involve[ ] no greater deprivation of liberty than is reasonably necessary"); *Morger*, 160 N.E.3d at 60 (invalidating as facially unconstitutional a statute imposing a blanket social media ban on probationers convicted of sexual offenses, while acknowledging more narrowly tailored measures that could achieve the same protective and rehabilitative objectives); *Weida v. State*, 94 N.E.3d 682, 690 (Ind. 2018) (requiring that probation conditions be "reasonably related to rehabilitating the probationer and protecting the public"); *see Dalton v. State*, 477 P.3d 650, 651 (Alaska Ct. App. 2020) (applying "special scrutiny" to "probation conditions that infringe constitutional rights"); *Fazili v. Commonwealth*, 835 S.E.2d 87, 94 (Va. Ct. App. 2019) (invalidating an internet ban where the record did not show that the internet played a role in the crime and the sentencing court did not articulate how the broad restriction "would serve any rehabilitative or public purpose").

By contrast, Nevada appears to be the only state in the nation that statutorily mandates its sentencing courts to impose an identical and total internet ban on every defendant who is granted probation after being convicted of a sexual offense, without regard for the nature of the defendant's crime of conviction, internet usage history, or threat to online users. *See* Hutt, *supra*, at 681 n.92 and accompanying text (collecting state statutes that impose internet bans, none of which is as broad as subsection (q)). This breadth would have been less remarkable in 2001, when the statute was first added and the First Amendment implications of internet connectivity had not yet matured. But the internet has since evolved into an essential public forum, while subsection (q) has gone unamended. *See* Hutt, *supra*, at 667 n.17 (collecting scholarship examining *Packingham*'s "treatment of the Internet as a public forum"). As evidenced by the rigorous tests placed on such restrictions in the interim, the statute has become fatally outmoded.

The State argues that subsection (q) is adequately tailored because (1) Aldape is only subject to the condition for five years; (2) the district court can modify the conditions under "extraordinary circumstances," NRS 176A.410(6); and (3) Aldape can access the internet or connected devices with the prior approval of his probation officer, NRS 176A.410(1)(q). But because Aldape

challenges the facial validity of the statute, its finite application to him does not change the analysis. And the phrase "extraordinary circumstances" denotes "a highly unusual set of facts that are not commonly associated with a particular thing or event." *Extraordinary Circumstances*, *Black's Law Dictionary* (11th ed. 2019). Confining the court's discretion to only extraordinary circumstances does not permit the tailoring necessary to save the statute's constitutionality.

Other courts have spoken directly and convincingly about the dangers of entrusting the constitutionality of a statute to the sole discretion of nonjudicial officers. *See, e.g.*, *Holena*, 906 F.3d at 293 (finding fault with the district court offering "no guidance on the sorts of internet use" that the probation office should approve); *United States v. Ramos*, 763 F.3d 45, 61 (1st Cir. 2014) (finding that such permission "does not immunize the ban from an inquiry that evaluates the justification for the ban in the first instance"); *Doe v. Jindal*, 853 F. Supp. 2d 596, 604 (M.D. La. 2012) (finding permission inadequate because the statute did "not define the standards to be used in evaluating the requests for an exemption"); *Dalton*, 477 P.3d at 653 (recognizing that under more recent jurisprudence, prior approval "is not a sufficient safeguard for First Amendment rights in this context"); *cf. J.I. v. N.J. State Parole Bd.*, 155 A.3d 1008, 1023 (N.J. 2017) (stating that the justification for internet restrictions must be based on "more than the caprice of a parole officer") (internal quotations omitted). The approval escape valve cannot save the statute's constitutionality, particularly without any guidelines on how and when it applies.

Aldape's case is the perfect example of the impropriety of a blanket internet ban. His victim was a family member who lived with or near him, and the record does not demonstrate any predatory online behaviors that would justify a generalized internet restriction. Because NRS 176A.410(1)(q) is both mandatory and restricts more speech than necessary to serve the government's interest with no tailoring mechanism, and the State fails its burden to show otherwise, it is facially unconstitutional under the First Amendment.[3]

IV.

Aldape also challenges special probation condition 11, which reads:

> Unless approved by the Parole and Probation Officer assigned to the Defendant and by a psychiatrist, psychologist or counselor

[3]We do not address the State's request that we instruct the district court to determine whether a narrower internet restriction should be imposed under its discretionary authority in NRS 176A.400, because it is not adequately briefed. This is a matter for the State to address to the district court in the first instance.

> treating the Defendant, if any, [the Defendant must] not be in or near:
>
> 1. a playground, park, school or school grounds.
> 2. a motion picture theater, or
> 3. a business that primarily has children as customers or conducts events that primarily children attend.

He argues that the district court abused its discretion by imposing this condition pursuant to NRS 176A.400(1)(c)(3) because it mirrors a mandatory condition imposed on Tier III offenders pursuant to NRS 176A.410(1)(m), but he is only a Tier II offender. That subsection (m) is mandatory for Tier III offenders, however, does not impede the district court's discretion to impose a similar condition under NRS 176A.400(1)(c)(3), permitting any reasonable condition "prohibiting the probationer from entering certain geographic areas."

The district court's imposition of a nonmandatory condition of probation is reviewed for an abuse of discretion, *Igbinovia*, 111 Nev. at 707, 895 P.2d at 1309, but questions of statutory interpretation are reviewed de novo, *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). "[S]tatutory provisions of the probation scheme must be strictly construed," *Igbinovia*, 111 Nev. at 710, 895 P.2d at 1311, including any penal statutes that "negatively impact a defendant," *Mangarella*, 117 Nev. at 134, 17 P.3d at 992. Any "[d]iscretionary powers of the district court accorded by a statutory grant of authority must be interpreted liberally." *Igbinovia*, 111 Nev. at 710, 895 P.2d at 1311.

To resolve Aldape's argument that the district court exceeded its authority under NRS 176A.410(1)(m) because it imposed on him a condition meant only for Tier III offenders, we review subsection (m) de novo. Aldape's challenge is easily answered by the statute's plain language. *See Ramos v. State*, 137 Nev. 721, 722, 499 P.3d 1178, 1180 (2021) ("[W]e first look to the statute's plain language to determine its meaning, and we will enforce it as written if the language is clear and unambiguous."). When read in conjunction with the sentence stem in NRS 176A.410(1), subsection (m) provides, "[T]he court *shall* . . . order as a condition of probation or suspension of sentence that the defendant . . . not knowingly be within 500 feet of any place . . . that is designed primarily for use by or for children . . . . The provisions of this paragraph apply only to a defendant who is a Tier III offender." (emphasis added). The meaning is clear—if the defendant is a Tier III offender, the court *must* impose subsection (m). The converse proposition is that the court *is not required to* impose subsection (m) if the defendant is a non-Tier III offender, not that the court *cannot* impose the restriction on

non-Tier III offenders. Therefore, condition 11 is not prohibited by NRS 176A.410(1)(m).

Even so, condition 11 must be a proper exercise of the district court's discretion under NRS 176A.400, reviewed for an abuse of discretion. NRS 176A.400(1)(c)(3) permits the imposition of *any* reasonable conditions including, *without limitation*, "[p]rohibiting the probationer from entering a certain geographic area." Given this broad language and our obligation to liberally interpret the discretionary powers of the district court, *see Igbinovia*, 111 Nev. at 710, 895 P.2d at 1311, we conclude that the district court did not abuse its discretion because it is reasonable to restrict an adult convicted of a sexual offense involving a child from areas where children commonly are found. We do not reach Aldape's argument that condition 11 violates his First Amendment rights because he did not present a cogent argument to that effect in his opening brief, *see Powell v. Liberty Mut. Fire Ins. Co.*, 127 Nev. 156, 161 n.3, 252 P.3d 668, 672 n.3 (2011) ("Issues not raised in an appellant's opening brief are deemed waived."), although we note that similar restrictions are regularly upheld against constitutional challenges when reasonable, *see, e.g.*, *United States v. Senke*, 986 F.3d 300, 318-19 (3d Cir. 2021); *United States v. MacMillen*, 544 F.3d 71, 75 (2d Cir. 2008).

Therefore, the district court permissibly imposed condition 11 on Aldape, both as a matter of statutory interpretation and pursuant to the discretion granted under NRS 176A.400.

CONCLUSION

Because Aldape's appellate waiver did not preclude challenges to the conditions of his probation, and because subsection (q) is facially unconstitutional, we reverse and remand to the district court to remove condition 15, restricting Aldape's access to the internet and internet-connected devices, from the judgment of conviction. We otherwise affirm the district court's conviction, including the imposition of condition 11 restricting Aldape's entry into specific geographic areas, pursuant to NRS 176A.400.

Stiglich, C.J., and Cadish, Lee, Parraguirre, and Bell, JJ., concur.

ELEANOR F. KILLEBREW, Trustee of the KILLEBREW REVOCABLE TRUST, 5TH ADM 1978; KWS NEVADA RESIDENTIAL LLC, aka KERN SCHUMACHER, LLC; DEAN INGEMANSON, Trustee of the LFI-MORGAN PERSONAL RESIDENTIAL TRUST and DEAN INGEMANSON as Trustee of the INGEMANSON FAMILY TRUST; DENNIS AND KATHERINE HART, Trustees of the HART TAHOE TRUST; TODD AND JANET LOWE, Trustees of the LOWE PERSONAL RESIDENCE TRUST; PAUL INGEMANSON; FRED J. AMOROSO AND REGINA A. AMOROSO, Trustees of the AMOROSO FAMILY TRUST; and SHOREZONE PROPERTY OWNERS ASSOCIATION, INC., dba TAHOE LAKEFRONT OWNERS ASSOCIATION, Appellants, *v.* STATE OF NEVADA, ex rel. CHARLES DONOHUE, State Land Registrar and Administrator of the Division of State Lands, Respondent.

No. 83830

September 28, 2023 535 P.3d 1167

Appeal from a district court order granting summary judgment in a declaratory relief action. Second Judicial District Court, Washoe County; Barry L. Breslow, Judge.

Affirmed.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg* and *Abraham G. Smith*, Las Vegas; *Snell & Wilmer* and *William E. Peterson*, Reno, for Appellants.

Aaron D. Ford, Attorney General, and *Daniel P. Nubel*, Senior Deputy Attorney General, Carson City, for Respondent.

Legislative Counsel Bureau, Legal Division, and *Kevin C. Powers*, General Counsel, Carson City, for Amicus Curiae Legislative Commission of the State of Nevada.

Before the Supreme Court, En Banc.

OPINION

By the Court, Lee, J.:

In this opinion, we are tasked with reviewing NAC 322.190, a regulation that sets permit fees for the residential use of piers and buoys on navigable waters in Nevada. In completing that task, we clarify the standard of review for challenges to the validity of an

agency's regulation under NRS 233B.110, which mandates that we review the regulation for violations of constitutional or statutory provisions or whether it exceeds the permissible scope of statutory authority. Because the regulation at issue does not violate any constitutional or statutory provision and does not exceed the statutory authority granted to the agency, we affirm the district court's grant of summary judgment.

FACTS AND PROCEDURAL HISTORY

Appellants own property in Nevada along Lake Tahoe's shoreline and have piers or buoys on the lake. For a fee, the State Land Registrar (the Registrar) issues permits for the use of piers and buoys on Lake Tahoe. The Registrar serves as the Administrator of the Division of State Lands of the State Department of Conservation and Natural Resources (the Division), and Lake Tahoe is administered by the Division.

Prior to 2017, the Legislature statutorily set a uniform permit fee for piers and buoys in former NRS 322.120. *See, e.g.*, 1995 Nev. Stat., ch. 645, § 9, at 2511. In 2017, the Legislature amended NRS 322.120 to require the Registrar to establish the permit fee amount by regulation rather than by statute. 2017 Nev. Stat., ch. 366, § 2, at 2256. In the preamble to the amended bill, the Legislature stated that "[t]his fee schedule has not been modified since 1995" and that "[t]he fees charged under this fee schedule are less than the fair market value for the use of state land and less than what other western states and agencies charge for comparable uses." *Id*. at 2256.

In response to the amendment, the Registrar promulgated NAC 322.195, which sets forth the fee schedule for pier and buoy permits. In creating the fee schedule, the Division took into consideration the following five methodologies: (1) a historical review of the statutory fee as established in 1993; (2) a comparative analysis of fees in other western states (Arizona, California, Idaho, Washington, Oregon, and Utah); (3) an evaluation of fees charged by marinas and other businesses in Nevada and adjacent states, such as Arizona and California; (4) an in-house evaluation method to estimate the fair market value of the piers in the Nevada side of Lake Tahoe; and (5) an independent appraisal. Additionally, the Division solicited comment and feedback from specific stakeholders, including appellant Tahoe Lakefront Owners Association. The Division also provided individual notice to all permittees, posted notice at every Nevada library, advertised in newspapers, and held five public workshops.

In response to comments, the Division reduced its proposed fee schedule and phased in fee increases over time. The Division ultimately set a uniform fee for the residential use of piers at $750 and buoys at $250 in the regulation, an increase to the previously set fees of $50 for piers and $30 for buoys. The regulation was sub-

sequently approved by the Legislative Commission, a legislative body that reviews agency regulations for legislative intent and statutory authority.

In March 2020, appellants petitioned under NRS 233B.110 for a declaratory judgment that the fee-setting regulation was invalid. The Division moved for summary judgment, claiming the regulation did not violate statutory or constitutional provisions and did not exceed the Division's statutory authority. After a hearing on the motion, the district court granted summary judgment in the Division's favor. This appeal follows.

DISCUSSION

Appellants argue the district court erred in granting summary judgment because it (1) used the wrong standard of review for the regulation, and (2) erroneously concluded that the regulation did not exceed or violate statutory authority. "A district court's decision to grant summary judgment is reviewed de novo." *A Cab, LLC v. Murray*, 137 Nev. 805, 813, 501 P.3d 961, 971 (2021). "Summary judgment is appropriate . . . when the pleadings, depositions, answers to interrogatories, admissions, and affidavits, if any, that are properly before the court demonstrate that no genuine issue of material fact exists, and the moving party is entitled to judgment as a matter of law." *Wood v. Safeway, Inc.*, 121 Nev. 724, 731, 121 P.3d 1026, 1031 (2005).

Standard for reviewing the validity of a regulation

Appellants first contend that the district court applied the wrong legal standard when considering the validity of the fee-setting regulation and insist the district court should have reviewed whether the regulation was "arbitrary and capricious." We take this opportunity to clarify the standard of review when assessing the validity of a regulation.[1]

The standard for reviewing the validity of a regulation is outlined in NRS 233B.110(1), which states that "[t]he court shall declare the regulation invalid if it finds that it *violates constitutional or statutory provisions or exceeds the statutory authority of the agency*."[2]

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[1]Nothing in our discussion here should be conflated with the standard of review of an agency's final decision under NRS 233B.135, which includes arbitrary and capricious review. *See* NRS 233B.135(3)(f). Because appellants did not petition for judicial review under that statute, our review is confined by the review mandates articulated in NRS 233B.110.

