HIGHROLLER TRANSPORTATION, LLC, Appellant, *v.*
NEVADA TRANSPORTATION AUTHORITY, Respondent.

No. 85007-COA

November 30, 2023 541 P.3d 793

Appeal from a district court order granting in part and denying in part a petition for judicial review of an administrative decision by the Nevada Transportation Authority. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed.

James S. Kent, Las Vegas, for Appellant.

Aaron D. Ford, Attorney General, and *Louis V. Csoka*, Deputy Attorney General, Carson City, 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 consider for the first time the scope and application of the waiver rule to the adjudication of contested cases before the Nevada Transportation Authority (NTA or Authority). We also emphasize the importance of a developed record at the agency level to enable district courts and appellate courts to meaningfully address the arguments raised in petitions for judicial review.

The NTA administers and enforces Nevada's laws governing the transportation of persons and property on Nevada's roadways. *See* NRS 706.166. The Authority generally conducts its business at public hearings during open meetings of the NTA general session. *See* NRS 706.1514(2). However, in cases involving the imposition of civil penalties or fines, administrative proceedings may be conducted by a hearing officer designated by the Authority. NRS 706.1514(2); NRS 706.771. At the conclusion of such administrative proceedings, the hearing officer delivers the record of the hearing and a proposed decision to the Authority for its consideration. Nevada Administrative Code (NAC) 706.4015. The Authority then reviews the hearing officer's proposed decision and, at a meeting of the NTA general session, enters a final order affirming, modifying, or setting aside the decision. NAC 706.4017.

In contested cases before the NTA, we conclude that arguments not raised during the administrative proceedings are generally waived and that the NTA need not consider arguments raised for the first time at the general session. Moreover, when a party to a

contested case before the NTA stipulates to informally dispose of the case and waive the findings of fact and conclusions of law otherwise required by NRS 233B.125, that party is bound by the terms of the stipulation and may not subsequently challenge the legal or factual underpinnings of the NTA's decision on judicial review. Accordingly, we affirm the district court's order granting in part and denying in part the petition for judicial review.

FACTS AND PROCEDURAL HISTORY

In 2015, Highroller Transportation, LLC, obtained authorization to operate charter buses in Nevada when the NTA granted Highroller a certificate of public convenience and necessity. Under the terms of its certificate, Highroller was prohibited from "stag[ing] or stand[ing] a vehicle at any location except while currently chartered or awaiting a preexisting charter client." Highroller accepted this restriction as a condition of its right to operate and did not challenge it at any point prior to the instant case.

In December 2020, Highroller received an administrative citation for improperly staging a vehicle at a casino without a charter order in violation of its certificate restriction and NAC 706.360.[1] Three months after receiving this citation, Highroller was issued a second citation, also for improperly staging its vehicles without a charter order. At a subsequent administrative hearing on both citations, Highroller stipulated to the facts underlying each citation and agreed to fines totaling $10,000.[2] The parties then signed written stipulations waiving formal findings of fact and conclusions of law. Under the terms of these stipulations, "[t]he parties . . . [agreed] to dispose of the case[s] by stipulation . . . [and waived] the requirement under Nevada Revised Statute ('NRS') 233B.125 that the Authority's final order include findings of fact and conclusions of law." The stipulations further provided that "a final order will issue which includes, generally: (1) The stipulations and admissions of the parties; (2) The [h]earing [o]fficer's recommendations to the Authority . . . [;] and (3) An order from the Authority approving, modifying, or setting aside the [h]earing [o]fficer's recommendations." The hearing officer then submitted a proposed decision for review by the NTA, recommending that the NTA accept the stipulations and enter the fines against Highroller.

In June 2021, at the NTA's general session, the Authority addressed the hearing officer's proposed decision in Highroller's contested cases. The meeting agenda for this general session

[1]NAC 706.360 provides that "vehicles of an authorized carrier may not be used for transportation services beyond the scope of the authority of that carrier."

[2]The $10,000 amount was calculated as $1600 for the initial citation, $4400 for the second citation, and $4000 for a prior fine that had previously been held in abeyance.

contained a total of 124 docket items, ranging from applications for driver permits, rate and tariff issues, and dozens of citations. At this meeting, Highroller, for the first time, objected to the NTA's legal authority to enter the violations and argued that the NTA's authority was preempted under federal law. Highroller posited that this argument was jurisdictional in nature and therefore could be raised at any time. The NTA declined to consider Highroller's federal preemption argument, noting that it should have been raised at the administrative hearing before the hearing officer. Thereafter, the NTA issued a final order affirming the hearing officer's proposed decision and formally imposing the $10,000 in fines.

Highroller then petitioned for judicial review in the district court. In its petition, Highroller argued that its certificate restriction, which formed the basis of the violations and fines, was federally preempted by 49 U.S.C. § 14501(a)(1)(C), and, as a result, the NTA did not have jurisdiction to find that Highroller was in violation of the restriction. Highroller specifically claimed that the restriction was preempted because the prohibition against staging was not a valid exercise of the NTA's safety regulatory authority; if the restriction were legitimately related to safety, Highroller argued, it would uniformly apply to all commercial vehicle operators in the state or otherwise be codified as a law or regulation. In its answering brief, the NTA argued that Highroller's certificate restriction was a proper exercise of its authority to regulate safety because the purpose of the certificate's prohibition on staging was to ensure that large charter buses would not contribute to traffic congestion by parking or being left unattended in vehicle loading areas at resort properties. The NTA also referenced several other codified regulations containing prohibitions on similar conduct and argued that Highroller's certificate restriction was safety-related when viewed in the context of these other regulations.[3]

The district court agreed with the NTA's position and determined that the restriction in Highroller's certificate was related to safety and thus not federally preempted. The court denied Highroller's petition as to the federal preemption claim, and this appeal followed.[4]

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[3]Specifically, the NTA referenced NAC 706.228 (prohibiting parking vehicles in close proximity to a taxi stand), NAC 706.234 (addressing the risk of unattended vehicles around resort properties), NAC 706.354 (requiring that charter orders be "[c]arried on the vehicle and be available for inspection during the period of the service"), and NAC 706.360 (stating that vehicles of an authorized carrier must not be used for services beyond the scope of the carrier's authority).

[4]The district court granted the petition in part because the NTA had levied duplicative fines against both Highroller and its employee personally for the same conduct. The district court reversed the NTA's order to the extent of any fines that had already been collected from Highroller's employee for the same "underlying events" as Highroller's contested citations. The NTA did not file a cross-appeal to challenge this portion of the district court's order.

ANALYSIS

Highroller does not dispute that its conduct violated the restriction in its certificate; rather, Highroller contends on appeal that the restriction is preempted by federal law and thus cannot form the basis for the violations in the NTA's final order. Similar to the argument presented in its petition for judicial review, Highroller argues that its certificate restriction is not related to safety because the NTA does not impose the restriction on all motor carriers, nor is the restriction codified as a uniformly applicable regulation. The NTA's "assertion" of safety in its answering brief on judicial review, Highroller claims, was insufficient to "provide any basis" or substantiate that the restriction pertains to safety, particularly given that there was no explanation of the restriction in 2015 when it was initially included in Highroller's certificate.

In response, the NTA argues that the restriction is related to safety because it was "designed to ensure public safety at the resort properties, by ensuring that the significantly larger charter buses are not whirling around clogging up *porte cocherers* next to resort properties, are not being left unattended around resort properties . . . , and not otherwise being used as taxicabs around resort properties." In addition, the NTA reiterates that Highroller's certificate restriction is safety-related when viewed in the context of similar administrative regulations.

The NTA argues in the alternative that Highroller waived its federal preemption argument by failing to raise it at the administrative hearing before the hearing officer and also by stipulating to informally dispose of its contested cases. As a result, the NTA contends that the safety purpose of the restriction was not fully briefed or argued at the agency level and, therefore, Highroller improperly argued preemption for the first time in its petition for judicial review.

When reviewing a decision of an administrative agency, this court's role "is identical to that of the district court: to review the evidence presented to the agency in order to determine whether the agency's decision was arbitrary or capricious and was thus an abuse of the agency's discretion." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 423, 851 P.2d 423, 424 (1993). Appellate review of a final agency decision is "confined to the record before the agency." *Law Offices of Barry Levinson, P.C. v. Milko*, 124 Nev. 355, 362, 184 P.3d 378, 384 (2008). However, we review purely legal questions, including matters of statutory interpretation, de novo. *Id.* "Whether state law is preempted by a federal statute or regulation is a question of law, subject to our de novo review." *Nanopierce Techs., Inc. v. Depository Tr. & Clearing Corp.*, 123 Nev. 362, 370, 168 P.3d 73, 79 (2007) (footnote omitted).

The doctrine of preemption stems from the Supremacy Clause of the United States Constitution. U.S. Const. art. VI, cl. 2. When a conflict arises between a federal law and a state law, the federal law will supersede the conflicting state law. *Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79. Preemption may be express or implied. Congress expressly preempts state law when it *explicitly* states the intent to do so in the statute. *Id.* at 371, 168 P.3d at 79. To determine whether Congress has expressly preempted state law, courts "examine the statutory language—any explicit preemption language generally governs the extent of preemption." *Id.*

Because Highroller contends that 49 U.S.C. § 14501(a) expressly preempts the restriction contained in its certificate, we begin by examining the statutory text, which states, in pertinent part:

> (a) Motor carriers of passengers.—
>
> (1) Limitation on State law.—No State or political subdivision thereof and no interstate agency or other political agency of 2 or more States shall enact or enforce any law, rule, regulation, standard, or other provision having the force and effect of law relating to—
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> . . .
>
> (C) the authority to provide intrastate or interstate charter bus transportation.
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> . . .
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> (2) Matters not covered.—*Paragraph (1) shall not restrict the safety regulatory authority of a State with respect to motor vehicles*, the authority of a State to impose highway route controls or limitations based on the size or weight of the motor vehicle, or the authority of a State to regulate carriers with regard to minimum amounts of financial responsibility relating to insurance requirements and self-insurance authorization.

(Emphasis added.)

Although the plain language of this statute expressly preempts any state "law, rule, regulation, standard, or other provision" relating to "the authority to provide intrastate or interstate charter bus transportation," 49 U.S.C. § 14501(a)(1)(C), Congress provided that the preemption directive "shall not restrict the safety regulatory authority of a State with respect to motor vehicles," 49 U.S.C. § 14501(a)(2); *see also City of Columbus v. Ours Garage & Wrecker Serv., Inc.*, 536 U.S. 424, 428 (2002) (addressing 49 U.S.C. § 14501(c)(2)(A), which contains an identical safety preemption exception for motor carriers of property). Thus, the extent of federal preemption under § 14501(a) is limited, and it does not apply to safety-related restrictions. *See Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79.

In this case, both Highroller and the NTA agree that § 14501(a) applies in this case, but as noted above, they dispute whether Highroller's certificate restriction falls under the NTA's valid safety regulatory authority, such that the restriction is excepted from preemption under § 14501(a)(2). Before we can reach the merits of Highroller's federal preemption claim, however, we must examine whether its preemption argument was properly preserved for appellate review.

Arguments not raised to a hearing officer in a contested case before the NTA are generally waived

Highroller raised its federal preemption argument for the first time at the NTA's general session, after all administrative hearings had concluded. Highroller contends that this was sufficient to properly preserve its preemption claim for judicial review. The NTA disagrees.

Arguments raised for the first time on appeal are typically deemed waived. *State ex rel. State Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008). In *Barta*, the Nevada Supreme Court extended the waiver rule to judicial review of administrative decisions and held that any arguments not made before an administrative agency are waived. *Id.* However, *Barta* did not clearly address *when* a party must raise an argument before an agency to properly preserve that argument for consideration on judicial review, and we take the opportunity to do so here, in cases arising before the NTA. Based on our review of the relevant statutes and administrative regulations, we conclude that arguments not presented to a hearing officer at an NTA administrative hearing are generally waived and may not be raised for the first time at the NTA's general session.

The Nevada Administrative Procedure Act (APA), codified in NRS Chapter 233B, provides that any agency proceeding that may result in the imposition of an administrative penalty is a "contested case." NRS 233B.032; *see also State, Dep't of Health & Human Servs., Div. of Pub. & Behav. Health Med. Marijuana Establishment Program v. Samantha Inc.*, 133 Nev. 809, 813, 407 P.3d 327, 330 (2017) ("[F]inal agency decisions from a proceeding requiring an opportunity for a hearing or imposing an administrative penalty are judicially reviewable contested cases."). In contested cases, all parties must be afforded an opportunity for a hearing. NRS 233B.121. Contested cases under the APA are quasi-judicial proceedings. *See Smith v. State, Bd. of Wildlife Comm'rs*, No. 77485, 2020 WL 1972791 at *3 (Nev. Apr. 23, 2020) (Order of Affirmance) (stating that contested cases under the APA are quasi-judicial in nature) (citing NRS 233B.032). As such, administrative hearings in contested cases have a "judicial character" and "maintain[ ] trial-like

attributes." *State, ex rel. Bd. of Parole Comm'rs v. Morrow*, 127 Nev. 265, 272-73, 255 P.3d 224, 228-29 (2011).

The APA establishes the administrative hearing as an adversarial proceeding that affords an opportunity to contest the validity or grounds for the issuance of a penalty. In addition to the statutory requirements found in NRS Chapter 233B, the NAC contains supplemental requirements for administrative hearings before the NTA specifically. At such hearings, the hearing officer may hear testimony, NAC 706.3985, consider documentary evidence, NAC 706.3992, and make a variety of procedural rulings, *see* NAC 706.3996 (consolidating hearings); NAC 706.400 (briefs); NAC 706.4001 (oral arguments). Parties have the right to examine witnesses, NAC 706.3939, cross-examine opposing witnesses, NAC 706.3985, object to the admissibility of evidence, NAC 706.399, introduce evidence, offer arguments, and make motions, NAC 706.3939; *see also* NAC 706.3959 (authorizing parties to file motions, including motions to dismiss). All motions must be in writing unless made during a hearing. NAC 706.3959(2). Parties may stipulate to facts, and such stipulations are binding upon the parties and may be considered as evidence by the NTA. NAC 706.3997.