[2]In order to remain within the authority provided by statute, an agency must articulate a basis or reason for the adoption of the challenged regulation that rationally relates to a reasonable interpretation of the agency's governing statutory authority. *See* NRS 233B.040(1) ("To the extent authorized by the statutes applicable to it, each agency may adopt reasonable regulations to aid

(Emphasis added.) "Where the language of a statute is plain and unambiguous, and its meaning clear and unmistakable, there is no room for construction, and the courts are not permitted to search for its meaning beyond the statute itself." *State v. Jepsen*, 46 Nev. 193, 196, 209 P. 501, 502 (1922).

Based on the statute's plain language, arbitrary and capricious review is not contemplated. NRS 233B.110(1) is clear and unambiguous—an agency regulation is reviewed for whether it violates statutory or constitutional provisions or whether it exceeds the agency's statutory authority. There is no room for us to read arbitrary and capricious review into the standard provided by statute.

Despite the distinct lack of language in NRS 233B.110 authorizing arbitrary and capricious review, we acknowledge our caselaw has included the words "arbitrary and capricious" when discussing regulatory review, beginning with *State, Division of Insurance v. State Farm Mutual Automobile Insurance Co.*, 116 Nev. 290, 995 P.2d 482 (2000). There, we said "a court will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency *or is otherwise arbitrary and capricious*." *Id*. at 293, 995 P.2d at 485 (emphasis added). We repeated this same standard in subsequent caselaw. *See Romano v. Romano*, 138 Nev. 1, 8, 501 P.3d 980, 985 (2022); *Felton v. Douglas County*, 134 Nev. 34, 38, 410 P.3d 991, 995 (2018); *Meridian Gold Co. v. State ex rel. Dep't of Taxation*, 119 Nev. 630, 635, 81 P.3d 516, 519 (2003).

No analysis or discussion, however, was presented in *State Farm* to account for the addition of the "arbitrary and capricious" language. We further cited two cases that also do not contain language for arbitrary and capricious review, *see Clark Cty. Social Serv. Dep't v. Newkirk*, 106 Nev. 177, 179, 789 P.2d 227, 228 (1990); *Roberts v. State*, 104 Nev. 33, 37, 752 P.2d 221, 223 (1988). *State Farm*, 116 Nev. at 293, 995 P.2d at 485.

Furthermore, of the cases that have included the "arbitrary and capricious" language, none have actually used the standard to review a regulation, including *State Farm*, and all were instead decided on different grounds. *See Romano*, 138 Nev. at 7-8, 501 P.3d at 985-86 (listing grounds for invalidating a regulation and concluding "none of those circumstances apply here"); *Felton*, 134

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it in carrying out the functions assigned to it by law . . . . [This] power . . . is limited by the terms of the grant of authority pursuant to which the function was assigned."); *Nev. Indep. v. Whitley*, 138 Nev. 122, 126, 506 P.3d 1037, 1042 (2022) (stating that "regulations cannot contradict or conflict with the statute they are intended to implement" (internal quotation marks omitted)); 73 C.J.S. *Public Administrative Law and Procedure* § 275 (2014) (noting that courts reviewing "whether a regulation that has been promulgated is consistent with the statutes" only defer when the agency's determination is "reasonable and not arbitrary").

Nev. at 38, 410 P.3d at 995 (interpreting the challenged regulation in harmony with statutory authority); *Meridian Gold*, 119 Nev. at 635-36, 81 P.3d at 519-20 (applying arbitrary and capricious review to an agency decision, not a regulation); *State Farm*, 116 Nev. at 295-96, 995 P.2d at 486 (determining the agency exceeded its statutory authority in promulgating the challenged regulation).

The statute at issue expressly provides for the standard of review that should be applied.[3] Therefore, we clarify that the standard for reviewing the validity of a regulation under NRS 233B.110 is that which is provided for in NRS 233B.110(1)—whether the regulation "violates constitutional or statutory provisions or exceeds the statutory authority of the agency."[4]

Application of the standard of review in the promulgation of NAC 322.195

Turning to the regulation at issue, appellants next argue that the Division exceeded its statutory authority in promulgating NAC 322.195 because the fee schedule does not comport with the statutory standard for setting fees. "Appeals involving interpretation of a statute or regulation present questions of law subject to our independent review." *Silver State Elec. Supply Co. v. State ex rel. Dep't of Taxation*, 123 Nev. 80, 84, 157 P.3d 710, 713 (2007). Although this court "will generally defer to an agency's interpretation of its governing statutes and regulations, we need only do so if its interpretation is *reasonable*," *Pub. Emps.' Ret. Sys. of Nev. v. Nev. Policy Research Inst., Inc.*, 134 Nev. 669, 673 n.3, 429 P.3d 280, 284 n.3 (2018), and it is firmly established that "regulations cannot contradict or conflict with the statute they are intended to implement," *Nev. Indep. v. Whitley*, 138 Nev. 122, 126, 506 P.3d 1037, 1042 (2022) (internal quotation marks omitted). Because "[a]gency regulations are presumed valid," the burden to overcome that presumption rests with the challenger. *Id.*

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[3]Appellants do not raise an issue of fundamental rights in the present case. We note, however, that a court's review of a regulation involving fundamental rights is not, and cannot be, limited by standards set by the Legislature. *See Salisbury v. List*, 501 F. Supp. 105, 109 (D. Nev. 1980) ("Where a fundamental right is involved, the inquiry of the court does not end upon a finding that the regulation . . . is reasonably related to its enabling legislation . . . ."); 73 C.J.S. *Public Administrative Law and Procedure* § 275; *see also Marbury v. Madison*, 5 U.S. 137, 178 (1803) ("[T]he constitution is superior to any ordinary act of the legislature; the constitution, and not such ordinary act, must govern the case to which they both apply.").

[4]The Legislative Commission, as amicus curiae, urges us to give deference to its approval of the regulation and to review whether the regulation is reasonable as a matter of law. We decline the invitation to alter our statutorily mandated review of a regulation.

The Division created the challenged regulation, NAC 322.195, based on amendments to NRS 322.120. NRS 322.120 mandates that the Registrar charge a fee when issuing permits for the residential use of a pier or buoy. NRS 322.120(1), (2)(b)(2). The statute does not specify the amounts to be charged or how they should be calculated. Both appellants and the Registrar agree, as do we, that we must look to another statute in the same section to find legislative guidance for calculating the fees—NRS 322.100.

NRS 322.100(1) provides that the fee charged for issuing a permit "for any lawful use of state land" be "in such an amount as the State Land Registrar determines to be reasonable based upon the fair market value of the use." Therefore, when read together, NRS 322.100 and NRS 322.120 require the Registrar to charge a permit fee for the residential use of a pier or buoy in an amount the Registrar determines is reasonable based on the fair market value of the use of state land. *See Ceballos v. NP Palace, LLC*, 138 Nev. 625, 629, 514 P.3d 1074, 1078 (2022) ("Whenever possible, this court interprets separate statutes harmoniously.").

Appellants argue that the "reasonable based upon the fair market value of the use" language in NRS 322.100(1)(b) means that the fee must be based *solely* on the fair market value of the state-owned submerged land that a pier or buoy occupies, without regard to other factors. They likewise argue that a uniform fee cannot be based on the fair market value of the use of state land because it charges the same fee regardless of the amount or location of the state-owned submerged land. Because the Division considered factors beyond the fair market value of the state-owned submerged land and imposed a uniform fee in NAC 322.195, appellants assert the Division exceeded its statutory authority.

We find that in attempting to establish a fair market value in line with its interpretation of the statutes, the Division did not exceed its statutory authority by referencing multiple methodologies. The statutes do not identify a particular formula for calculating the fair market value of the use of piers and buoys on state land. And the Division employed a range of approaches to obtain varying estimates. The Division then determined a reasonable amount to charge for pier and buoy permits based on those varying estimates. All of this was done within the authority provided by NRS 322.100 and NRS 322.120.

Lastly, we are unpersuaded by appellants' attempts to supplement the statutory language by arguing that the fees should be based on the fair market value of the *individualized* use of state land and that a uniform fee conflicts with the statutes. Nothing in NRS 322.100 or NRS 322.120 provides for such a customized approach to setting fees, and we note that the statute previously set fees for piers and buoys in a uniform manner.

CONCLUSION

In conclusion, the Division did not exceed its statutory authority in promulgating NAC 322.195, and appellants have not overcome the presumption that the regulation is valid.[5] Contrary to appellants' assertion, no genuine issue of material fact exists, and the Division is entitled to judgment as a matter of law. Accordingly, we affirm the district court's order granting summary judgment.

Stiglich, C.J., and Cadish, Pickering, Herndon, Parraguirre, and Bell, JJ., concur.

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[5]Appellants assert the district court erred by imposing on them a burden to propose an alternative fee schedule in order to prevail in their challenge to the regulation. As discussed, regulations are entitled to a presumption of validity, and it was appellants' burden to overcome that presumption. In concluding appellants had not met their burden, the district court commented that appellants did not present evidence of what constituted a fair market value or what a reasonable fee based on the fair market value would have been. We discern no error by the district court in this regard. *Cf. Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 602-03, 172 P.3d 131, 134 (2007) ("[I]f the nonmoving party will bear the burden of persuasion at trial, the party moving for summary judgment may satisfy the burden of production by . . . pointing out . . . that there is an absence of evidence to support the nonmoving party's case." (second omission in original) (internal quotation marks omitted)).

PARVIZ EIVAZI, Appellant, *v.* FATEMEH EIVAZI, Respondent.

No. 84427-COA

October 5, 2023 537 P.3d 476

Appeal from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Nancy Saitta, Sr. Judge.[1]

Affirmed in part, reversed in part, and remanded.

Hofland & Tomsheck and *Bradley J. Hofland*, Las Vegas, for Appellant.

Radford J. Smith, Chartered, and *Garima Jain* and *Radford J. Smith*, Henderson, for Respondent.

Before the Court of Appeals, Gibbons, C.J., and Bulla and Westbrook, JJ.

OPINION

By the Court, Westbrook, J.:

In this opinion, we take the opportunity to caution both practitioners and district courts of the dangers inherent in the practice of adopting wholesale a litigant's proposed findings of fact and conclusions of law. In this case, following lengthy divorce proceedings, the district court summarily adopted respondent Fatemeh Eivazi's proposed 61-page findings of fact, conclusions of law, and decree of divorce as drafted, without making any modifications. Appellant Parviz Eivazi contends that it was reversible error for the district court to do so. We conclude that utilizing a party's proposed order does not in and of itself constitute an abuse of discretion, as the practice of requesting and adopting proposed orders from the parties is both well established and often necessary to the administration of justice. Nevertheless, we strongly urge both litigants and judges to exercise care when preparing and adopting such orders.

Practitioners should ensure that proposed orders are both factually accurate and legally adequate, and courts should diligently exercise their discretion and thoroughly review litigant-drafted orders before adopting them. In this case, while portions of the decree are legally and factually supportable, other parts contain numerous legal and factual deficiencies. With respect to the latter, we conclude that the district court abused its discretion when it granted financial awards for alimony, attorney fees, and expert

[1]District Court Judge Nadin Cutter is now assigned to the case.

fees and when it unequally distributed the parties' community property and debt. Accordingly, we affirm in part, reverse in part, and remand this matter to the district court for further proceedings consistent with this opinion.

FACTS AND PROCEDURAL HISTORY

Although previously married in Iran, Parviz and Fatemeh moved to the United States and were married in Las Vegas in 2001. Fatemeh filed for divorce in June 2016.[2] From the inception of the case, the divorce proceedings were drawn out and highly contested. In the first year alone, both parties filed multiple motions and countermotions, requesting attorney fees and costs in connection with those filings. The district court entered numerous orders granting and denying the parties' various requests for attorney fees and costs, and Fatemeh did not move to reconsider any of these orders.

In April 2017, Parviz filed a motion for summary judgment related to the parties' marriage in Iran and again requested attorney fees and costs. Fatemeh opposed the motion and also sought attorney fees and costs in connection with that motion under EDCR 7.60(b) and NRS 18.010(2)(b), on grounds that Parviz had multiplied the proceedings in a manner that increased costs unreasonably and vexatiously and because his motion was maintained without reasonable grounds or to harass. Because there were genuine disputes of material fact, the district court denied Parviz's motion for summary judgment but scheduled an evidentiary hearing to resolve three discrete issues. The court deferred the parties' pending motions for attorney fees and costs until that time.

The pretrial evidentiary hearing was held over a three-day period in October 2017, May 2018, and June 2018. Following this hearing, the district court entered a minute order in November 2018, ruling in favor of Fatemeh on all three issues, providing that the parties "would bear their own fees and costs," and directing Fatemeh to prepare the order. A year later, Fatemeh still had not prepared the order. So, in November 2019, Parviz prepared an order that was filed by the district court. After Parviz served Fatemeh with a copy of the order, Fatemeh filed a notice of entry of order in December 2019. On the same day, she moved for reconsideration of that order.

In her motion for reconsideration, Fatemeh argued she was entitled to all attorney fees from the inception of the case through the evidentiary hearing—not just the fees that related to the summary judgment motion and evidentiary hearing that the district court had denied in its December 2019 order. In the motion, Fatemeh also requested reconsideration as to expert fees, but she did not seek

[2]After the initiation of divorce proceedings, Parviz filed for Chapter 13 bankruptcy. Prior to the entry of the divorce decree, Parviz's debt was reduced from approximately $187,000 to $65,000, and Parviz was making monthly payments towards the principal amount.

reconsideration as to costs. The district court granted Fatemeh's motion for reconsideration and set the case for trial.[3]

A divorce trial was held over three days in June, July, and August 2020 to address the parties' remaining contested issues. During the trial, Fatemeh alleged that Parviz had wasted a substantial amount of community funds and presented an expert forensic accountant who identified potential waste. Analyzing financial transactions from 2011 to 2017, Fatemeh's expert determined that a variety of "unknown or unsupported transactions" constituted potential marital waste in the aggregate amount of $208,294. Fatemeh posited that these transactions were waste because she had no knowledge of them and did not consent to the depletion of the community funds. When asked about the expenditures at trial, Parviz testified that the funds were used for marital expenses including education, travel, jewelry for Fatemeh, fertility treatments, home improvements, a down payment on a new home, and cash given directly to Fatemeh.

Fatemeh and Parviz each also testified about their respective employment status. Fatemeh was previously employed full time as an ultrasound technician, but she suffered injuries during a car accident in 2018. Following her accident, Fatemeh initially worked part time, but in 2019 she ceased employment completely due to her physical limitations. Parviz was employed full time as a scientist with the Las Vegas Valley Water District. During the trial, however, Parviz testified that he had several health problems and that he was currently using his accrued sick days pending his request for FMLA leave.

At the conclusion of the trial, the district court asked both parties to submit proposed orders. They complied, and in February 2021, the district court entered Fatemeh's 61-page proposed findings of fact, conclusions of law, and decree of divorce in its entirety, without modification. Although the decree noted that neither party had significant assets, the decree awarded Fatemeh $5,000 per month in alimony for ten years, $176,976.99 in attorney fees and costs from the inception of the case through the pretrial evidentiary hearing, and $19,565 in expert fees. The decree ordered Parviz to reimburse Fatemeh $59,000 for monies she used "to fund the litigation." The decree also made an unequal distribution of community property and debt, requiring Parviz to reimburse Fatemeh for half of the wasted community assets in the amount of $100,357.50 and ordering Parviz to pay half of Fatemeh's credit card debt while Parviz remained solely responsible for his bankruptcy debt. In total, the decree required Parviz to pay Fatemeh more than $400,000. In addition, the decree ordered Parviz to sell the marital home. Lastly, the

[3]Although the district court granted Fatemeh's motion for reconsideration, it did not enter an order formally awarding Fatemeh her requested fees until the entry of the divorce decree.

decree provided that any unpaid balance would be reduced to judgment and accrue interest.