At the conclusion of an administrative hearing, the hearing officer is required to prepare a proposed decision for the NTA's review. NAC 706.4015(1)(f), (g). At that time, the matter stands "submitted for decision by the [NTA]," unless otherwise ordered by the hearing officer, NAC 706.4002, and only the hearing officer or the NTA may reopen the proceedings for the taking of additional evidence, NAC 706.4003; NAC 706.3994(2). The NTA then reviews the hearing officer's recommended decision and the administrative hearing record and enters a final order at an NTA general session affirming, modifying, or setting aside the recommendation. NAC 706.4017.

In quasi-judicial proceedings before an administrative hearing officer, waiver rules serve the same purpose as in traditional judicial proceedings: allowing a party to make arguments to which the opposing party has a chance to respond and the trier of fact has an opportunity to consider in an informed manner. *See Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344-45, 905 P.2d 168, 172 (1995) (stating that the purpose of the waiver rule "is to prevent appellants from raising new issues on appeal concerning which the prevailing party had no opportunity to respond and the district court had no chance to intelligently consider during the proceedings below"); *see also Valley Health Sys., LLC v. Eighth Judicial Dist. Court*, 127 Nev. 167, 173, 252 P.3d 676, 680 (2011); *accord Landmark Hotel & Casino, Inc. v. Moore*, 104 Nev. 297, 299, 757 P.2d 361, 362 (1988) ("The purpose of the requirement that a party object to the action of the trial court at the time it is taken is to allow the trial court to rule intelligently and to give the opposing party the opportunity to respond to the objection.").

To permit judicial review of arguments not raised at an NTA administrative hearing would contravene the purpose of the waiver rule by allowing a party to make arguments to which the agency had no chance to respond and which the hearing officer had no opportunity to fully consider. *Oliver*, 111 Nev. at 1344-45, 905 P.2d at 172. In this case, Highroller raised its federal preemption argument for the first time at an NTA general session, after the conclusion of the administrative hearing and after the hearing officer had already issued his proposed decision. Thus, the NTA had no opportunity to respond during the hearing or present evidence of the restriction's safety-related purpose, which was necessary to evaluate Highroller's preemption argument. *Cf. Auto. Club of N.Y., Inc. v. Dykstra*, 423 F. Supp. 2d 279, 281, 285 (S.D.N.Y. 2006) (concluding that a state statute was preempted after evidence presented of the statute's purpose at a bench trial did not show that it was legitimately related to safety concerns). In addition, the hearing officer was unable to consider Highroller's claim in an informed manner, nor could he make any findings of fact as to the restriction's purpose or conclusions of law as to whether that restriction fell within the preemption exception for safety under 49 U.S.C. § 14501(a)(2). The NTA general session was neither the time nor the place to raise such arguments in the first instance.

We note that the rule prohibiting new arguments from being raised for the first time on appeal serves the additional purpose of ensuring a proper record for appellate review. *Young v. State*, 139 Nev., Adv. Op. 20, 534 P.3d 158, 164 (Ct. App. 2023) (discussing generally the "importance of making timely objections to preserve the record in order to facilitate appellate review"). In other contexts, the Nevada Supreme Court has consistently required lower courts to make findings, either in writing or on the record, so it can evaluate the lower court's decision and the reasons underlying that decision. *See, e.g.*, *Somee v. State*, 124 Nev. 434, 441-42, 187 P.3d 152, 158 (2008) (requiring the district court to make specific factual findings because "[w]ithout an adequate record, this court cannot review a district court's decision to admit or suppress evidence"); *Davis v. Ewalefo*, 131 Nev. 445, 452, 352 P.3d 1139, 1143 (2015) ("Specific findings and an adequate explanation of the reasons for the custody determination are crucial to enforce or modify a custody order and for appellate review. Without them, this court cannot say with assurance that the custody determination was made for appropriate legal reasons." (internal quotation marks and citation omitted)). The necessity of a fully developed record applies with no less force in administrative agency appeals, such as Highroller's, where appellate review is strictly confined to the agency record. *State Indus. Ins. Sys.*, 109 Nev. at 424, 851 P.2d at 424 (stating that the appellate court's review of an agency decision is limited to the agency record).

We also note that the hearing officer in a contested case before the NTA functions somewhat like a magistrate judge who conducts hearings and issues recommendations for review and approval by a district court judge. *See Valley Health*, 127 Nev. at 172, 252 P.3d at 679. In *Valley Health*, the Nevada Supreme Court recognized the similarities between federal magistrate judges and discovery commissioners, who both submit proposed findings of fact and recommendations to the district court for approval, and held that principals of waiver apply to issues resolved in the first instance by a discovery commissioner. *Id.* The supreme court observed that it would lead to an "inefficient use of judicial resources" to allow parties to make "one set of arguments before the commissioner, waiting until the outcome is determined, then adding or switching to alternative arguments before the district court." *Id.* at 172-73, 252 P.3d at 679-80. The court concluded that neither the district court nor the appellate courts would "consider new arguments raised in objection to a discovery commissioner's report and recommendation that could have been raised before the discovery commissioner but were not." *Id.* at 173, 252 P.3d at 680.

We find the analysis of *Valley Health* instructive. Permitting parties to raise new arguments at an NTA general session, when those arguments could have been raised at an administrative hearing, would create inefficiency because the new arguments were never presented to or considered by a hearing officer in the first instance. While the NTA can certainly *choose* to reopen administrative proceedings after the conclusion of a contested hearing if it wishes to do so for the taking of additional evidence, *see* NAC 706.4003, it is not obligated to do so, NAC 706.4002 ("Unless otherwise specifically ordered, a matter stands submitted for decision by the Authority at the close of the hearing."). Thus, while the NTA has the discretion to consider an untimely argument raised for the first time at a general session, it may choose not to entertain it, and doing so is not an abuse of that discretion.

Nevertheless, while we hold that arguments must *generally* be raised at the administrative hearing before the NTA, we recognize that a party may raise subject matter jurisdiction at any time. *See Swan v. Swan*, 106 Nev. 464, 469, 796 P.2d 221, 224 (1990) (stating generally that subject matter jurisdiction "can be raised by the parties at any time"). Although Highroller has never *expressly* invoked subject matter jurisdiction, Highroller did argue at the NTA general session and in its petition for judicial review that, as a result of federal preemption, the NTA was without jurisdiction to adjudicate the citations or find that Highroller was in violation of its certificate restriction. Therefore, we must determine whether Highroller's brief statement at the NTA general session was sufficient to demonstrate that the NTA lacked subject matter jurisdiction over the citations at issue in this case as a result of federal preemption.

Highroller did not establish that 49 U.S.C. § 14501(a)(1)(C) divested the NTA of subject matter jurisdiction in this case

At the outset, we note that neither party on appeal briefed the issue of whether preemption under 49 U.S.C. § 14501(a) implicates the NTA's subject matter jurisdiction. In Highroller's petition for judicial review, while Highroller summarily asserted that the NTA was without authority to find it was in violation of its certificate restriction, Highroller did not clearly argue that federal preemption divested the NTA of subject matter jurisdiction such that its preemption claim could be raised at any time.[5] Nonetheless, because subject matter jurisdiction can be raised "sua sponte by a court of review," *Swan*, 106 Nev. at 469, 796 P.2d at 224, we address Highroller's preemption claim to the extent Highroller contends it removes the NTA's subject matter jurisdiction to adjudicate Highroller's contested cases.