After entry of the decree, both Fatemeh and Parviz filed motions to amend the decree. The district court denied Parviz's motion but granted Fatemeh's motion in part and ordered that Fatemeh would also receive nearly the entire value of Parviz's retirement account, which the decree had previously split evenly between them, to satisfy the financial obligations that remained after the sale of the marital home.[4] Parviz timely appealed.

ANALYSIS

In this appeal, we address the following issues: (1) whether the district court abused its discretion when it adopted Fatemeh's proposed decree verbatim in its entirety; (2) whether the district court abused its discretion when it found marital waste because Parviz was unable to account for unknown transactions by clear and convincing evidence; (3) whether the district court adequately considered the alimony factors in NRS 125.150(9), including Fatemeh's need for alimony and Parviz's ability to pay, when it awarded Fatemeh alimony of $5,000 per month for ten years; (4) whether the district court abused its discretion when it awarded Fatemeh attorney fees from the inception of litigation through the evidentiary hearing, $59,000 to reimburse her for money she borrowed to fund the litigation, and expert fees; and (5) whether the district court abused its discretion in connection with other miscellaneous financial awards and allocations in the divorce decree.

This court reviews a district court's alimony determinations, attorney fee awards, and disposition of community property, including any underlying marital waste determinations, for an abuse of discretion. *Kogod v. Cioffi-Kogod*, 135 Nev. 64, 75, 439 P.3d 397, 406 (2019). This court reviews the district court's factual findings deferentially and will not set them aside unless they are clearly erroneous or unsupported by substantial evidence. *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009). Substantial evidence "is evidence that a reasonable person may accept as adequate to sustain a judgment." *Ellis v. Carucci*, 123 Nev. 145, 149, 161 P.3d 239, 242 (2007).

"Although this court reviews a district court's discretionary determinations deferentially, deference is not owed to legal error" or findings so conclusory that they mask legal error. *Davis v. Ewalefo*, 131 Nev. 445, 450, 352 P.3d 1139, 1142 (2015). The district court "must have reached its conclusions for the appropriate reasons," *Ellis*, 123 Nev. at 149, 161 P.3d at 241-42, and if there are no

[4]On appeal, Parviz does not challenge any of the district court's rulings on the parties' post-decree motions, including the court's redistribution of his retirement account.

facts explaining how the district court reached its conclusions, this court cannot determine whether those conclusions were made for appropriate reasons, *see Davis*, 131 Nev. at 451-52, 352 P.3d at 1143 (explaining that, because the district court did not tie its factual findings to its conclusion, the appellate court "cannot say with assurance that the . . . determination was made for appropriate legal reasons").

Adopting Fatemeh's proposed decree verbatim was not, by itself, an abuse of discretion

Parviz initially contends that the divorce decree must be set aside because the district court accepted Fatemeh's proposed decree in its entirety, without making any modifications. Parviz argues that, by doing so, the district court abdicated its judicial role and, necessarily, abused its discretion. We disagree that a district court abuses its discretion simply by entering an order proposed by one of the litigants without modification; however, we caution courts and practitioners alike that there are risks inherent in this practice, and scrutiny should be given to the contents of any proposed orders before entering them. *See Fed. Nat'l Mortg. Ass'n v. Westland Liberty Vill., LLC*, 138 Nev. 614, 623 n.6, 515 P.3d 329, 337 n.6 (2022) (urging district courts "to scrutinize [proposed] draft orders, being mindful that they assume responsibility for those findings and attendant rulings upon entry of the order").

At the outset, we note that in the Eighth Judicial District Court's Family Division, the court rules expressly contemplate that parties may submit proposed orders for consideration and adoption by the court. *See* EDCR 5.515 ("Proposed orders may include such findings, conclusions, and orders as the submitting party believes relevant to each point in dispute in the proceedings."). Moreover, the Nevada Supreme Court has recognized that a district court may properly adopt a party's proposed order, provided that the opposing party is apprised of the order and given an opportunity to respond. *See Byford v. State*, 123 Nev. 67, 69, 156 P.3d 691, 692 (2007) (discussing the predecessor to Nevada Code of Judicial Conduct (NCJC) Cannon 2, Rule 2.6(a), which was substantively identical to the present rule).[5]

Parviz does not argue on appeal that he did not have an opportunity to respond to Fatemeh's proposed decree prior to the district court's adoption. In fact, the record reflects that both parties timely emailed their proposed decrees to the court and copied opposing counsel on those emails, at which point either party could have raised objections thereto. Further, after entry of the decree, Parviz

[5]Although NCJC Cannon 2, Rule 2.6(a) does not include the commentary from the former version of the rule that was discussed in *Byford*, the decision's rationale remains equally applicable today given that the current rule still requires the district court to "accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to the law."

had an opportunity, under NRCP 52(b), to request amendments to the decree. *See* NRCP 52(b) ("On a party's motion . . . the court may amend its findings—or make additional findings—and may amend the judgment accordingly."); *cf. Byford*, 123 Nev. at 70, 156 P.3d at 693. The availability of this procedure offers an additional level of protection to litigants in the event that they believe the district court's findings and conclusions are improper. In this case, Parviz availed himself of that opportunity by filing a motion to amend the decree.

Nevertheless, Parviz contends that the district court erred by adopting Fatemeh's proposed order verbatim based on several cases that have criticized the practice of district courts adopting litigant-drafted orders. *See, e.g.*, *Anderson v. Bessemer City*, 470 U.S. 564, 572 (1985) (stating that "[w]e, too, have criticized courts for their verbatim adoption of findings of fact prepared by prevailing parties" and noting "the potential for overreaching and exaggeration on the part of attorneys preparing findings of fact"); *In re Colony Square Co.*, 819 F.2d 272, 275 (11th Cir. 1987) ("The dangers inherent in litigants ghostwriting opinions are readily apparent."); *Chudasama v. Mazda Motor Corp.*, 123 F.3d 1353, 1373 n.46 (11th Cir. 1997) (explaining that "[w]e have consistently frowned upon the practice of delegating the tasks of drafting important opinions to litigants," as the "practice harms the quality of the district court's deliberative process"); *Harris v. Davis*, 88 N.E.3d 1081, 1086 n.2 (Ind. Ct. App. 2017) (stating that "[w]hen a trial court adopts verbatim a party's proposed findings and conclusions," it "weakens our confidence as an appellate court that the findings are the result of considered judgment by the trial court" (internal quotation marks omitted)).

Although these cases strongly discourage the practice of adopting litigant-drafted orders verbatim, they do not support Parviz's argument that the practice is itself an independent basis for reversal. For instance, in *Anderson*, the United States Supreme Court explained that "even when the trial judge adopts proposed findings verbatim, the findings are those of the court and may be reversed only if clearly erroneous." 470 U.S. at 572. The Supreme Court declined to subject the district court's findings to a more stringent appellate review than called for by the applicable rules. *Id.* at 572-73. Likewise, in *In re Colony Square*, the United States Court of Appeals for the Eleventh Circuit explained that "[t]he fact that a judge allowed a litigant to draft the court's orders without notice to the opposing party" did not automatically invalidate those orders absent a finding that the opposing party was denied a meaningful opportunity to be heard. 819 F.2d at 276-77. In *Saylor v. State*, also cited by Parviz, the Indiana Supreme Court concluded that "although we do not encourage . . . judges to adopt wholesale the findings and conclusions of either party, we decline to find bias solely on that basis. The critical inquiry is whether the findings adopted by the court are clearly

erroneous." 765 N.E.2d 535, 565 (Ind. 2002), *rev'd on reh'g on other grounds*, 808 N.E.2d 646 (Ind. 2004); *see also Harris*, 88 N.E.3d at 1086 n.2 (stating that when a trial court adopts a party's proposed order without modification, "it does not alter our standard of review"); *Chudasama*, 123 F.3d at 1373 n.46 (recognizing "that the district court's adoption of [a party's] draft orders nearly verbatim does not affect our standard of review" and also "does not automatically create an appearance of impropriety that would require the district court judge to recuse" (internal quotation marks omitted)).

Caselaw from the Nevada Supreme Court also undermines Parviz's argument. In *Foley v. Morse & Mowbray*, the appellant made a similar argument challenging a district court's adoption of a proposed order "without any changes." 109 Nev. 116, 123, 848 P.2d 519, 524 (1993). The supreme court evaluated the *substance* of the district court's order for potential error. The court identified errors as to certain findings of fact and conclusions of law because those particular findings were not supported by the record, but the court approved the remainder of the district court's order. *Id.* at 124, 848 P.2d at 524. Thus, in analyzing the *contents* of the district court's order, the supreme court implicitly rejected the appellant's claim that adopting the respondent's proposed order "without any changes" was itself error. *Id.* at 123-24, 848 P.2d at 524.

As noted above, we recognize that numerous authorities have criticized, discouraged, and condemned the practice of courts adopting verbatim orders and findings of fact prepared by prevailing parties. *See, e.g.*, *Anderson*, 470 U.S. at 571. We, too, share these concerns. *See Fed. Nat'l Mortg. Ass'n*, 138 Nev. at 623 n.6, 515 P.3d at 337 n.6. Nonetheless, we also recognize that asking litigants to submit proposed orders is a customary practice that is often necessary for the timely administration of justice. *See, e.g.*, *Prowell v. State*, 741 N.E.2d 704, 708-09 (Ind. 2001) (providing that courts may adopt a proposed party's findings because "trial courts of this state are faced with an enormous volume of cases" and "the need to keep the docket moving is properly a high priority of our trial bench"). Further, NRCP 52(b) protects parties by providing the opportunity to object to and amend such findings, and Parviz did in fact avail himself of that opportunity. *See Foley*, 109 Nev. at 123-24, 848 P.2d at 524 (citing *Foster v. Bank of Am.*, 77 Nev. 365, 365 P.2d 313 (1961)). Therefore, although a district court's verbatim adoption of a litigant's entire proposed order is not recommended as sound judicial practice, we cannot conclude under these circumstances that doing so is, in and of itself, an abuse of discretion. Rather, as in *Foley*, we will analyze the content and substance of the proposed order that was adopted by the district court and decide whether any particular findings of fact and conclusions of law were unsupported by substantial evidence or legally erroneous. *Ogawa*, 125 Nev. at 668, 672, 221 P.3d at 704, 707.

Although the district court did not abuse its discretion by adopting Fatemeh's proposed decree verbatim, when it did so, the court and the practitioners assumed the risk that any legal or factual errors contained in that decree might be reversible. *Fed. Nat'l Mortg. Ass'n*, 138 Nev. at 623 n.6, 515 P.3d at 337 n.6. And in this case, Fatemeh's proposed decree contained several legal and factual deficiencies, particularly in relation to the monetary awards and allocations, which we address in turn.

The district court abused its discretion in finding marital waste

In its decree, the district court made an unequal disposition of community property in favor of Fatemeh in the amount of $100,357.50 to account for marital waste. Parviz challenges this disposition on multiple grounds. He alleges the district court abused its discretion when it failed to distinguish between waste and discretionary expenditures, applied an erroneous legal standard that negligent expenditures of community funds constituted waste, and imposed an improper burden on him to prove that all expenditures made during the marriage without Fatemeh's knowledge were not waste.

A district court must make an equal disposition of community property in a divorce unless there is a "compelling reason" to make an unequal disposition. NRS 125.150(1)(b); *see also Kogod*, 135 Nev. at 75, 439 P.3d at 406. "Dissipation," also known as "waste," can constitute a compelling reason for an unequal disposition of community property. *Kogod*, 135 Nev. at 75, 439 P.3d at 406; *see also Lofgren v. Lofgren*, 112 Nev. 1282, 1283, 926 P.2d 296, 297 (1996) ("[I]f community property is lost, expended or destroyed through the intentional misconduct of one spouse, the court may consider such misconduct as a compelling reason for making an unequal disposition of community property and may appropriately augment the other spouse's share of the remaining community property."). "Generally, the dissipation [or waste] which a court may consider refers to one spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." *Kogod*, 135 Nev. at 75-76, 439 P.3d at 406-07 (quoting 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018)); *see also Dissipation*, *Black's Law Dictionary* (11th ed. 2019) (defining "dissipation" as "[t]he use of an asset for an illegal or inequitable purpose, such as a spouse's use of community property for personal benefit when a divorce is imminent").

In *Kogod*, the supreme court analyzed various types of expenditures to determine if they constituted dissipation or waste. Initially, the court pointed out that when community property is spent on extramarital affairs, those expenditures will almost always constitute waste. *Kogod*, 135 Nev. at 76, 439 P.3d at 407. Such expenditures

are waste, regardless of when they occur, because the act of engaging in an extramarital affair is inherently inimical to the marital relationship. As a result, *Kogod* upheld an unequal disposition of community property in the amount that a husband spent on extramarital affairs throughout the marriage. *Id.*

In contrast, when community property is spent on gifts to family members, such expenditures do not necessarily constitute waste because supporting one's family does not inherently undermine the marital relationship. Whether gifts to family members constitute waste ultimately depends on the timing and circumstances of those gifts. In *Kogod*, the supreme court explained that "[a]bsent a specific injunction, a gift to a family member is not [waste] if there is an established pattern or history of giving such gifts to family members during the marriage." *Id.* at 77, 439 P.3d at 407. On the other hand, a gift to a family member *could* constitute waste if there was "no previous history of gift giving or the amount of the gift during the divorce [was] substantially greater than past gifts." *Id.* at 77, 439 P.3d at 408. Accordingly, the supreme court agreed with the district court that a husband's "long-standing and regular" expenditures on his family were not waste because he "routinely gave money to his family throughout the marriage, and often did so without consulting" his wife. *Id.* In contrast, the supreme court also agreed that the husband's post-separation payments that occurred *after* a joint preliminary injunction, which were neither regular nor routine, were properly characterized as waste. *Id.*

Kogod also recognized that waste committed after separation or during an irreconcilable breakdown of the marriage is distinguishable from overconsumption during the marriage. *Id.* at 78-79, 439 P.3d at 408-09; *see Putterman v. Putterman*, 113 Nev. 606, 609, 939 P.2d 1047, 1048 (1997) ("It should be kept in mind that the secreting or wasting of community assets while divorce proceedings are pending is to be distinguished from undercontributing or overconsuming of community assets during the marriage."). Thus, the court instructed district courts to "differentiate between ordinary consumption for higher-income earners . . . which is not necessarily dissipation, and misappropriation of community assets solely for personal gain." *Kogod*, 135 Nev. at 78, 439 P.3d at 408.