When federal preemption implicates the choice of law governing an action, it operates as an affirmative defense that may be waived. *See Int'l Longshoremen's Ass'n, AFL-CIO v. Davis*, 476 U.S. 380, 381-82 (1986); *see also Wiener v. AXA Equitable Life Ins. Co.*, 58 F.4th 774, 779-80 (4th Cir. 2023) (stating that in the context of federal preemption, "[a]ll U.S. Courts of Appeals to have addressed the issue have held that choice of law issues may be waived"); *Saks v. Franklin Covey Co.*, 316 F.3d 337, 349 (2d Cir. 2003) ("Where federal preemption affects only the choice of law, the defense may be waived if not timely raised."). However, a more limited subset of nonwaivable, jurisdictional federal preemption exists when the preemptive federal legislation vests subject matter jurisdiction "exclusively in one forum" and, in doing so, withdraws jurisdiction from all other forums. *Davis*, 476 U.S. at 393 nn.9 & 11. Federal preemption derived from choice-of-forum legislation "mark[s] the bounds of a [state] court's adjudicatory authority, and as such cannot be waived or forfeited." *Wiener*, 58 F.4th at 780 (internal quotation marks omitted).

In *Davis*, the United States Supreme Court considered whether *Garmon* preemption[6] under the National Labor Relations Act

[5]Rather, Highroller argued before the district court that it had properly preserved its preemption argument by referencing preemption at the general session. In the alternative, Highroller asserted that if preemption was being raised for the first time on judicial review, the district court should nonetheless consider it because proper resolution was "beyond any doubt" and allowing the NTA's order to stand would be unjust, citing *Singleton v. Wulff*, 428 U.S. 106, 121 (1976).

[6]In *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 245-46 (1959), the Supreme Court held, as a general matter, that when union activities are "arguably within the compass of § 7 or § 8 of the [NLRA], the State's jurisdiction is displaced" or preempted, and "the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

(NLRA), 29 U.S.C. §§ 151-168, was an affirmative defense and thus subject to waiver, or choice-of-forum legislation and therefore non-waivable. Following the conclusion of a trial in state court on Davis' wrongful termination claims, the union argued for the first time in a post-trial motion that the state court lacked subject matter jurisdiction to adjudicate Davis' claims due to federal preemption under the NLRA. 476 U.S. at 385. The state court held that the union had waived its preemption argument by failing to timely raise it until the conclusion of trial and declined to address it on the merits. *Id.* at 385-86. However, the Supreme Court disagreed, determining that, with certain exceptions, state courts lack subject matter jurisdiction to adjudicate claims raised under the NLRA because "in enacting the NLRA Congress intended for the [National Labor Relations] Board generally to exercise exclusive jurisdiction in this area." *Id.* at 391. In holding that the NLRA is a choice-of-forum statute because it vested exclusive jurisdiction in the National Labor Relations Board, the Supreme Court concluded that *Garmon* preemption was jurisdictional, and therefore the union did not waive its federal preemption argument by waiting to raise it until after the conclusion of the trial. *Id.*

Nonetheless, even while recognizing that *Garmon* preemption could not be waived, the Supreme Court ultimately concluded that the union did not meet its burden to establish jurisdictional preemption because its allegations of preemption were entirely conclusory in nature and not based on any evidence in the record. *Id.* at 394-95, 398. Crucially, whether the NLRA preempted the state court proceedings hinged on whether Davis was an employee, in which case the NLRA would apply, or a supervisor, in which case the NLRA would not apply. *Id.* at 395. In its briefing to the Supreme Court, the union's "sole submission [was] that Davis was *arguably* an employee because the Board has not decided that he was a supervisor." *Id.* at 396 (emphasis added). Similarly, "[t]he [u]nion's claim of pre-emption in the state courts was also devoid of any factual or legal showing that Davis was arguably not a supervisor but an employee." *Id.* at 398. When the union argued preemption in the state court, its motion "contained no more than a conclusory assertion that state jurisdiction was preempted," and "[u]ntil that motion, no claim of pre-emption had been made out." *Id.*

The Supreme Court determined this was insufficient. "To accept the [u]nion's submission would be essentially equivalent to allowing a conclusory claim of pre-emption and would effectively eliminate the necessity to make out an arguable case." *Id.* at 396. Rather, "a

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The Nevada Supreme Court addressed *Garmon* preemption in *Rosner v. Whittlesea Blue Cab Co.*, 104 Nev. 725, 766 P.2d 888 (1988), holding that a state law breach of contract action that did not involve a collective bargaining agreement was not preempted by the NLRA and, therefore, the district court had subject matter jurisdiction to adjudicate that claim.

party asserting pre-emption must put forth *enough evidence* to enable a court to conclude that the activity is arguably subject to the [NLRA]." *Id.* at 398 (emphasis added). "[T]hose claiming pre-emption must carry the burden of showing at least an arguable case before the jurisdiction of a state court will be ousted." *Id.* at 396.

Here, Highroller does not argue that 49 U.S.C. § 14501(a) vests subject matter jurisdiction "exclusively in one forum." *Davis*, 476 U.S. at 393 nn.9 & 11. Moreover, unlike the NLRA, which requires claims to be brought before the National Labor Relations Board, 49 U.S.C. § 14501(a) does not, on its face, require transportation carrier citations to be adjudicated in another forum. Therefore, it is doubtful that Highroller's claim, even if it had it been properly supported, would have divested the NTA of subject matter jurisdiction to adjudicate the citations and fines at issue this case.

Nonetheless, even assuming *arguendo* that Highroller's pre-emption claim implicates the NTA's subject matter jurisdiction, Highroller presented no evidence at the administrative level concerning whether the restriction at issue is safety-related or not, such that the NTA's authority was even arguably preempted. *See Davis*, 476 U.S. at 395-96 (requiring a party asserting preemption to "put forth enough evidence to enable the court to find" preemption); *see also Davidson v. Velsicol Chem. Corp.*, 108 Nev. 591, 594, 834 P.2d 931, 933 (1992) ("The burden of establishing pre-emption is on the party seeking to give the statute such effect.").

Like in *Davis*, where the question of preemption turned on Davis' status as either an employee or a supervisor, the question of preemption in this case turns on whether Highroller's certificate restriction was safety-related or not. Highroller concedes that the NTA has jurisdiction to impose safety-related restrictions on charter bus operators. Therefore, to the extent the restriction in Highroller's certificate can be deemed safety-related, the NTA would necessarily have had subject matter jurisdiction to adjudicate citations related to a violation of that restriction. Had Highroller timely raised its preemption argument during the administrative hearing, the hearing officer could have considered evidence and argument regarding the purpose of the certificate restriction in order to determine in the first instance whether the restriction was, or was not, preempted by 49 U.S.C. § 14501(a).

But Highroller did not avail itself of the opportunity to litigate the preemption issue before the hearing officer and instead made only a "conclusory claim of pre-emption" at the NTA general session. *See Davis*, 476 U.S. at 396. Highroller failed to present *any* evidence at the agency level to permit a finding that the restriction in its certificate was not safety-related. Highroller's claim was thus "devoid of any factual or legal showing" that its certificate restriction was not sufficiently safety-related, which was "a relevant inquiry in making out [its] case." *Id.* at 398. Therefore, Highroller's conclusory and

bare assertion of preemption at the NTA general session was insufficient to establish that the NTA lacked subject matter jurisdiction to adjudicate the citations in this case.