Unlike the wasted funds spent on the husband's extramarital affairs, which were inherently adverse to the marriage, *Kogod* concluded that the district court erroneously found waste when the husband could not prove that unexplained expenditures *affirmatively* served a marital purpose. *Id.* at 78-79, 439 P.3d at 408-09. After the wife's forensic expert examined the parties' finances and identified millions of dollars in unknown transactions, or "potential community waste," the district court required the husband to account for each of the transactions and demonstrate that those transactions were *not* waste. *Id.* at 78, 439 P.3d at 408. When the

husband was unable to do so, the district court made an unequal disposition of community property to the wife, in the amount of more than $2 million, to account for the potential community waste. *Id.* at 78-79, 439 P.3d at 408-09.

The supreme court deemed this to be error and reversed the district court's unequal disposition of community property that related to this purported waste. *Id.* In doing so, the supreme court noted that the district court did not require the husband "to account for these expenditures because [his wife] raised a reasonable inference that the transactions furthered a purpose inimical to the marriage, that he made them to diminish [his wife's] community share, or even that they were unusually large withdrawals from community accounts." *Id.* at 78, 439 P.3d at 408. Rather, the district court required the husband to prove that the expenditures were not waste "because they exceeded [the husband's] self-described monthly expenses" and he failed to provide his own forensic accounting after promising to do so. *Id.* Thus, the supreme court concluded that the husband's inability to account for unknown expenses did not demonstrate a compelling reason for an unequal disposition of community assets. *Id.* at 79, 439 P.3d at 409.

Just like in *Kogod*, in this case Fatemeh presented an expert forensic accountant at trial who identified potential marital waste in the form of unknown transactions. Although Fatemeh did not file for divorce until June 2016, her expert analyzed financial transactions from 2011 to 2017 and determined that a variety of "unknown or unsupported transactions" constituted potential waste in the amount of $208,294.[6] At trial, Fatemeh testified that she believed Parviz used community funds to purchase a condominium in Iran for his mother, but the district court did not make any findings as to whether he, in fact, did so, or whether any particular transaction reflected such a purchase. Rather, the district court simply listed in the decree four categories of potential waste identified by Fatemeh's expert, including (1) "[u]nknown checks" in the amount of $53,438 between April 2011 and July 2017; (2) "[c]ash" in the amount of $120,865 between October 2013 and July 2016; (3) a transfer to "someone by the name of 'Yousfi' " in the amount of $10,000 in December 2013; and (4) "[u]nknown withdrawals" of cash in the amount of $16,412 from 2010 through 2014. The district court determined that Fatemeh demonstrated a prima facie case for "breach of fiduciary duty in the form of community waste," ostensibly because Fatemeh did not know how these funds were spent and therefore did not consent to the expenditures. And the court determined that Parviz "failed to meet his burden of proof by the 'clear and convincing' standard to explain the waste identified by Fatemeh and he failed to provide any independent accounting of that waste."

[6]The decree identified waste in the amount of $200,715. The reason for the discrepancy between the expert report and the decree is unclear.

When asked about the expenditures at trial, Parviz testified that the funds were used for various marital expenses. However, the district court found that Parviz's testimony "d[id] not explain" the waste and concluded that, because he failed to account for the missing funds, all of the unknown expenditures constituted marital waste. Ultimately, the court ordered Parviz to reimburse Fatemeh for one half of this "waste" by making an unequal disposition of community property in Fatemeh's favor in the amount of $100,357.50. This was an abuse of discretion.

Because the district court's waste analysis included expenditures that were made during the six-year period *before* Fatemeh filed for divorce, the parties' briefing addresses the theoretical issue of whether waste can occur at any time during a marriage, or whether waste can occur *only after* a marriage has undergone an irretrievable breakdown. *Kogod* did not squarely address that question, and we need not resolve it here, because we conclude that regardless of *when* the alleged waste may have occurred, the district court made the very same error that the supreme court deemed reversible in *Kogod*—"requiring [Parviz] to explain everyday expenditures over the course of several years, including before this divorce action began, and finding [waste] when he failed in this task." 135 Nev. at 78, 439 P.3d at 408.[7]

Like in *Kogod*, the district court erred by placing an evidentiary burden on Parviz to demonstrate the *absence of waste* by clear and convincing evidence[8] without first requiring Fatemeh to raise a reasonable inference that any transactions were, in fact, waste. The district court appears to have found that Fatemeh established a prima facie showing of waste simply because she was unaware of the expenditures at the time they were made and could not have

[7]Insofar as Fatemeh argues on appeal that we should reach a decision contrary to *Kogod*, this court cannot overrule Nevada Supreme Court precedent. *See Hubbard v. United States*, 514 U.S. 695, 720 (1995) (Rehnquist, C.J., dissenting) (noting that stare decisis "applies *a fortiori* to enjoin lower courts to follow the decision of a higher court"); *People v. Solórzano*, 63 Cal. Rptr. 3d 659, 664 (2007) ("The Court of Appeal must follow, and has no authority to overrule, the decisions of the [state supreme court]." (internal quotation marks omitted)).

[8]As we explained in *Monahan v. Hogan*, 138 Nev. 58, 69, 507 P.3d 588, 597 (Ct. App. 2022), "preponderance of the evidence is still the default evidentiary standard in family law absent clear legislative intent to the contrary." (Citation omitted.) Fatemeh does not cogently argue why the fiduciary relationship between husband and wife required Parviz to account for all "unknown" expenditures by clear and convincing evidence when the court only needed to find waste by a preponderance of the evidence. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to consider issues that are not supported by cogent argument). We note that when Fatemeh's counsel raised a virtually identical argument in briefing to the supreme court in *Kogod*, the court declined to adopt a clear and convincing standard in that case.

consented to them, and thus Parviz had a fiduciary duty to account for all of them. To support this conclusion, the district court stated that "the negligent or willful dissipation of community funds by one of the spouses, or the surreptitious and personal use of community property or funds without the other [spouse's] knowledge, is waste." Yet, this definition of waste is much broader than that adopted by the supreme court in *Kogod*, 135 Nev. at 75-76, 439 P.3d at 406-07 (generally defining waste as a "spouse's use of marital property for a selfish purpose unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown" (quoting 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018))).

In this case, the district court's overly expansive definition of waste failed to account for *Kogod*'s holding that a husband's "relatively long-standing and regular" expenditures to family members, *which were often made without consulting his wife*, did not constitute waste. *Id.* at 77, 439 P.3d at 408. Likewise, the district court's overly broad conception of waste failed to account for the distinction between waste and a spouse's overconsumption during a marriage, of which the other spouse might not be aware. *Id.* at 78-79, 439 P.3d at 408-09; *see also Putterman*, 113 Nev. at 609, 939 P.2d at 1048-49 ("Almost all marriages involve some disproportion in contribution or consumption of community property. Such retrospective considerations are not and should not be relevant to community property allocation and do not present 'compelling reasons' for an unequal disposition . . . ."). In addition, the district court failed to recognize that consent to make a gift of community property may also be *implied* by the circumstances. *See* NRS 123.230.

We note that family-related expenditures, even when not disclosed or agreed to, are not necessarily inimical to a harmonious marital relationship when viewed in the context of the marital estate. *See, e.g.*, *Kogod*, 135 Nev. at 77, 439 P.3d at 407-08. Arguably, upon entering into a marriage, most couples impliedly consent to provide reasonable support for one another's immediate family. *Cf.* NRS 123.230 ("Neither spouse may make a gift of community property without the express or implied consent of the other."). Although married couples may disagree about money spent on family members, such gifts standing alone should not be deemed dissipation or waste without examining the context of the expenditures, including consideration of the overall marital estate and implied consent under the facts and circumstances of the case.[9] The existence of

[9]To the extent that the district court found that Parviz wasted community assets by allowing his brother and his brother's wife to live with him without providing any financial contribution after the entry of the Joint Preliminary Injunction (JPI), we conclude that this finding was clearly erroneous. The JPI in this case did not prohibit Parviz from allowing family members to stay with him without paying room and board; therefore, he did not violate it. *See also*

implied consent is a question of fact for the district court and should be considered along with other factors, such as the size of the gift (higher value may draw higher scrutiny), the regularity of the gift (routine or long-standing gifts are generally not waste), the timing of the gift (the closer to separation or irreconcilable breakdown, the greater the scrutiny), the purpose of the gift, and how close the recipient of the gift is to the parties.[10]

Whether a particular expenditure by one spouse constitutes waste does not turn on whether the other spouse had *knowledge* of the expenditure at the time it was made; rather, waste generally requires a finding by the court that the expenditure in question was for a selfish *purpose* that is "unrelated to the marriage in contemplation of divorce or at a time when the marriage is in serious jeopardy or is undergoing an irretrievable breakdown." *Kogod*, 135 Nev. at 75-76, 439 P.3d at 406-07 (quoting 24 Am. Jur. 2d *Divorce and Separation* § 524 (2018)). Thus, in *Kogod*, the supreme court suggested that it might be permissible to shift the burden of proving the absence of waste if one spouse could demonstrate that the "transactions furthered a purpose inimical to the marriage, that [the other spouse] made them to diminish [that spouse's] community share, or even that they were unusually large withdrawals from community accounts." *Id.* at 78, 439 P.3d at 408. But here, the district court made no such finding as to *any* of the transactions at issue before improperly shifting the burden of proof to Parviz.

The decree in this case identified only one specific transaction that allegedly constituted waste,[11] while otherwise finding that large groupings of unknown checks and cash withdrawals over a seven-year period, in the aggregate, constituted waste simply because

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EDCR 5.703(a) (explaining that a JPI enjoins the parties from "[t]ransferring, encumbering, concealing, selling, or otherwise disposing of any of the joint, common, or community property of the parties . . . except in the usual course of conduct or for the necessities of life").

[10]In *Kogod*, the supreme court affirmed the district court's finding of waste when a husband gave his father two "non-routine" gifts of $3,600, along with a $50,000 "political campaign contribution," after separating from his wife. 135 Nev. at 77, 439 P.3d at 408. The supreme court considered the size, irregular nature, timing, and purpose of these gifts, along with the identity of the recipient, in assessing waste. *Id.* In this case, the district court similarly found that Parviz wasted funds spent on his adult son after the JPI was entered, but failed to evaluate the size, regularity, or purpose of the gifts in its decree. Although gifts given to family after a JPI may be subject to greater scrutiny, under *Kogod*, the district court should still consider these other factors when determining if those funds were wasted.

[11]Although the court identified a December 23, 2013, transfer of $10,000 to "someone by the name of 'Yousfi' " as waste, the only explanation given by the court as to why this transfer constituted waste was that "Fatemeh did not consent to the transfer and had no knowledge of the transfer" and "Parviz did not know who Yousfi was and what the transfer was for." The *purpose* of this expenditure was never established and should be reevaluated on remand.

those expenditures were unexplained. The district court's vague findings in this case stand in stark contrast to the specific findings of waste in *Lofgren*, where the district court identified discrete expenditures that constituted financial misconduct because of both the *timing* of those expenditures (e.g., after the court issued a preliminary injunction in the parties' divorce action) and the *purpose* of the expenditures (e.g., for a selfish purpose unrelated to the marriage).[12] Likewise, the district court's conclusion in this case that groups of transactions, the majority of which occurred before Fatemeh filed for divorce, must be waste simply because Parviz could not explain them is distinguishable from the "specific and meticulous findings of fact" that justified the waste finding in *Putterman*.[13] Because the decree in this case failed to indicate how *any* of the allegedly wasted funds were actually spent, it could not identify which transactions were made for an improper purpose that would justify a finding of waste.

"[D]eference is not owed to legal error" or findings so conclusory that they mask legal error. *Davis*, 131 Nev. at 450, 352 P.3d at 1142. Here, because the decree improperly shifted the burden of proving the absence of waste to Parviz, and because it also failed to identify any specific transactions that constituted waste or make any findings as to the purpose of those transactions, we are left to speculate whether the unequal distribution to account for waste "was made for appropriate legal reasons." *Id.* at 452, 352 P.3d at 1143. We thus reverse the district court's unequal distribution of community property in the amount of $100,357.50 and remand for a proper evaluation of waste consistent with this opinion.

The district court abused its discretion by failing to adequately analyze alimony

Parviz next argues that the district court abused its discretion when it awarded Fatemeh alimony of $5,000 per month for ten years. He contends that the decree failed to properly consider the

[12]In *Lofgren*, the district court found that a husband committed waste when he violated the terms of a preliminary injunction in a divorce action by transferring $100,000 of community funds to his father (although some of the funds were later paid back), transferring $17,000 of community funds for his own personal use, using $11,200 in community funds to improve his personal house, using $10,000 of community funds to furnish his personal house, transferring another $13,000 in community funds to his father, and misappropriating $5,000 of community funds by paying his children without court consent. 112 Nev. at 1284, 926 P.2d at 297-98.

[13]In *Putterman*, the district court awarded a wife a country club membership and a portion of stock in a closely held corporation after making specific findings that the husband charged several thousand dollars on his wife's credit cards after the parties' separation, in addition to lying about his income, and refusing to account for *any* finances over which he had control. 113 Nev. at 609-10, 939 P.2d at 1049.

factors under NRS 125.150(9) because the decree's analysis lacked "a rational nexus" between those factors and the district court's decision and because the decree failed to include adequate facts when addressing each factor.

"Alimony is financial support paid from one spouse to the other whenever justice and equity require it." *Rodriguez v. Rodriguez*, 116 Nev. 993, 999, 13 P.3d 415, 419 (2000); *see also* NRS 125.150(1)(a) (providing that the alimony award must be "just and equitable"). When determining if alimony is just and equitable, a district court must consider the 11 factors listed in NRS 125.150(9). *See generally Devries v. Gallio*, 128 Nev. 706, 712, 290 P.3d 260, 264-65 (2012). These factors are:

> (a) The financial condition of each spouse;
>
> (b) The nature and value of the respective property of each spouse;
>
> (c) The contribution of each spouse to any property held by the spouses pursuant to NRS 123.030;
>
> (d) The duration of the marriage;
>
> (e) The income, earning capacity, age and health of each spouse;
>
> (f) The standard of living during the marriage;
>
> (g) The career before the marriage of the spouse who would receive the alimony;
>
> (h) The existence of specialized education or training or the level of marketable skills attained by each spouse during the marriage;
>
> (i) The contribution of either spouse as homemaker;
>
> (j) The award of property granted by the court in the divorce, other than child support and alimony, to the spouse who would receive the alimony; and
>
> (k) The physical and mental condition of each party as it relates to the financial condition, health and ability to work of that spouse.

NRS 125.150(9). Although the district court can consider other relevant factors, it *cannot* consider "the marital fault or misconduct, or lack thereof, of the spouses." *Kogod*, 135 Nev. at 67, 439 P.3d at 401.

Alimony may be awarded "based on the receiving spouse's need and the paying spouse's ability to pay." *Id*. at 68, 439 P.3d at 401. The statutory factors relevant to a needs-based alimony award include NRS 125.150(9)(a), (b), (e), (j), and (k). *Kogod*, 135 Nev. at 69, 439 P.3d at 402. Alternatively, alimony may "be awarded to compensate for economic loss as the result of a marriage and subsequent divorce, particularly one spouse's loss in standard of living or earning capacity." *Id.* at 70, 439 P.3d at 403. The statutory factors relevant to an award designed to compensate for economic loss include NRS 125.150(9)(d), (e), (f), (g), (h), and (i). *Kogod*, 135 Nev. at 71, 439 P.3d at 404.

In this case, the district court awarded Fatemeh alimony in the amount of $5,000 per month for a period of ten years based on Fatemeh's "need[ ]" and Parviz's "ability to pay." The court determined that Parviz's net income was approximately $13,000 per month, while Fatemeh currently does not have any income. Then, the court determined, "[u]pon a review of Fatemah's FDF . . . she needs $5,000 per month in alimony" and "Parviz has an ability to pay that amount."

Although the district court superficially addressed the factors contained in NRS 125.150(9)(a)-(k) before reaching this conclusion, the court's factual findings were incomplete, unsupported by substantial evidence, and internally inconsistent, and they improperly referenced misconduct by Parviz. Further, the court failed to connect its findings with a determination that alimony was "just and equitable" as either a needs-based award or as an award intended to compensate Fatemeh for economic loss after a 20-year marriage due to a change in her standard of living.

Where factor (a) required the district court to consider *each spouse's* financial condition, the court made no findings as to Parviz and noted only that Fatemeh was "presently unemployed" and "actively looking for employment despite being in severe pain from a recent car accident." When evaluating factor (a), the court did not otherwise discuss the parties' respective financial conditions, which would have "help[ed] the court understand the spouses' financial needs and abilities to pay." *Kogod*, 135 Nev. at 69, 439 P.3d at 402.

Where factor (b) required the district court to consider the nature and value of each spouse's respective property, and factor (j) required the district court to take into consideration the property that Fatemeh would be awarded in the divorce, the court did not assign any monetary values to the parties' property or explain how the court's division of that property would impact either Fatemeh's need for alimony or Parviz's ability to pay that amount.[14] *See id.* at 72, 439 P.3d at 404 (requiring district courts to consider whether the "value of the community property [a spouse] received in the divorce obviated any basis for awarding alimony").

When considering the income, earning capacity, age, and health of each spouse under factor (e), the district court's findings are like-

[14]The decree failed to assign a consistent monetary value to the waste finding, which was necessary in order to adequately consider how the determination would impact Fatemeh's need for alimony or Parviz's ability to pay. For example, the decree states, "Even if the Court finds that all of the waste identified by Fatemeh is accurate, then perhaps Fatemeh will receive around $200,000 for the waste issue." However, later in the same decree, the court found waste in the amount of $100,357.50. In addition, we note the decree was internally contradictory in several instances, and it contained both "findings" that were speculative or argumentative in nature as well as "conclusions" that were inconsistent with those findings. These inconsistencies again demonstrate the dangers inherent in the district court's wholesale adoption of litigant-drafted orders.

wise incomplete and, in addition, are unsupported by substantial evidence. The court noted that Parviz was a scientist for the Las Vegas Valley Water District whose income was publicly available on the Transparent Nevada website. However, Parviz objected at trial when Fatemeh sought to introduce a printout of Parviz's income from the Transparent Nevada website, and that evidence was never admitted. Yet, the court erroneously relied exclusively on this unadmitted evidence from Transparent Nevada to calculate Parviz's average income as $189,331 per year, or approximately $13,000 per month. This was an abuse of discretion.[15] *See Burroughs Corp. v. Century Steel, Inc.*, 99 Nev. 464, 470, 664 P.2d 354, 358 (1983) (holding that a district court determination that was based upon an exhibit not admitted into evidence was clearly erroneous).

Relatedly, when evaluating Parviz's ability to pay alimony, the district court determined that Parviz had "grossly exaggerated his expenses" but made no findings as to what his actual expenses were to determine if $5,000 per month was an amount that Parviz could pay. The court indicated that Parviz had "significant resources for the payment of support to Fatemeh" due to the discharge of some of his debt in bankruptcy. But the court also ordered Parviz to sell his home to compensate Fatemeh for awards under the decree because it found that "the only cash available is from the sale of the house." The court's acknowledgment that Parviz was unable to compensate Fatemeh under the decree without selling his home undermines its finding that he had "significant resources" to pay alimony.

When considering Parviz's age and health, in connection with factors (e) and (k) as it related to his ability to work, the district court also made insufficient findings. On the one hand, the court acknowledged Parviz's testimony at trial that "his health is poor, and he has 'stress, anxiety, high blood pressure and suicidal ideation' as a result of this divorce." Yet, the court inexplicably concluded that Parviz "did not provide any evidence of such allegations of his poor health." *See In re DISH Network Derivative Litig.*, 133 Nev. 438, 445 n.3, 401 P.3d 1081, 1089 n.3 (2017) (noting that "evidence need not be in a particular format to qualify as evidence—testimony is evidence whether it is given in court or a deposition").[16] And while

[15]Parviz does not specifically challenge the district court's reliance upon this evidence; however, the error is apparent on the record, and we may "take cognizance of plain error *sua sponte*." *Crow-Spieker # 23 v. Robert L. Helms Constr. & Dev. Co.*, 103 Nev. 1, 3 n.2, 731 P.2d 348, 350 n.2 (1987). In her answering brief, Fatemeh points out that "Parviz's 2015-2019 W-2s were admitted at Trial reflecting his historical income." The district court should have looked to the admitted evidence when calculating Parviz's income.

[16]We reject Parviz's argument that the district court's income calculation was incorrect since he "lost his employment because of his poor health." Although Parviz claims to have lost his employment, he did not support this claim with any citation to the record. *See* NRAP 28(e)(1) (requiring every assertion in briefs pertaining to matters in the record to be supported by a

the court noted that Parviz was 59 years old, had already worked at the Las Vegas Valley Water District for 25 years, and was currently working, the court did not address Parviz's ability to *continue working* for the 10-year period of the alimony award, especially when he was nearing retirement age.

For Fatemeh, the district court did not make any findings as to her earning capacity, but instead focused on her current lack of income after finding that she was not, at present, "willfully unemployed." In passing, the court noted that Fatemeh was previously employed as an ultrasound technician, that she earned an average of $32,540 annually between 2017 and 2019, that she had been in an automobile accident in 2018, and that she was actively looking for work. But the court did not consider Fatemeh's likelihood of obtaining employment in the future, nor did it consider how much she might be able to earn under circumstances where she was actively looking for work.

The district court appears to have determined that because Fatemeh was not willfully unemployed, it did not need to consider her earning capacity when calculating alimony but, instead, could look only to her actual income. Fatemeh takes a similar position on appeal, when she asserts that "[t]he district court did not impute income to Fatemeh because it correctly found that Fatemeh was not willfully unemployed." But regardless of whether Fatemeh was willfully unemployed, the district court was still required to consider her earning *capacity* when evaluating an award of alimony. *See* NRS 125.150(9)(e) (requiring consideration of the "earning capacity" of "each spouse"); *see also Earning Capacity*, *Black's Law Dictionary* (11th ed. 2019) ("A person's ability or power to earn money, given the person's talent, skills, training, and experience.").

The district court did not consider Fatemeh's ability to earn money in light of her talent, skills, training, and experience. Instead, the court examined Fatemeh's declared monthly expenses, determined that she currently does not have any income, and summarily concluded she had a financial need for ten years of alimony payments of $5,000 per month to cover those expenses. But by failing to consider Fatemeh's own earning capacity, the court could not properly evaluate her ongoing need for alimony in relation to Parviz's ability to pay.[17]

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cite to the appendix where the matter relied upon is to be found). Moreover, based on our review of the record, it does not appear that Parviz presented the district court with any evidence that he lost his employment *prior to entry* of the divorce decree; thus, the district court cannot have erred by declining to consider this issue at the time the court entered the decree. Parviz had applied for Family Medical Leave, but it is unclear what effect, if any, this had on his earnings.

[17]To the extent Fatemeh argues on appeal that a $5,000 per month award of alimony was necessary to compensate her for economic losses caused by the dissolution of their 20-year marriage, we note that the district court improperly

When "the trial court does not indicate in its judgment or decree that it gave adequate consideration" to the appropriate alimony factors, "this [c]ourt shall remand for reconsideration of the issue." *Devries*, 128 Nev. at 712, 290 P.3d at 264 (alteration in original) (quoting *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983)). Even though the district court superficially addressed the 11 factors contained in NRS 125.150(9), it was not enough for the court to simply process this case through the list of statutory factors and announce its ruling. The court's factual findings had to be supported by substantial evidence, and the court needed to explain why those findings supported its alimony award in both amount and duration. Because the district court abused its discretion in evaluating alimony in this case, we reverse the district court's alimony award and remand for a proper determination of alimony. *See Devries*, 128 Nev. at 711-12, 290 P.3d at 264.

The district court abused its discretion when it awarded Fatemeh all attorney fees and costs from the inception of litigation, an additional $59,000 that she borrowed to fund the litigation, and $7,450 for translation services

Parviz contends that several of the decree's other financial awards are legally improper or not based on substantial evidence, including an award of $176,976.99 representing all of Fatemeh's attorney fees and costs from the inception of the case in June 2016 through a pretrial evidentiary hearing, an award of $59,000 to reimburse Fatemeh

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considered misconduct by Parviz as evidence of her economic losses. Initially, when evaluating the nature and value of Fatemeh's property under factor (b), the court commented that "Fatemeh has significant debt that she had to incur as a result of Parviz's unreasonable positions, all of which were denied, and his filing of the bankruptcy proceedings which further delayed the case." When analyzing Fatemeh's income and employment under factor (e), the court commented that "Fatemeh has borrowed significant funds to meet her basic needs, and to pay counsel to combat the litany of motions and other proceedings brought by Parviz in bad faith. While Parviz seeks to avoid responsibility for his actions through bankruptcy, Fatemeh should not have to do the same." Finally, when analyzing Fatemeh's contributions as a homemaker under factor (i), the court chastised Parviz for "fail[ing] to acknowledge Fatemeh's contributions toward their marriage" and for "vehemently object[ing] to Fatemeh going to Iran in December 2014 and February 2016 to visit her father when he was sick and in a coma."

Although the court could properly award attorney fees and costs to sanction Parviz for needlessly multiplying the proceedings, it was error for the district court to rely on his alleged misconduct during the divorce as justification for awarding alimony. *See Rodriguez*, 116 Nev. at 998, 13 P.3d at 418 ("[W]hen considering an award of alimony, the court may not consider either party's misconduct or fault."). On remand, the district court should instead consider the economic loss factors set forth in NRS 125.150(9)(d), (e), (f), (g), (h), and (i) when evaluating alimony, including the length of the marriage, the parties' standard of living, and Fatemeh's contributions as a homemaker.

for money she borrowed to pay for her litigation fees, and an award of $19,565 for expert witness and translator fees.

Parviz first challenges the district court's award granting Fatemeh all of her attorney fees and costs through the pretrial evidentiary hearing. This award was entered in response to Fatemeh's motion for reconsideration of the district court's December 2019 order that the parties were to bear their own fees and costs in connection with Parviz's failed motion for summary judgment and the subsequent evidentiary hearing. However, when the district court granted Fatemeh's motion for reconsideration, it improperly awarded Fatemeh attorney fees and costs that had been the subject of *prior* motions that had already been resolved on the merits and were never challenged. In addition, the court awarded costs even though Fatemeh's motion for reconsideration only requested attorney fees and expert witness fees. While the court could permissibly reconsider its decision not to award attorney fees *in connection with the summary judgment motion and evidentiary hearing*, any additional fees were outside the scope of the order for which Fatemeh sought reconsideration. Further, it was improper to award costs when Fatemeh did not address them or request them in her motion for reconsideration. We therefore reverse the district court's award of attorney fees and costs in the amount of $176,976.99 and remand for the district court to consider only those fees incurred in connection with the summary judgment motion and evidentiary hearing. When calculating those fees, the court must ensure that any fees that were already addressed in prior court orders are excluded. The court must also consider any fees that Parviz has already paid toward that amount to ensure the attorney fee award is not duplicative.

In addition, the $59,000 award to reimburse Fatemeh for monies she borrowed to fund the litigation was an abuse of discretion. The decree contains no findings or analysis about this award but merely states that "Parviz shall be required to reimburse the money to her." It appears that the award of money borrowed to fund the litigation is duplicative of the other attorney fee awards in the decree. Yet, in the absence of factual findings, this court cannot adequately review the district court's award. *See Robison*, 100 Nev. at 673, 691 P.2d at 455; *see also Roe v. Roe*, 139 Nev. 163, 183-85, 535 P.3d 274, 293-95 (Ct. App. 2023). We therefore reverse this award and, on remand, direct the court to ensure that Fatemeh does not receive double recovery of her attorney fees.

Next, Parviz challenges the award of expert fees. The decree awarded a total of $19,565 in expert fees for three experts, including $7,450 for translation services. NRS 18.005(5) provides for the recovery of fees "in an amount of not more than $1,500 for each witness, unless the court allows a larger fee after determining that the circumstances surrounding the expert's testimony were of such

necessity as to require the larger fee."[18] "A district court's decision to award more than $1,500 in expert witness fees is reviewed for an abuse of discretion." *Frazier v. Drake*, 131 Nev. 632, 644, 357 P.3d 365, 373 (Ct. App. 2015). A district court abuses it discretion when it fails to provide "an express, careful, and preferably written explanation of the court's analysis of factors pertinent to determining the reasonableness of the requested fees and whether the circumstances surrounding the expert's testimony were of such necessity as to require the larger fee." *Id.* at 650, 357 P.3d at 377 (internal quotation marks omitted). The decree made specific findings to justify the fees for the first two experts but failed to further address the translation fee. Because the decree failed to justify the translation services award,[19] granting Fatemeh this expert fee for translation services was an abuse of discretion.[20]

Miscellaneous financial awards and allocations

Lastly, Parviz challenges a number of miscellaneous financial awards and allocations to Fatemeh and argues they were not supported by factual findings or substantial evidence. Specifically, he challenges an award for interim spousal support arrears, the division of insurance proceeds from Fatemeh's car accident, the unequal allocation of the parties' debt, and the sale of Parviz's residence.

The interim spousal support arrears were supported by substantial evidence, as Fatemeh filed a schedule of arrearages shortly before trial. *See Ogawa*, 125 Nev. at 668, 221 P.3d at 704. The division of insurance proceeds from Fatemeh's car accident was also supported by substantial evidence because Fatemeh testified that Parviz received the full insurance payout. Therefore, we affirm these two awards.

However, the decree does not contain adequate findings to support the unequal distribution of debt, where Parviz was ordered to

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[18]Following the entry of the divorce decree, the Nevada Legislature amended NRS 18.005(5) to authorize awards up to $15,000, rather than $1,500, for each expert witness, which amendment became effective on July 1, 2023. 2023 Nev. Stat., ch. 70, § 1, at 342 (enacting A.B. 76, 82d Leg. (Nev. 2023)). For clarity, we cite to the pre-amendment version of NRS 18.005(5), which was the version in effect when the divorce decree was entered.

[19]Although it is arguable whether the expenses of the translation services qualify as expert fees, in this case the decree explicitly included the translation fee as an expert fee award, and neither party challenged the expert designation on appeal, only the amount of the fee awarded.