We recognize that in the judicial review proceedings before the district court, both Highroller and the NTA briefed the issue of whether Highroller's certificate restriction was excluded from preemption under 49 U.S.C. § 14501(a)(2) for being related to safety. However, this post hoc briefing was insufficient for Highroller to establish jurisdictional preemption, both under the framework utilized in *Davis* and under existing Nevada law. In *Davis*, the union's post-trial brief contained only a conclusory assertion of preemption. 476 U.S. at 398. Moreover, when it argued for preemption, the union "did not assert that Davis was an employee, not a supervisor, let alone point to any evidence to support such a claim." *Id.* Here, similarly, Highroller's briefing in support of its petition for judicial review contained a conclusory assertion of preemption that did not point to any evidence to support such a claim in the administrative record.[7]

We again emphasize the need for a fully developed record at the agency level in order to properly evaluate arguments made in a petition for judicial review. Though we review questions of law, including preemption, de novo, *see Nanopierce Techs.*, 123 Nev. at 370, 168 P.3d at 79, a sufficient record is still necessary for appellate review of administrative decisions. While de novo review entails that "we decide pure legal questions without deference to an agency determination," our review, like the district court's, is still limited to the agency record. *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011) (internal quotation marks omitted).

Insofar as the district court addressed Highroller's preemption claim on the merits by relying exclusively on the briefs or arguments of counsel rather than the administrative agency record, this was error. NRS 233B.135(1)(b) (providing that the district court's review is confined to the administrative agency record). As discussed above, Highroller's preemption argument required the NTA to make factual findings as to the restriction's purpose, and absent those findings in the administrative record, the district court could not conclude, as a matter of law, whether the restriction was federally preempted. Nonetheless, because Highroller did not establish at the agency level that its certificate restriction was preempted, jurisdictionally or otherwise, we affirm the district court's decision denying judicial review, albeit on other grounds. *See Wyatt v. State*, 86 Nev.

[7]In Highroller's petition for judicial review and on appeal, Highroller summarily asserts that because its certificate restriction is not universally applicable to *all* motor carriers, it cannot be related to safety for purposes of preemption under 49 U.S.C. § 14501(a). However, Highroller does not provide any legal authority or citations to the administrative record in support of its position.

294, 298, 468 P.2d 338, 341 (1970) ("If a judgment or order of a trial court reaches the right result, although it is based on an incorrect ground, the judgment or order will be affirmed on appeal.").

Highroller also waived its federal preemption argument by stipulating to informal disposition of its contested cases

Lastly, the NTA argues that Highroller waived its preemption argument by stipulating to the violations and waiving additional findings of fact and conclusions of law. In response, Highroller reiterates its argument that due to federal preemption, the NTA lacked jurisdiction to adjudicate its contested cases. Insofar as Highroller relies on federal preemption as a basis to disregard its stipulations, for the reasons discussed above, Highroller is not entitled to relief. Nonetheless, we take this opportunity to clarify the effect of Highroller's stipulations on its subsequent preemption challenge on judicial review.

A stipulation is an agreement made before a judicial tribunal that requires the assent of the parties to its terms. *Taylor v. State Indus. Ins. System*, 107 Nev. 595, 598, 816 P.2d 1086, 1088 (1991) (recognizing the validity of a stipulation between an administrative agency and a party). Written stipulations are enforceable contracts. *Redrock Valley Ranch, LLC v. Washoe County*, 127 Nev. 451, 460, 254 P.3d 641, 647 (2011). Indeed, a stipulation to settle a lawsuit is binding if signed by the party against whom enforcement is sought. *See Casentini v. Hines*, 97 Nev. 186, 187, 625 P.2d 1174, 1175 (1981). If a stipulation contains an unequivocal statement indicating an intent to dispose of an entire case, a court may treat the stipulation accordingly. *See Taylor*, 107 Nev. at 599, 816 P.2d at 1088.

In administrative proceedings, a decision or order that is adverse to a party in a contested case must be in writing or stated on the record and ordinarily must include findings of fact and conclusions of law. NRS 233B.125. However, a party in a contested case may agree to "informal disposition" by stipulation and, in doing so, waive the requirement that the agency make findings of fact and conclusions of law. NRS 233B.121(5). When a party to a contested case validly stipulates to informally dispose of the case and waive the findings of fact and conclusions of law otherwise required by NRS 233B.125, that party is bound by the terms of that stipulation. *See Second Baptist Church of Reno v. Mount Zion Baptist Church*, 86 Nev. 164, 172, 466 P.2d 212, 217 (1970) (stating that "valid stipulations are controlling and conclusive and both trial and appellate courts are bound to enforce them"). As a result, a party who waives an agency's obligations under NRS 233B.125 may not subsequently raise claims on judicial review that, had those claims been raised before the agency, would have required the agency to make additional findings of fact and conclusions of law.

In this case, the parties' written stipulations were valid and their terms enforceable. Both parties signed the stipulations and assented to their terms, which included an unequivocal statement of intent to informally dispose of Highroller's contested cases. *Taylor*, 107 Nev. at 598, 816 P.2d at 1088; *Casentini*, 97 Nev. at 187, 625 P.2d at 1175.

As noted above, in order to evaluate Highroller's preemption argument—raised for the first time *after* the stipulations were signed—the hearing officer would have had to make further findings of fact regarding the underlying purpose of Highroller's certificate restriction and conclusions of law to determine if the restriction fell within the safety exception of 49 U.S.C. § 14501(a)(2). Because the terms of the stipulations relieved the NTA of its obligation under NRS 233B.125 to make these findings of fact and conclusions of law, Highroller's stipulation waived its federal preemption argument for purposes of judicial review.

To the extent that Highroller argues on appeal that the NTA failed to meet its burden to establish a safety purpose for the restriction, we conclude that Highroller invited the claimed error. *See Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) ("The doctrine of invited error embodies the principle that a party will not be heard to complain of any errors which he himself induced or provoked the court or the opposite party to commit." (quoting 5 Am. Jur. 2d *Appeal and Error* § 713 (1962)) (internal quotation marks omitted)). Because Highroller waived the NTA's obligation to make findings of fact and conclusions of law, it cannot challenge the omission of such findings and conclusions on appeal. Therefore, as Highroller invited the alleged error, it is not entitled to relief.[8]

CONCLUSION

Generally, consistent with traditional waiver principles, a party in a contested case before the NTA must raise arguments at the administrative hearing in order to properly preserve those arguments for appellate review. The agency must have an opportunity to respond, and the hearing officer must also have an opportunity to

[8]The NTA argues on appeal that Highroller's petition for judicial review should have been dismissed for failure to timely serve the Nevada Attorney General in accordance with NRS 233B.130(2)(c)(1). However, as the NTA recognizes, the time for service can be extended upon a showing of good cause. *Heat & Frost Insulators & Allied Workers Local 16 v. Labor Comm'r of Nev.*, 134 Nev. 1, 4-5, 408 P.3d 156, 159-60 (2018). In this case, the district court found that good cause existed to extend the time for Highroller to properly serve the Attorney General. We review the district court's decision to enlarge time for an abuse of discretion. *Scrimer v. Eighth Judicial Dist. Court*, 116 Nev. 507, 513, 998 P.2d 1190, 1193-94 (2000). After reviewing the record in this case, we conclude that the district court did not abuse its discretion when it enlarged the time for Highroller to effectuate service. *Id.* Insofar as the parties have raised other arguments that are not specifically addressed in this opinion, we have considered the same and conclude that they do not present a basis for relief.