[20]Parviz argues on appeal that the expert fee award in the decree failed to account for a preliminary $5,000 expert fee awarded to Fatemeh more than three years before the parties' divorce trial. On remand, similar to the attorney fee award, the district court should review any amounts that Parviz has already paid to ensure the expert fee award is not duplicative. If the court finds that Parviz had already paid toward the expert fee prior to trial, the decree should reduce the expert fee award correspondingly.

pay half of Fatemeh's community credit card debt but was deemed solely responsible for his bankruptcy debt. Because the district court failed to state its reasoning for why it made an unequal distribution of the parties' community debt, the court abused its discretion. NRS 125.150(1)(b) (providing that the court must make an equal disposition of community property, unless the court sets forth in writing the reasons for making an unequal disposition); *Lofgren*, 112 Nev. at 1283, 926 P.2d at 297. We reverse these allocations as well and remand for further findings.

The final issue is the sale of Parviz's home. Parviz contends on appeal that the district court violated his due process rights by ordering the forced sale of the home, despite the parties' stipulation to the contrary, without affording him the opportunity to be heard. We disagree.

Initially, the parties stipulated that Parviz would be permitted to keep the marital home and buy out Fatemeh's interest so long as he paid for an appraisal, which Parviz agreed to do. However, in his closing brief after trial, Parviz requested that the district court order the sale of the marital home and split the net proceeds between the parties. Similarly, in her closing brief, Fatemeh also requested the district court order the sale of the home to satisfy Parviz's financial obligations under the decree. Finally, in his rebuttal brief, Parviz repeated his request for the district court to order the sale of the marital home, though he disputed which party should be financially responsible for home maintenance and costs pending the sale.

"The doctrine of 'invited error' embodies the principle that a party will not be heard to complain on appeal of errors which he himself has introduced or provoked the court or the opposite party to commit. It has been held that for the doctrine of invited error to apply it is sufficient that the party who on appeal complains of the error has contributed to it." *Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (citing 5 Am. Jur. 2d *Appeal and Error* § 713 (1962)).

In this case, Parviz twice requested that the district court order the sale of the marital home, but he then contends on appeal that the district court denied his due process rights when it did, in fact, order the sale of the home. Because Parviz introduced the very error he challenges on appeal, he invited the error and is not entitled to relief. *Pearson*, 110 Nev. at 297, 871 P.2d at 346 (stating that the appellant "may not be heard to complain of the decision which resulted from her own attorney's request").

CONCLUSION

This case illustrates the importance of both practitioners and courts exercising diligence when submitting and adopting proposed orders; practitioners should ensure that proposed orders are factually accurate and legally adequate, and courts should exercise due

diligence and judgment when reviewing litigant-drafted orders prior to adoption. Although we strongly caution courts against adopting litigant-drafted orders without first engaging in thorough and diligent review, we cannot conclude under these circumstances that adopting a proposed order without modification is itself an abuse of discretion. Rather, the appropriate inquiry is to examine the district court's substantive findings, and in this case, we conclude that the court abused its discretion when making several of the financial awards and orders.

In conclusion, we affirm the financial award for interim spousal support arrears and the distribution of the insurance proceeds from Fatemeh's car accident, which were supported by substantial evidence in the record. We also affirm the decree's order to sell the marital home. However, we reverse and remand the financial awards for alimony, attorney fees, and translation services fees. We also reverse and remand the decree's $59,000 award to reimburse Fatemeh for monies she borrowed to fund the litigation and the unequal distribution of the parties' community property and debts. Insofar as the parties have raised any other arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.[21]

On remand, the court must reevaluate the financial awards for alimony, attorney fees, and expert fees under the appropriate legal standards as set forth in this opinion.[22] The court must also reevaluate the issue of waste and make particularized findings to identify any compelling reasons to justify the unequal distribution of the parties' community property and debt in accordance with NRS 125.150(1)(b).

Gibbons, C.J., and Bulla, J., concur.

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[21]We note that Parviz made several arguments that did not include appropriate citations to the record, and therefore, we decline to consider them. *See Allianz Ins. Co. v. Gagnon*, 109 Nev. 990, 997, 860 P.2d 720, 725 (1993) ("This court need not consider the contentions of an appellant where the appellant's opening brief fails to cite to the record on appeal."). We remind counsel that every assertion in briefs regarding matters in the record shall be supported by a reference to the appendix where the matter relied on is to be found. NRAP 28(e)(1).

[22]As noted earlier, Parviz does not challenge the district court's redistribution of his retirement account. Nevertheless, in light of our disposition, the district court should reevaluate the necessity of using Parviz's share of his retirement account to satisfy his financial obligation to Fatemeh in light of any financial awards the court orders in accordance with this opinion.

DEUTSCHE BANK NATIONAL TRUST COMPANY, AS TRUSTEE, IN TRUST FOR THE REGISTERED HOLDERS OF MORGAN STANLEY ABS CAPITAL I TRUST 2004-HE8, MORTGAGE PASS-THROUGH CERTIFICATES, SERIES 2004-HE8, APPELLANT, *v.* FIDELITY NATIONAL TITLE INSURANCE COMPANY, RESPONDENT.

No. 84161

October 12, 2023 536 P.3d 915

Appeal from a district court order granting a motion to dismiss, certified as final under NRCP 54(b), in an insurance matter. Eighth Judicial District Court, Clark County; Adriana Escobar, Judge.

Affirmed.

[Rehearing denied November 13, 2023]

Wright, Finlay & Zak, LLP, and *Darren T. Brenner* and *Lindsay D. Dragon*, Las Vegas, for Appellant.

McCormick, Barstow, Sheppard, Wayte & Carruth LLP and *Scott M. Reddie* and *Michael A. Pintar*, Fresno, California; *Early Sullivan Wright Gizer & McRae LLP* and *Scott E. Gizer* and *Sophia S. Lau*, Las Vegas, for Respondent.

Hutchison & Steffen, PLLC, and *Joseph C. Reynolds*, Reno, for Amicus Curiae American Land Title Association.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, CADISH, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, we recognized that NRS 116.3116 designates a portion of an HOA's lien for assessment obligations as senior to a first deed of trust, and if this "superpriority piece" is foreclosed upon, it "extinguish[es] the first deed of trust." 130 Nev. 742, 747, 334 P.3d 408, 412 (2014), *superseded by statute on other grounds as stated in Saticoy Bay LLC 9050 W Warm Springs 2079 v. Nev. Ass'n Servs.*, 135 Nev. 180, 444 P.3d 428 (2019). At issue in this appeal is whether, following such a foreclosure, the first deed of trust holder may recover for its loss of interest in the property by making a claim on its title-insurance policy. The underlying dispute arose when an insurer denied coverage as to such a claim, prompting the first deed of trust holder to file

[1]The Honorable Patricia Lee, Justice, is disqualified and did not participate in the decision of this matter.

a complaint for breach of contract and related claims. The district court dismissed the complaint, determining that there was no coverage and that each of the claims fails as a matter of law.

As the district court reasoned, an HOA does not have an existing, enforceable lien for assessment obligations until the assessment obligation becomes due, but here the superpriority HOA assessment lien that extinguished the insured's deed of trust arose post-policy, and the losses resulting from the enforcement of that post-policy superpriority assessment lien do not fall within the coverage provided under the title-insurance policy that the insured relies on in its complaint. Because we conclude that the insured's losses resulted from the enforcement of a superpriority lien, governed exclusively by NRS 116.3116, the fact that the HOA's covenants, conditions, and restrictions (CC&Rs) established the assessment obligation that later became delinquent and enforceable by a lien on the property does not create coverage under the policy. Accordingly, we affirm the dismissal of the insured's claims.

FACTUAL AND PROCEDURAL BACKGROUND

Extinguishment of Deutsche Bank's deed of trust

Appellant Deutsche Bank National Trust Company obtained a deed of trust to real property by assignment from nonparty New Century Mortgage Corporation. This deed of trust served as security for a loan provided by New Century to nonparties James and Sharon Lutkin in May 2004. Respondent Fidelity National Title Insurance Company issued a title-insurance policy to New Century and its assigns. The Lutkins' real property was part of Mira Vista Homeowners Association (Mira Vista HOA), which was established pursuant to a declaration of CC&Rs recorded in 1995. After the Lutkins became delinquent on their annual HOA assessments in 2011, Mira Vista HOA proceeded with a nonjudicial foreclosure in August 2012, at which nonparty G&P Investments Enterprises, LLC purchased the property. G&P sold the property to nonparty TRP Fund VI, LLC in July 2016.

Shortly before TRP obtained title to the property, Deutsche Bank sued G&P for a declaratory judgment that its deed of trust survived the foreclosure. After being added as a party, TRP counterclaimed for quiet title, arguing that the nonjudicial foreclosure of Mira Vista HOA's assessment lien extinguished Deutsche Bank's interest in the property. Ultimately, title was quieted in TRP's favor, and Deutsche Bank reconveyed the deed of trust in a settlement.

Denial of coverage under the title-insurance policy

Around the same time as the TRP litigation, Deutsche Bank submitted a claim under the Fidelity title-insurance policy seeking defense and indemnification. The policy insures any losses "sus-

tained or incurred by the insured by reason of . . . [a]ny defect in or lien or encumbrance on the title" or "[t]he priority of any lien or encumbrance over the lien of the insured mortgage [upon the title,]" among other situations.

The policy also incorporates several standard provisions, including the two endorsements at issue in this matter, developed by the American Land Title Association (ALTA)[2] and the California Land Title Association (CLTA), both trade associations comprised of title-insurance agents, issuers, underwriters, and other entities. CLTA 115.2(2), the first endorsement, insures losses sustained "by reason of . . . [t]he priority of any lien for charges and assessments at Date of Policy in favor of any [HOA] . . . over the lien of [the] insured mortgage." CLTA 100(1)(a), the second endorsement, provides coverage for losses sustained "by reason of . . . [t]he existence of any . . . [CC&Rs] under which the lien of the mortgage . . . can be cut off, subordinated, or otherwise impaired." Moreover, CLTA 100(2)(a) covers losses sustained

> by reason of . . . [a]ny future violations on the land of any [CC&Rs] occurring prior to acquisition of title to the estate or interest . . . by the insured, provided such violations result in impairment or loss of the lien of the mortgage . . . , or result in impairment or loss of the title to the estate or interest . . . if the insured shall acquire such title in satisfaction of the indebtedness secured by the insured mortgage.

However, the policy provides disclaimers stating that the endorsements are "made a part of the policy" and are "subject to all of the terms and provisions thereof and of any prior endorsements thereto." The disclaimers further provide that "[e]xcept to the extent expressly stated," the endorsements "neither modif[y] any of the terms and provisions of the policy, nor . . . extend the effective date of the policy and any prior endorsements, nor . . . increase the face amount thereof."

Ultimately, Fidelity denied Deutsche Bank's claim. Fidelity maintained that Mira Vista HOA did not record its assessment lien against the property until more than seven years after the date of policy. Moreover, because the events that resulted in the extinguishment of Deutsche Bank's interest in the property occurred after the date of policy, Fidelity concluded that the claim did not fall within the insuring provisions of the policy but, rather, fell within the exclusions of the policy. Fidelity also determined that CLTA 100 did not provide coverage because no provision in the Mira Vista HOA's CC&Rs allowed for Mira Vista HOA's encumbrances to take priority over Deutsche Bank's lien. Fidelity explained that Deutsche Bank's loss from the lack of priority instead resulted

[2]ALTA is an amicus curiae in this matter.

from (1) unpaid post-policy assessments, (2) the application of NRS 116.3116(2), and (3) this court's interpretation of NRS 116.3116(2). Fidelity concluded that CLTA 100 was not triggered because the priority of the HOA's assessment lien arose due to NRS 116.3116, not Mira Vista HOA's CC&Rs.

Deutsche Bank requested reconsideration of the claim, maintaining that because NRS 116.3116(9) deems the recordation of an HOA's declaration of CC&Rs to constitute record notice and perfection of assessment liens enforced in the future, the assessment liens did not arise post-policy. For the same reason, Deutsche Bank asserted that CLTA 115.2(2) and CLTA 100 afforded coverage. Finally, Deutsche Bank maintained that because Mira Vista HOA conducted the foreclosure in violation of the CC&Rs, the exclusion in Schedule B(10) for losses incurred by reason of the CC&Rs did not apply.

Lawsuit challenging denial of coverage

After Fidelity did not respond to the request to reconsider its claim, Deutsche Bank filed the underlying complaint against Fidelity in the district court, asserting claims for declaratory judgment, breach of contract, breach of the covenant of good faith and fair dealing, deceptive trade practices, and unfair claims practices. Deutsche Bank alleged that CLTA 100 and 115.2 cover the losses it suffered by the foreclosure of Mira Vista HOA's assessment lien because that lien and its superpriority status were created before the policy date by virtue of NRS 116.3116, which had been incorporated into the Mira Vista HOA CC&Rs by the statute in 1991 and by an amended declaration of CC&Rs recorded in 2000. Deutsche Bank alleged that trade manuals, which it attached to its complaint, confirmed that Fidelity and other insurers believed CLTA 100 and 115.2 applied to losses caused by the enforcement of a superpriority HOA assessment lien. Therefore, Deutsche Bank asserted, Fidelity's claim denial and refusal to defend or indemnify Deutsche Bank amounted to breach of the insurance contract and bad faith.

Deutsche Bank also contended that Fidelity violated the Nevada Deceptive Trade Practices Act (NDTPA), codified in NRS Chapter 598, by denying Deutsche Bank's claim under CLTA 100 and 115.2, despite knowingly representing at the policy's issuance that those endorsements afforded coverage in such situations. Finally, Deutsche Bank asserted that Fidelity's claims procedures violated several subsections of NRS 686A.310, which specifically pertains to trade practices in the insurance business, based on the allegedly wrongful denial.

Dismissal of claims

Fidelity moved to dismiss under NRCP 12(b)(5), arguing that Deutsche Bank's claims failed for the same reasons it cited in deny-

ing Deutsche Bank's insurance claim. It also argued that no HOA assessment triggered CLTA 100(2)(a), as assessment obligations did not constitute future violations on the land of any CC&Rs. Because, in Fidelity's view, no potential for coverage existed, it argued that its claim denial did not afford a basis for declaratory relief or amount to breach of the insurance contract, breach of the covenant of good faith and fair dealing, or a violation of unfair claims practices under NRS 686A.310. As to the NDTPA claim, Fidelity asserted that Nevada law prohibits the assignment of NDTPA claims.

Deutsche Bank opposed, making the same arguments it made in seeking reconsideration of the claim denial. It also argued that its losses were covered by CLTA 100(1)(a) because they arose by reason of the existence of NRS 116.3116 and the CC&Rs in tandem as opposed to the former in isolation. Alternatively, Deutsche Bank maintained that the CLTA 100(2)(a) endorsement provided coverage for post-policy violations of the CC&Rs that run with the land, such as the covenant to pay assessments. Because it asserted the policy afforded coverage, Deutsche Bank argued that its claims for breach of contract and breach of the covenant of good faith and fair dealing were viable. It also relied on Fidelity's internal documents in which Fidelity allegedly acknowledged coverage in such situations as rendering its claim denial wrongful and unreasonable. Deutsche Bank contended that its claim under NRS 686A.310 was viable, as insurers may be liable under that statute regardless of the existence of coverage under the policy. Finally, Deutsche Bank asserted that the NDTPA claim was assignable, unlike personal-injury tort claims, because the tortious conduct harmed property, not a person.