fully consider the party's claim. If an argument is presented for the first time at an NTA general session, the Authority is not obligated to consider it. Though a challenge to subject matter jurisdiction may be raised at any time, in this case Highroller's conclusory assertion of preemption at the NTA general session, without reference to any evidence in the agency record, was insufficient to establish that the NTA lacked subject matter jurisdiction to enforce Highroller's certificate restriction. Further, because Highroller failed to adequately develop the record at the agency level, neither the district court nor this court can fully assess the merits of Highroller's preemption claim, as our review is limited to the agency record. Lastly, Highroller waived its preemption argument by stipulating to an informal disposition of its contested cases and waiving further findings of fact and conclusions of law. Accordingly, we affirm the district court order granting in part and denying in part Highroller's petition for judicial review in this case.

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

LARRY J. WILLARD, Individually and as Trustee of the LARRY JAMES WILLARD TRUST FUND; and OVERLAND DEVELOPMENT CORPORATION, a California Corporation, Appellants, *v.* BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; JERRY HERBST, an Individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, Deceased, Respondents.

No. 83640

LARRY J. WILLARD, Individually and as Trustee of the LARRY JAMES WILLARD TRUST FUND; and OVERLAND DEVELOPMENT CORPORATION, a California Corporation, Appellants, *v.* BERRY-HINCKLEY INDUSTRIES, a Nevada Corporation; JERRY HERBST, an Individual; and TIMOTHY P. HERBST, as Special Administrator of the ESTATE OF JERRY HERBST, Deceased, Respondents.

No. 84848

November 30, 2023 539 P.3d 250

Consolidated appeals from district court orders denying NRCP 60(b) relief. Second Judicial District Court, Washoe County; Lynne K. Simons, Judge.

Affirmed.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Robertson, Johnson, Miller & Williamson* and *Richard D. Williamson* and *Jonathan J. Tew*, Reno, for Appellants.

Dickinson Wright, PLLC, and *John P. Desmond*, *Brian R. Irvine*, and *Anjali D. Webster*, Reno, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, C.J.:

In this opinion, we consider whether the district court abused its discretion in denying appellants relief under NRCP 60(b)(1), NRCP 60(b)(5), and NRCP 60(b)(6). We have not previously resolved whether an order of dismissal applies "prospectively" for purposes of NRCP 60(b)(5) and today conclude that it does not.

The underlying proceedings commenced with a complaint sounding in breach of contract. After appellants generally failed to

prosecute their case, the district court granted respondents' motion for sanctions, dismissing the case with prejudice. Appellants moved for NRCP 60(b)(1) relief, which the district court denied. In a first appeal, this court reversed and remanded for the district court to make findings as to the factors set forth in *Yochum v. Davis*, 98 Nev. 484, 653 P.2d 1215 (1982). *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471, 469 P.3d 176, 180 (2020). On remand, the district court again denied the NRCP 60(b)(1) motion, now providing detailed findings as to the *Yochum* factors. The district court also denied a subsequent motion for relief under NRCP 60(b)(5) or NRCP 60(b)(6). Appellants appealed both denial orders, and we have consolidated the appeals.

As to the denial of appellants' NRCP 60(b)(1) motion, we conclude that the district court's decision is supported by substantial evidence and therefore does not constitute an abuse of discretion. As to NRCP 60(b)(5), we follow persuasive federal authority and clarify that orders of dismissal are not "prospective" within the meaning of the rule. Therefore, NRCP 60(b)(5) was not an appropriate vehicle by which appellants could obtain relief. Finally, we conclude that the district court did not abuse its discretion in denying relief under NRCP 60(b)(6), given that appellants sought relief on a basis that was cognizable under NRCP 60(b)(1), which is mutually exclusive from NRCP 60(b)(6) relief. Accordingly, we affirm the district court's orders denying NRCP 60(b) relief.

FACTS AND PROCEDURAL HISTORY

Appellants Larry J. Willard and the Overland Development Corporation (collectively, Willard) sued respondents Berry-Hinckley Industries and Jerry Herbst[1] (collectively, Berry-Hinckley) on claims sounding in breach of contract. After three years of Willard failing to comply with discovery requirements and various court orders and otherwise failing to prosecute the case, Berry-Hinckley moved for sanctions, seeking dismissal with prejudice. Willard did not oppose, and the district court granted the motion. Willard did not appeal the sanctions order.

Willard moved to set aside the sanctions order under NRCP 60(b)(1) based on excusable neglect. He argued that mental health issues had caused his lead attorney, Brian Moquin, to constructively abandon the case, ultimately resulting in the dismissal of the action. The district court denied Willard's motion without addressing the factors set forth in *Yochum*, and Willard appealed.

In resolving the appeal, we held that when determining whether NRCP 60(b)(1) relief is warranted, the district court must address the *Yochum* factors regardless of whether the movant seeks relief from

[1]Timothy P. Herbst is participating in this matter as special administrator of the estate of Jerry Herbst, who passed away in 2018.

an order or a judgment. *Willard*, 136 Nev. at 470, 469 P.3d at 179. We concluded that the district court abused its discretion by failing to set forth findings as to the *Yochum* factors, reversed the district court's order denying Willard's NRCP 60(b)(1) motion, and remanded the case for further proceedings. *Id.* at 471, 469 P.3d at 180.

Berry-Hinckley moved for en banc reconsideration. This court denied reconsideration but clarified that the parties were precluded from presenting new evidence or arguments on remand and that the district court's consideration of the *Yochum* factors was limited to the record currently before the court.

On remand, the district court held a status hearing and requested proposed orders from the parties. The district court subsequently issued an order denying Willard's NRCP 60(b)(1) motion with consideration of the *Yochum* factors. Willard appealed the order denying the NRCP 60(b)(1) motion.

While that appeal was pending, Willard moved for relief under NRCP 60(b)(5) or (6). Willard explained that attorney Moquin had admitted he violated the rules of professional conduct with regard to Willard's case in a guilty plea entered pursuant to attorney discipline proceedings. *In re Discipline of Moquin*, No. 78946, 2019 WL 5390401 (Nev. Oct. 21, 2019) (Order Approving Conditional Guilty Plea Agreement and Enjoining Attorney From Practicing Law in Nevada). Willard argued that Moquin's admissions constituted a change in conditions that made application of the sanctions order prospectively no longer equitable and thus that relief was warranted under NRCP 60(b)(5). Willard also argued that Moquin's admissions constituted new evidence of the mental illness that allegedly caused Moquin's failures during the district court proceedings and that relief was warranted on that basis. The district court denied Willard's motion. The court ruled that NRCP 60(b)(5) relief was not warranted because the guilty plea did not constitute a significant change in factual conditions and that NRCP 60(b)(6) relief was not available because Willard's allegations sounded in excusable neglect under NRCP 60(b)(1). It alternatively ruled that Willard did not show extraordinary circumstances to justify reopening the case. Willard appealed the district court order denying the motion seeking relief pursuant to NRCP 60(b)(5) and (6). We have consolidated Willard's appeals.