After a hearing, the district court granted Fidelity's motion as to all claims on the ground that no coverage existed under the policy because NRS 116.3116 unambiguously provided that the Mira Vista HOA assessment lien arose when it became delinquent in 2011 and, therefore, constituted a post-policy lien outside the scope of the Fidelity policy. Declining to look beyond the statute, the district court acknowledged that the HOA's recording of its CC&Rs perfected the assessment lien, but it reasoned that the lien nonetheless came into existence only if the homeowner failed to timely pay the assessment.

The district court further concluded that neither of the endorsements provided coverage. The court interpreted CLTA 115.2(2) as providing coverage for losses suffered because of the priority of any lien for charges or assessments only if the lien existed or arose at the date of policy, and the HOA assessment lien arose post-policy when the annual assessment became delinquent in 2011. Next, the district court reasoned that because CLTA 100 did not expressly mention HOA assessment liens, it did not cover losses from such liens. But, alternatively, even if CLTA 100 extended to HOA assessment liens, the district court reasoned that Deutsche Bank's losses did not arise

by reason of the Mira Vista HOA's CC&Rs but by reason of the provisions of NRS 116.3116. Therefore, neither subsection of CLTA 100 was triggered. Further, the district court determined that the homeowners' failure to pay the assessment did not constitute a violation on the land and, therefore, did not fit within CLTA 100(2)(a). The district court rejected Deutsche Bank's proffered trade usage evidence because it conveyed an uncommunicated, subjective intent and contradicted an unambiguous contract.

Because it concluded that no coverage existed under the Fidelity policy, the district court dismissed the declaratory judgment and breach-of-contract claims. Although it noted that Fidelity's position was "fairly debatable," it dismissed the bad-faith claim based on its coverage determinations. Next, the district court determined that Deutsche Bank's claim under NRS 686A.310 failed because there was no wrongful denial of coverage. Finally, the district court concluded that the prohibition against the assignment of tort claims extended to the NDTPA claim. The court denied Deutsche Bank leave to amend based on futility. This appeal followed.

DISCUSSION

Standard of review

We review a dismissal under NRCP 12(b)(5) de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 228, 181 P.3d 670, 672 (2008). Dismissal under NRCP 12(b)(5) is appropriate only "if it appears beyond a doubt that [the plaintiff] could prove no set of facts" that, if true, entitle the plaintiff to relief. *Id.* We accept all factual allegations in the complaint as true and construe all inferences in its favor. *Id*. Although "[a]s a general rule" a court does "not consider matters outside the pleading being attacked," it "may take into account matters of public record, orders, items present in the record of the case, and any exhibits attached to the complaint when ruling on [an NRCP 12(b)(5)] motion to dismiss." *Breliant v. Preferred Equities Corp.*, 109 Nev. 842, 847, 858 P.2d 1258, 1261 (1993).

Fundamentals of a title-insurance policy

Under Nevada law, title insurance is intended to insure against loss or damage suffered by "defects in, or the unmarketability of, the title to the property." NRS 681A.080(1). A title insurer agrees to indemnify the insured if the insured suffers a loss caused by defects or encumbrances on the title when ownership or interest is transferred to another. *See Karl v. Commonwealth Land Title Ins. Co.*, 24 Cal. Rptr. 2d 912, 915 (Ct. App. 1993).

The insurer issues a policy "on the basis of, and in reliance on, the quality of its own investigation" into a title. *Quelimane Co. v. Stewart Title Guar. Co.*, 960 P.2d 513, 521 (Cal. 1998). Unlike other types of insurance, such a policy typically "does not insure against future

events" and "is not forward looking." *Id*. Therefore, generally, title-insurance "policyholders are only protected against defects, liens or encumbrances in existence when they take title, and are not insured against defects which may arise later." *Rosen v. Nations Title Ins. Co.*, 66 Cal. Rptr. 2d. 714, 720 (Ct. App. 1997). To this end, the California Supreme Court has held that "there is no implied agreement [for an insurer] to go beyond the conditions existing at the time the policy is issued and to assume a general liability to indemnify against future incumbrances." *Rice v. Taylor*, 32 P.2d 381, 384 (Cal. 1934).

The claims for declaratory judgment, breach of contract, and breach of the covenant of good faith and fair dealing were properly dismissed

Deutsche Bank contends that three of the policy's endorsements, CLTA 115.2, CLTA 100(1)(a), and CLTA 100(2)(a), provide coverage for its losses. We address each of those endorsements below.[3]

"Insurance policies are, of course, contracts, and they are treated like other contracts." *Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. 96, 99, 482 P.3d 683, 687 (2021). Thus, we enforce the plain meaning of an insurance policy. *Century Sur. Co. v. Casino W., Inc.*, 130 Nev. 395, 398, 329 P.3d 614, 616 (2014). "And we consider the policy as a whole 'to give reasonable and harmonious meaning to the entire policy.'" *Id.* (quoting *Siggelkow v. Phoenix Ins. Co.*, 109 Nev. 42, 44, 846 P.2d 303, 304 (1993)). Nevertheless, "we interpret an insurance policy 'from the perspective of one not trained in law or in insurance, with the terms of the contract viewed in their plain, ordinary and popular sense.'" *Id.* (quoting *Siggelkow*, 109 Nev. at 44, 846 P.2d at 304). And our interpretation of the policy must avoid any "absurd or unreasonable result." *Id.*

Moreover, we broadly construe any clauses that provide coverage and narrowly construe any clauses that exclude coverage. *Id.* While the insured bears the burden to prove coverage under a policy, *Zurich Am. Ins. Co. v. Ironshore Specialty Ins. Co.*, 137 Nev. 651, 656, 497 P.3d 625, 630 (2021), we nevertheless require the insurer to draft a policy exclusion "so that it 'clearly and distinctly communicates to the insured the nature of the limitation'" or the scope of coverage, *Century Sur. Co.*, 130 Nev. at 398, 329 P.3d at 616 (quoting *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 485, 133 P.3d 251, 255 (2006)). Additionally, in the face of ambiguity in the policy,

[3]An endorsement to an insurance policy generally either "provide[s] affirmative coverage for facts that exist in a transaction which standard title insurance policies have not traditionally addressed" or "modif[ies] the effect of preprinted policy exclusions or exceptions." 1 Joyce Palomar, *Title Insurance Law* § 9:1 (2022 ed.); *see also Frontier Oil Corp. v. RLI Ins. Co.*, 63 Cal. Rptr. 3d 816, 838 (Ct. App. 2007) ("An endorsement can expand or restrict the coverage otherwise provided by the policy.").

we interpret the policy so as to "effectuate the insured's reasonable expectations." *Id.* ("We interpret ambiguities in an insurance contract against the drafter, which is typically the insurer.").

Coverage under CLTA 115.2(2)

Noting that CLTA 115.2(2) only covers losses resulting from the enforcement of a superpriority lien that existed at the date of policy, the parties disagree on how the policy's language applies. Deutsche Bank argues that coverage applies because the lien's priority existed at the date of policy, whereas Fidelity contends that the lien itself must exist by the date of policy. Further, Deutsche Bank contends that under NRS 116.3116 the lien's superpriority is established on the date of the recordation of the HOA's declaration of CC&Rs, not the date of the delinquent assessment. It asserts that CLTA 115.2(2) insured its losses because the recordation of Mira Vista HOA's CC&Rs preceded the date of policy. By contrast, Fidelity argues that under NRS 116.3116 a superpriority assessment lien does not arise until the assessment becomes due and, likewise, does not obtain its superpriority status until that time, both of which occurred here after the date of policy.

As noted, CLTA 115.2 insures losses sustained "by reason of . . . [t]he priority of any lien for charges or assessments at Date of Policy in favor of any [HOA] . . . over the lien of [the] insured mortgage." A natural reading of the endorsement is that rather than modifying the "priority" language, the "at Date of Policy" language modifies the "any lien for charges or assessments" language, as it more closely precedes the "at Date of Policy" language. In other words, the applicability of CLTA 115.2 depends firstly on the existence of an assessment lien at the date of policy. It depends secondly on whether that assessment lien, if in existence at the date of policy, has priority over the insured's mortgage under NRS 116.3116, and if so, whether the foreclosure of the priority piece of that lien caused the insured's losses. We must, therefore, interpret NRS 116.3116 to determine when the statute gives rise to an assessment lien.

We enforce the plain meaning of an unambiguous statute, *see City of Reno v. Yturbide*, 135 Nev. 113, 115-16, 440 P.3d 32, 35 (2019), and interpret sections "in harmony with the statute as a whole," *Branch Banking & Tr. Co. v. Windhaven & Tollway, LLC*, 131 Nev. 155, 158, 347 P.3d 1038, 1040 (2015). In interpreting a uniform act, the official comments and the interpretations of other states that have enacted the act are persuasive. *See SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 744, 334 P.3d 408, 410 (2014). Only in the event of ambiguity, or language that gives rise to more than one reasonable interpretation, do we resort to external sources or the rules of statutory construction. *See Univ. & Cmty. Coll. Sys. of Nev. v. Nevadans for Sound Gov't*, 120 Nev. 712, 731, 100 P.3d 179, 193 (2004).

In 1991, the Nevada Legislature adopted the Uniform Common Interest Ownership Act (UCIOA), codified in NRS Chapter 116, to govern common-interest communities like HOAs. *See Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 404, 215 P.3d 27, 31 (2009). The UCIOA permits an HOA to assess dues on its homeowners' "units," i.e., residences. *See* NRS 116.3102(1)(b); NRS 116.093 (defining "unit"). It also gives the HOA a lien on its homeowners' units for "any assessment levied against that unit or any fines imposed against the unit's owner from the time the . . . assessment or fine becomes due." NRS 116.3116(1); *see also id.* ("If an assessment is payable in installments, the full amount of the assessment is a lien from the time the first installment thereof becomes due."). Recordation of an HOA's "declaration" of CC&Rs "constitutes record notice and perfection of the lien. No further recordation of any claim of lien for assessment . . . is required." NRS 116.3116(9).

The UCIOA also establishes the priority of the HOA's assessment lien. As relevant here, NRS 116.3116(2)(b) grants the HOA's assessment lien priority over all other liens, except liens recorded before the HOA's declaration or a "first security interest . . . recorded" after the HOA's declaration but "before . . . the assessment . . . became delinquent," among others. However, the statute grants the HOA's assessment lien "superpriority" over a first security interest for "the last nine months of unpaid HOA dues and maintenance and nuisance-abatement charges." *SFR Invs. Pool 1*, 130 Nev. at 745, 334 P.3d at 411; *see also* NRS 116.3116(3)(b).[4] Thus, while "all other HOA fees or assessments" remain junior to a first deed of trust, an HOA's foreclosure on its "superpriority piece . . . extinguish[es] the first deed of trust." *SFR Invs. Pool 1*, 130 Nev. at 745, 747, 334 P.3d at 411, 412. Moreover, an HOA may not, in the provisions of its CC&Rs, vary or override the superpriority status granted by law. *See* NRS 116.1104 (prohibiting agreements purporting to vary provisions of the chapter); *see also SFR Invs. Pool 1*, 130 Nev. at 757-58, 334 P.3d at 419 (concluding that a mortgage-savings clause in an HOA's CC&Rs that purported to subordinate the HOA's entire assessment lien to a first security interest did "not affect NRS 116.3116(2)'s application").

We have not previously addressed the point when the assessment lien arises or attaches. Generally, a lien constitutes a "legal right or interest" of a creditor "in another's property, lasting usu[ally] until a debt or duty that it secures is satisfied." *Lien*, *Black's Law Dic-*

[4]Although we discussed a prior version of NRS 116.3116 in *SFR Investments*, the relevant provisions of the statute have stayed substantially the same since 1991. *See* 1991 Nev. Stat., ch. 245, § 100, at 568 (providing that an HOA assessment lien is prior to a first security interest for the preceding six months of assessment obligations).

tionary (11th ed. 2019); *see* 51 Am. Jur. 2d *Liens* § 1 ("A 'lien' is a security interest in property."). Thus, a lien "presupposes the existence of a debt. If there is no debt in the first instance, there is no need for a lien, so *a lien cannot legally exist or attach*." 51 Am. Jur. 2d *Liens* § 13 (footnote omitted) (emphasis added). A lien thus does not arise until the debt the lien seeks to secure arises.

Per NRS 116.3116(1), the HOA "*has* a lien" for any assessment "from the time the . . . assessment or fine *becomes due*." (Emphases added.) In other words, the point when the assessment becomes due (and goes unpaid) is the point when the HOA's assessment lien is created. The statute's use of the phrase "*has* a lien" underscores that the HOA acquires the lien at the time the assessment becomes due. The same subsection further provides that the assessment, if payable in installments as here, "*is* a lien from the time the first installment thereof *becomes due*." NRS 116.3116(1) (emphases added). Again, the use of "*is* a lien" and the "from the time" the installment/assessment "*becomes due*" language indicates that the debt arises, and accordingly the assessment becomes an enforceable lien, when the first installment becomes due (here, annually). Further, the HOA has only three years from when assessments "become[ ] due" to enforce its "lien for unpaid assessments." *See* NRS 116.3116(10) (extinguishing an assessment lien unless a notice of default and election to sell is filed or judicial proceedings are commenced within three years of the assessment becoming due). This provision supports that the creation of the assessment lien is not linked to its recordation and perfection; instead, it is linked, logically, to the assessment obligation which goes unpaid.[5] Otherwise, this provision would extinguish the assessment lien (purportedly arising when the CC&Rs were recorded) three years following any assessment becoming due, an absurd result that the Legislature clearly did not intend. In sum, these considerations favor interpreting NRS 116.3116 to give rise to the assessment lien when the assessment obligation becomes due, i.e., is levied and owed.

Nevertheless, the comments to the UCIOA discuss that, as early as 1994, amendments to the section of the uniform act that cor-

[5]Generally speaking, the recordation and perfection of a lien does not create the lien but, rather, establishes its priority and enforceability *against other interests* on a property. *See generally Com. Credit Counseling Servs., Inc. v. W.W. Grainger, Inc.*, 840 N.E.2d 843, 848 (Ind. Ct. App. 2006) ("The term 'attachment' encompasses creation of a security interest by execution of a security agreement between the parties, while 'perfection' is an additional step that makes the security interest effective against third parties."). Thus, the provision in NRS 116.3116(9) stating that record notice and perfection of the lien occurs at the recordation of the CC&Rs governs the priority of the lien once it comes into existence, but it does not establish the time of attachment of the lien, which is instead plainly described in NRS 116.3116(1). It also would not make sense to refer to a lien created when the CC&Rs were recorded as a "lien for unpaid assessments." NRS 116.3116(10).

responds with NRS 116.3116(1)[6] "delete[d] the language 'from the time the assessment or fine becomes due' . . . 'to make clear that the lien was enforceable at the time the assessment became due'. . . . The deletion of the language as suggested makes clear that the lien arises immediately upon . . . recording of the declaration." Unif. Common Interest Ownership Act § 3-116 cmt. 1, at 194-95 (Unif. Law Comm'n 2021). The comments add that "[a]s a result of this deletion, it is clear that in the absence of an exception in a title insurance policy for [assessments], a title insurer would be liable for post-insurance obligations which have a priority established prior to the time the policy was issued." *Id.* at 195. Of significance, the "from the time the . . . assessment or fine becomes due" language in NRS 116.3116(1) has never been amended by the Nevada Legislature and thus remains susceptible to the interpretation we have thus far described.[7]

Based on NRS 116.3116's plain language and interpreting its sections in harmony with the statute as a whole, while considering official comments of the UCIOA in tandem with the version of the statute in effect in Nevada, we conclude that the assessment lien arises when the assessment obligation becomes due, i.e., is levied and owed. We acknowledge, as does Fidelity, that the HOA has a perfected inchoate lien from the time it records the CC&Rs. However, the inchoate lien does not become an existing, enforceable lien against a particular unit until assessments are due and unpaid. Our conclusion is based on interpretation of this particular statutory scheme, and we thus offer no opinion regarding when liens arise in other contexts and potential title-insurance coverage for such liens.

Here, Mira Vista HOA began the enforcement of its assessment lien in December 2011, meaning that the assessment obligation likely arose in the preceding month. The superpriority piece included only the preceding nine months of assessment obligations. Thus, the assessment lien that ultimately extinguished Deutsche Bank's deed of trust did not exist until roughly seven years after the date of the policy, and by consequence, those losses do not fall within the scope of CLTA 115.2(2).

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[6]Uniform Common Interest Ownership Act § 3-116(a) corresponds with NRS 116.3116(1).

[7]Our Legislature has not amended NRS 116.3116(1) despite the UCIOA commenters' recommendation to do so nearly 30 years ago. It is not our role to make changes to statutes the Legislature has not elected to make, and we are aware of no authority for the proposition that we should interpret a uniform act based on comments written after the pertinent statute was adopted in Nevada. Moreover, to the extent the motivation for this proposed edit to the portion of the uniform act corresponding to subsection (1) of NRS 116.3116 was to prevent confusion regarding the priority of HOA liens, the provisions of subsections (2) and (3) specifically address those priorities, and our decision today does not change the law in that regard.

Even assuming CLTA 115.2(2) requires only that the assessment lien's priority status exist at the date of the policy, the outcome remains the same. The relevant "priority" in CLTA 115.2 refers to the superpriority piece of an assessment lien that may jeopardize the first security interest on the property. True, under NRS 116.3116(9), the assessment lien, once created, is automatically deemed recorded and perfected as of the date the declaration of CC&Rs was recorded. However, its priority over a first deed of trust is an entirely different matter. As we explained in *SFR Investments*, NRS 116.3116 divides the assessment lien into superpriority and subpriority pieces. 130 Nev. at 745, 334 P.3d at 411. The superpriority piece that threatens the first security interest on the property exists only for the unpaid assessments for the nine months preceding the recording of a notice of default. *Id.* By contrast, the subpriority piece exists for all other unpaid assessments. *Id.* Indeed, the starting point is that the assessment lien is junior to a first security interest. *Id.* at 745, 334 P.3d at 410 ("If subsection 2 [now subsection 3] ended there, a first deed of trust would have complete priority over an HOA lien.").

Applying this understanding of NRS 116.3116, Mira Vista HOA's assessment lien attained superpriority status only when the lien arose in 2011 and a notice of default was recorded. Because the priority of Mira Vista HOA's assessment lien that caused the losses claimed by Deutsche Bank arose roughly seven years after the policy date, CLTA 115.2 would not apply to insure Deutsche Bank's losses even if it was interpreted to depend on the priority of the lien—rather than the existence of the lien—at the date of the policy. Accordingly, there is no coverage for Deutsche Bank under CLTA 115.2(2).

Coverage under CLTA 100(1)(a)

As detailed, CLTA 100(1)(a) provides coverage for losses sustained "by reason of . . . the existence of any . . . [CC&Rs] under which the lien of the mortgage . . . can be cut off, subordinated, or otherwise impaired." Under this endorsement, it does not suffice that a covenant imposes an assessment obligation enforceable as a lien. The language "under which the lien of the mortgage . . . can be *cut off, subordinated, or otherwise impaired*" creates a restrictive clause that modifies "CC&Rs." The plain meaning of this clause requires some aspect of the at-issue CC&Rs—here, the covenant for maintenance assessments—to cut off, subordinate, or impair the insured's mortgage. However, no language in the pertinent covenant gives the HOA that authority. To the contrary, the covenant expressly "subordinate[s]" its lien "to the lien of any Eligible Mortgage upon any Lot." Although this mortgage-savings clause remains unaffected by NRS 116.3116, *see SFR Invs. Pool 1*, 130 Nev. at 757-58, 334 P.3d at 419, the clause supports the conclusion that the

covenant itself does not provide for the subordination or impairment of Deutsche Bank's deed of trust. Thus, that covenant does not come within the plain meaning of CLTA 100(1)(a).

Deutsche Bank alleges that the enforcement of the superpriority piece of Mira Vista HOA's assessment lien caused its losses. However, NRS 116.3116 created the superpriority piece, as well as the ability to enforce that piece and extinguish a first security interest. Without the statute, an HOA's assessment lien, if foreclosed upon, does not precede and extinguish a first security interest. *See SFR Invs. Pool 1*, 130 Nev. at 745, 334 P.3d at 410. This interpretation finds support in our characterization of NRS Chapter 116 as "creat[ing] . . . *statutory liens*," the enforcement of which remain "governed by statute." *Bank of Am., N.A. v. SFR Invs. Pool 1, LLC*, 134 Nev. 604, 611, 427 P.3d 113, 120 (2018) (emphasis added). In so stating, we cited with approval secondary authority explaining that statutory liens are "limited in operation, extent, and effect by [the] terms" of the statute and are enforceable "only in the circumstances provided for in the legislation." 53 C.J.S. *Liens* § 14; *accord* 51 Am. Jur. 2d *Liens* § 54; *see also Bank of Am.*, 134 Nev. at 610, 427 P.3d at 120. Because the superpriority assessment lien here constitutes a statutory lien, only NRS 116.3116 governs its creation and effect. It follows that the precise injury Deutsche Bank sustained arose not by the existence of a Mira Vista HOA CC&R, but by the existence of NRS 116.3116. Accordingly, CLTA 100(1)(a) did not cover Deutsche Bank's losses here because (1) there was not a CC&R that cut off, impaired, or subordinated Deutsche Bank's deed of trust, and (2) the superpriority assessment lien that ultimately extinguished Deutsche Bank's deed of trust was a product of NRS 116.3116.

Coverage under CLTA 100(2)(a)

As mentioned, CLTA 100(2)(a) insures losses sustained "by reason of . . . [a]ny future violations on the land of any [CC&Rs] occurring prior to acquisition of title to the estate or interest . . . by the insured, provided such violations result in impairment or loss of the lien of the mortgage . . . , or result in impairment or loss of the title to the estate or interest . . . if the insured shall acquire such title in satisfaction of the indebtedness secured by the insured mortgage." The applicability of this endorsement presupposes that the losses resulted from a future violation of a CC&R, although other caveats exist. However, as we discussed above, the losses resulting from the extinguishment of Deutsche Bank's deed of trust occurred because NRS 116.3116 created a statutory lien for HOA assessments comprised of a superpriority portion that, when foreclosed on, extinguishes a first security interest. Again, without this statute, the failure to pay the assessment obligations, even if resulting in an assessment lien by virtue of the declaration of the CC&Rs, would

not extinguish a first security interest. Therefore, the losses arose by reason of NRS 116.3116. Because the losses did not arise by reason of a violation of a CC&R, the policy does not provide coverage under CLTA 100(2)(a).[8]

Accordingly, we affirm the court's dismissal of the claims for declaratory judgment and breach of contract, as the policy does not provide coverage for Deutsche Bank's losses resulting from the enforcement of the superpriority portion of an HOA assessment lien. We likewise affirm the district court's dismissal of the claim for breach of the covenant of good faith and fair dealing because Fidelity had a reasonable basis to deny coverage under the policy based on NRS 116.3116 and the language of the endorsements. *See Am. Excess Ins. Co. v. MGM Grand Hotels, Inc.*, 102 Nev. 601, 605, 729 P.2d 1352, 1354-55 (1986) (providing that breach of the covenant of good faith and fair dealing occurs if the insurer acts with "an actual or implied awareness of the absence of a reasonable basis for denying [the] benefits of the policy"). For similar reasons, we conclude that the district court properly rejected Deutsche Bank's claim that Fidelity breached its duty to defend Deutsche Bank in the litigation with TRP. An insurer's obligation under an insurance policy containing a duty to defend "is triggered whenever the potential for indemnification arises, and it continues until this potential for indemnification ceases." *Nautilus Ins. Co. v. Access Med., LLC*, 137 Nev. 96, 99, 482 P.3d 683, 687 (2021). However, if the facts known to the insurer do not show any possibility of coverage, then there is no duty to defend. *Id.* at 100, 482 P.3d at 688. Our discussion above shows that there has never been a potential for coverage based on the undisputed facts of this case. Thus, the duty to defend did not arise.

The claim for unfair claims practices was properly dismissed[9]

Deutsche Bank contends that it stated a claim for relief under NRS 686A.310 because Fidelity improperly denied coverage, and regardless of whether coverage ultimately exists, the statute subjects an insurer to liability for improperly handling claims.

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[8]Because we determine that the endorsements do not cover Deutsche Bank's losses, we do not need to consider the effect of the policy's exclusions on those endorsements.

[9]Deutsche Bank also claims Fidelity engaged in deceptive trade practices. Deutsche Bank argues, without analysis, that the general prohibition against the assignment of tort claims is not implicated by a claim for deceptive trade practices. Without citing to authority, it contends that, in any event, it suffered injury or damages as a result of Fidelity's deceptive trade practices as evidenced by internal manuals. We reject these arguments as they are not properly supported. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (declining to address arguments unsupported by relevant authority or cogent argument). And more fundamentally, Deutsche Bank does not establish any knowingly false representation on the part of Fidelity.

NRS 686A.310 prohibits insurers from engaging in certain "unfair practice[s]" in handling its insureds' claims. An insurer who violates any of the subsections therein "is liable to its insured for any damages sustained by the insured as a result of the commission of any act" that constitutes "an unfair practice." NRS 686A.310(2).

Although nothing in the statute limits its application to an affirmative finding of coverage under the policy, Deutsche Bank's allegations draw on the internal manuals to argue that Fidelity misrepresented coverage under the policy and wrongfully denied coverage. For example, Deutsche Bank alleges that Fidelity's denial of coverage violated NRS 686A.310(1)(a), (1)(c), and (1)(e), under which insurers are prohibited from misrepresenting facts related to coverage, failing to promptly investigate and process claims, and failing to settle claims when the insurer's liability has become reasonably clear, respectively. But Fidelity did not improperly deny coverage under the policy, and the internal manuals do not show that Fidelity made prior representations, let alone misrepresentations, of the existence of coverage.

Additionally, Deutsche Bank ignores pertinent language in the statute. For instance, in stating that Fidelity's coverage denial by itself failed to effectuate a prompt, fair, and equitable settlement of the claim, Deutsche Bank ignores the qualifying language "in which liability of the insurer has become reasonably clear." *See* NRS 686A.310(1)(e). But Fidelity's liability did not become reasonably clear because the policy did not cover Deutsche Bank's losses. As another example, Deutsche Bank's allegations that Fidelity violated subsection (1)(c) hinge simply on the denial of coverage without any connection to the standards used in the "investigation" and "processing" of the claim. *See* NRS 686A.310(1)(c). Deutsche Bank does not even suggest that Fidelity failed to properly investigate or process the claim; it only disputes the outcome of that investigation and process. Yet another example is Deutsche Bank's claim that Fidelity improperly required it to bring this litigation by denying coverage in violation of subsection (1)(f), as Deutsche Bank fails to explain how the subsection even applies where the insurer never "offer[ed] substantially less than the amounts ultimately recovered in actions brought by such insured[ ], when the insured[has] made claims for amounts reasonably similar to the amounts ultimately recovered." *See* NRS 686A.310(1)(f).

Finally, Deutsche Bank contends that Fidelity's failure to respond to its request for reconsideration of the claim denial violated subsections (1)(d), (1)(e), and (1)(n) of NRS 686A.310. However, Deutsche Bank cites no authority that these subsections pertain to an internal appeal of a claim denial or require an insurer to entertain a request for reconsideration. Nothing in their plain language indicates that these subsections apply, requiring instead prompt denial or affir-

mance of the claim, a reasonable explanation of such denial or affirmance, and fair processes in the settlement of the claim. There is no suggestion that Fidelity's first denial did not comply with these requirements. Thus, even assuming NRS 686A.310 applies regardless of any affirmative coverage under the policy, and even accepting the allegations in Deutsche Bank's complaint as true, it failed to state a claim for relief under NRS 686A.310. Accordingly, we affirm the district court's dismissal of the claim.[10]

CONCLUSION

The applicability of the at-issue endorsements in the title-insurance policy depends on the interpretation of NRS 116.3116, which is unambiguous. Under that statute, an HOA's lien for assessment obligations arises when the assessment obligation becomes due. Moreover, NRS 116.3116 determines the superpriority of the HOA's assessment lien over the first security interest by reference to the assessment obligation and when it becomes due. Applying this understanding of NRS 116.3116 to the allegations in the complaint, the assessment lien that extinguished Deutsche Bank's deed of trust arose roughly seven years after the date of policy. Because the CLTA 115.2 endorsement insures losses resulting from the priority of assessment liens in existence at the date of the policy, this post-policy lien does not fall within the endorsement's scope.

We also conclude that without NRS 116.3116, which created a statutory lien comprised of a superpriority piece, as well as the ability to enforce that piece and extinguish a first security interest, the enforcement of the HOA's assessment lien would not extinguish a first security interest. Therefore, the injury alleged arose not by the existence of an HOA's CC&R or a violation of a CC&R, but by the existence of NRS 116.3116. Because only the statute creates the HOA's superpriority assessment lien and drives the ensuing extinguishment of a first security interest, the CLTA 100 endorsement does not provide coverage for Deutsche Bank's losses. Nor can it be said that a future violation on the land of a CC&R caused the loss under CLTA 100(2)(a), when, again, only the statute allows for the HOA to extinguish a first deed of trust by enforcement of its super-

[10]Deutsche Bank asserts that it should have been granted leave to amend to add waiver and estoppel allegations because Fidelity is attempting to rely on reasons for denying the claim that were not raised during the claim denial. Deutsche Bank would also add facts to bolster its extra-contractual allegations. We disagree as in the insurance context, "there is a well established doctrine that waiver and/or estoppel cannot be used to extend the coverage or scope of the policy." *Prime Ins. Syndicate, Inc. v. Damaso*, 471 F. Supp. 2d 1087, 1098 (D. Nev. 2007) (quoting *Walker v. Am. Ice Co.*, 254 F. Supp. 736, 741 (D.D.C. 1966)). Also, Deutsche Bank has not stated what additional facts it would allege that would lead to a different result, nor did it attach a proposed amended complaint. Accordingly, amendment would be futile under these circumstances.

priority assessment lien. Accordingly, operation of NRS 116.3116 precludes coverage under the title-insurance policy endorsements CLTA 115.2 and CLTA 100.

Accordingly, we affirm the district court's order dismissing Deutsche Bank's complaint.

Stiglich, C.J., and Pickering, Herndon, Parraguirre, and Bell, JJ., concur.