DISCUSSION

Standard of review

We review a district court's decision "to grant or deny a motion to set aside a judgment under NRCP 60(b)" for abuse of discretion. *Cook v. Cook*, 112 Nev. 179, 181-82, 912 P.2d 264, 265 (1996). An abuse of discretion occurs when the district court's decision is not supported by substantial evidence, which is evidence that

a reasonable mind might accept as adequate to support a conclusion, *see Otak Nev., LLC v. Eighth Judicial Dist. Court*, 129 Nev. 799, 805, 312 P.3d 491, 496 (2013), or when the district court disregards established legal principles, *Willard*, 136 Nev. at 469, 469 P.3d at 179.

The district court did not abuse its discretion in denying relief under NRCP 60(b)(1)

Willard argues that the district court misapplied the *Yochum* factors, as each factor favored granting the NRCP 60(b)(1) motion. Berry-Hinckley counters that the district court correctly considered and applied each of the *Yochum* factors.

Under NRCP 60(b)(1), a district court "may relieve a party . . . from a final judgment, order, or proceeding" on grounds of "mistake, inadvertence, surprise, or excusable neglect." An NRCP 60(b)(1) movant bears the burden of establishing, by a preponderance of the evidence, that such grounds for relief exist. *See Willard*, 136 Nev. at 470, 469 P.3d at 179-80. To determine whether such grounds for relief exist, the district court must consider the following four factors, set forth by this court in *Yochum*: "(1) a prompt application to remove the judgment; (2) the absence of an intent to delay the proceedings; (3) a lack of knowledge of procedural requirements; and (4) good faith." *Id.* at 470, 469 P.3d at 179 (quoting *Yochum*, 98 Nev. at 486, 653 P.2d at 1216). The district court "must issue express factual findings, preferably in writing, pursuant to each *Yochum* factor." *Id.* at 468, 469 P.3d at 178. And the district court must consider Nevada's policy of "decid[ing] cases on the merits whenever feasible when evaluating an NRCP 60(b)(1) motion." *Id.* at 470, 469 P.3d at 179.

While the district court found that Willard filed the NRCP 60(b)(1) motion promptly with respect to the first *Yochum* factor, it concluded that the *Yochum* factors as a whole weighed against granting relief. We conclude that substantial evidence supports the district court's findings and that the district court did not abuse its discretion in denying Willard NRCP 60(b)(1) relief.

We note that neither party contests the district court's finding on the first factor on appeal. As to the second *Yochum* factor, the district court found, given Willard's failures to comply with procedural obligations and other conduct causing delay, intent to delay proceedings. The record supports this finding. Willard's initial disclosures did not provide a computation of alleged damages, which was required by NRCP 16.1(a)(1)(A)(iv) and necessary to enable Berry-Hinckley to complete discovery. Larry J. Willard personally appeared at least once at a hearing at which this deficiency was addressed and thus knew of this omission, which contributed to the delay. Willard also failed to respond to interrogatories, requiring

Berry-Hinckley to move to compel, and failed to oppose Berry-Hinckley's motion for sanctions, even after the district court urged him to respond. *See Rodriguez v. Fiesta Palms, LLC*, 134 Nev. 654, 658, 428 P.3d 255, 258 (2018) ("[Appellant] should have inferred the consequences of not opposing the motion to dismiss, especially in light of the court's express warning to take action."); *see also Kahn v. Orme*, 108 Nev. 510, 514, 835 P.2d 790, 793 (1992) (concluding that a party did not show an absence of intent to delay proceedings where the party did not oppose a motion for a default judgment, among other considerations), *overruled on other grounds by Epstein v. Epstein*, 113 Nev. 1401, 950 P.2d 771 (1997), *as recognized in Rodriguez*, 134 Nev. at 657, 428 P.3d at 258. Willard further failed to timely and properly disclose his expert witness. Willard's non-compliance with discovery requirements and court orders required extending trial and discovery deadlines numerous times. While Willard argues that Moquin's mental illness supported finding excusable neglect, Willard knew that Moquin was not responding to communications, and many procedural deficiencies occurred before the sanctions order was entered, but Willard took no measures to replace Moquin as counsel. *See Kahn*, 108 Nev. at 515, 835 P.2d at 793 (admonishing that the "failure to obtain new representation or otherwise act on his own behalf is inexcusable" in reviewing appellant's knowledge of procedural requirements). Willard has not shown that the district court's findings as to this factor were not supported by substantial evidence. *See Rodriguez*, 134 Nev. at 658, 428 P.3d at 258 (inferring an intent to delay proceedings from a party's earlier conduct).

As to the third *Yochum* factor, the district court found that the record showed Willard knew the relevant procedural requirements. A party is held to know the procedural requirements where the facts establish either knowledge or legal notice, the party should have inferred the consequences of failing to act, or the party's attorney acquired legal notice or knowledge. *See Stoecklein v. Johnson Elec., Inc.*, 109 Nev. 268, 273, 849 P.2d 305, 308 (1993). As noted, Willard personally attended at least one hearing where the court discussed the discovery violations and ordered that an updated NRCP 16.1 damages disclosure be filed by a certain date. At the hearing on Willard's NRCP 60(b)(1) motion, Willard's counsel acknowledged that "Willard [had] been here and [had] been involved." He further explained that "candidly, [Willard did] know that things needed to be filed" and that Willard had been "an active participant" in the case. Willard also texted attorney Moquin about deadlines. The court also found that Willard was represented by two attorneys, who participated in multiple communications with the court related to procedural requirements, and Willard does not argue that his attorneys were unaware of procedural requirements. Willard's

contention that his reliance on Moquin establishes that he was unaware of his procedural obligations is belied by the record. Willard has not shown the district court's findings as to this factor were not supported by substantial evidence.

As to the fourth *Yochum* factor, the district court found that Willard failed to show that he acted in good faith given the evidence demonstrating an intent to delay the proceedings and which supported issuance of the sanctions order. "Good faith is an intangible and abstract quality with no technical meaning or definition and encompasses, among other things, an honest belief, the absence of malice, and the absence of design to defraud." *Stoecklein*, 109 Nev. at 273, 849 P.2d at 309. The court may look to a party's conduct in the proceedings in ascertaining good faith. *See id.* (observing that, while the underlying action alleged fraud, the record did not show that appellant perpetrated a fraud in the court proceedings). The district court noted its previous findings that Willard knew the relevant procedural requirements and intended to delay the proceedings and that multiple willful violations had justified the issuance of the sanctions order. The court also found that after three years of failing to comply with the rules of civil procedure, and with only four weeks remaining for discovery, Willard moved for summary judgment, alleging new bases for damages. And it found that the new damages request was based on information that Willard had possessed throughout the proceedings and that Willard's conduct was intentional, strategic, and in bad faith. The court likewise found that the failure to disclose NRCP 16.1 damages was done in bad faith. Although Willard argues for good faith on the premise that Moquin's personal hardships were responsible for the procedural failings, the record shows that Willard continued to retain Moquin after becoming aware of discovery and disclosure violations.[2] The initial disclosure regarding damages was deficient, Willard knew of the deficiency by February 2015 at the latest, and Willard retained Moquin through 2017. Willard has not shown that the district court's findings as to this factor were not supported by substantial evidence.

Finally, the district court acknowledged Nevada's policy of adjudicating cases on the merits but found that Willard had frustrated that policy by failing to provide damages calculations or expert

[2]Willard argues that the district court improperly excluded certain evidence of Moquin's mental illness. Having reviewed the arguments in this regard, we conclude that Willard has not shown that the district court abused its discretion. *See Frei ex rel. Litem v. Goodsell*, 129 Nev. 403, 408-09, 305 P.3d 70, 73 (2013) (reviewing the district court's decision to exclude evidence for abuse of discretion). Even assuming that the district court had improperly excluded this evidence, Willard has not shown relief would be warranted given his continued retention of Moquin after deficiencies became apparent. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("When an error is harmless, reversal is not warranted.").

disclosures and thus could not "hide behind" it. This policy "is not absolute and must be balanced against countervailing policy considerations, including the public's interest in expeditious resolution of [cases], the parties' interests in bringing litigation to a final and stable judgment, prejudice to the opposing side, and judicial administration concerns, such as the court's need to manage its sizeable and growing docket." *Huckabay Props., Inc. v. NC Auto Parts, LLC*, 130 Nev. 196, 198, 322 P.3d 429, 430-31 (2014). The court found that Berry-Hinckley served multiple rounds of discovery requests but Willard, by failing to provide threshold information necessary to resolve the claims alleged, impeded a merits resolution. Substantial evidence supports this finding, and Willard has not shown that the district court abused its discretion in concluding Nevada's policy in favor of adjudicating cases on the merits did not warrant granting the NRCP 60(b)(1) motion here.[3] *See Lentz v. Boles*, 84 Nev. 197, 200, 438 P.2d 254, 256-57 (1968) ("Litigants and their counsel may not properly be allowed to disregard process or procedural rules with impunity."). We therefore affirm the district court's order denying Willard NRCP 60(b)(1) relief.[4]

Orders of dismissal are not "prospective" and therefore do not fall within the purview of NRCP 60(b)(5) relief

Willard argues that NRCP 60(b)(5) provides a ground for relief based on "significant" changes in both legal and factual circumstances. Willard explains that Moquin admitted to violating the

[3]Willard invokes *Passarelli v. J-Mar Development, Inc.*, 102 Nev. 283, 720 P.2d 1221 (1986), to argue that Moquin abandoned his representation and that the matter should be resolved on the merits. However, *Passarelli* presents significantly different facts. In *Passarelli*, the attorney ceased performing job functions due to substance abuse, and the record did not show that Passarelli had knowledge of his attorney's abandonment until the damage had been done. 102 Nev. at 285-86, 720 P.2d at 1223. Here, Moquin appeared at status hearings, participated in depositions, filed motions and other papers, and participated in oral arguments before abandonment occurred in December 2017. Numerous instances of failure to comply with discovery requirements and court orders preceded December 2017, and thus allowing the dismissal to stand did not unjustly frustrate the policy favoring disposition on the merits.

[4]Willard also argues the district court violated this court's mandate on remand when the district court purportedly allowed Berry-Hinckley to raise new arguments through a proposed order that applied the *Yochum* factors because its opposition to Willard's NRCP 60(b)(1) motion did not analyze those factors. We limited the remand to considering the *Yochum* factors based on the record then before the district court without any new evidence or arguments. *Willard v. Berry-Hinckley Indus.*, Docket No. 77780 (February 23, 2021) (Order Denying En Banc Reconsideration). Berry-Hinckley's proposed order applied the *Yochum* factors based on the record already before the court and did not introduce new arguments. Had the proposed order failed to address *Yochum*, it would have violated our mandate. Willard has not shown that the district court erred in this regard.

rules of professional conduct during Willard's case by way of a conditional guilty plea in attorney discipline proceedings. Willard argues that therefore it is no longer equitable to maintain the sanctions order of dismissal. Berry-Hinckley counters that orders of dismissal are not "prospective" and thus cannot be set aside under NRCP 60(b)(5).

NRCP 60(b)(5) permits a district court to relieve a party from an order if "applying [the order] prospectively is no longer equitable." This court has yet to address the meaning of "prospective" under NRCP 60(b)(5), but "[w]here the Nevada Rules of Civil Procedure parallel the Federal Rules of Civil Procedure, rulings of federal courts interpreting and applying the federal rules are persuasive authority for this court in applying the Nevada Rules." *Nutton v. Sunset Station, Inc.*, 131 Nev. 279, 285 n.2, 357 P.3d 966, 970 n.2 (Ct. App. 2015).

The federal circuit courts of appeal agree that orders of dismissal do not apply prospectively within the meaning of the federal counterpart to NRCP 60(b)(5). *See Tapper v. Hearn*, 833 F.3d 166, 171 (2d Cir. 2016) (collecting circuit court cases universally holding "that a judgment or order of dismissal or a judgment or order denying a plaintiff injunctive relief . . . does not apply prospectively within the meaning of Rule 60(b)(5)"). To that end, the Second Circuit Court of Appeals held that "a final judgment or order has prospective application for purposes of Rule 60(b)(5) only where it is executory or involves the supervision of changing conduct or conditions." *Id.* at 170-71 (internal quotation marks omitted).

We agree with the interpretation put forward by the federal courts. As the D.C. Circuit has explained, "[v]irtually every court order causes at least some reverberations into the future, and has, in that literal sense, some prospective effect." *Twelve John Does v. District of Columbia*, 841 F.2d 1133, 1138 (D.C. Cir. 1988). "That a court's action has continuing consequences, however, does not necessarily mean that it has 'prospective application' for the purposes of Rule 60(b)(5)." *Id.* Accordingly, we clarify that orders of dismissal are not prospective within the meaning of NRCP 60(b)(5). *See id.* at 1139 ("[I]t is difficult to see how an unconditional dismissal could ever have prospective application within the meaning of Rule 60(b)(5).").

Here, the sanctions order is not prospective within the meaning of NRCP 60(b)(5) because it dismissed Willard's case with prejudice. NRCP 60(b)(5) was therefore not an appropriate vehicle by which Willard could seek relief. We acknowledge that the district court did not rely on this analysis in denying Willard's 60(b)(5) motion, but we affirm the district court's order denying NRCP 60(b)(5) relief because it nevertheless reached the correct outcome. *See Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198,

1202 (2010) (affirming the district court where it reached the correct result, albeit for the wrong reason).

The district court did not abuse its discretion in denying Willard's request for relief under NRCP 60(b)(6)

Willard argues the district court abused its discretion in denying relief under NRCP 60(b)(6). Willard asserts the NRCP 60(b)(6) motion is based on attorney Moquin's willful misconduct rather than on excusable neglect. Berry-Hinckley counters that Willard's motion falls within the scope of NRCP 60(b)(1) and therefore Willard cannot seek NRCP 60(b)(6) relief.[5]

Under NRCP 60(b)(6), a district court may relieve a party from an order for "any other reason that justifies relief." NRCP 60(b)(6) relief, however, is available only under extraordinary circumstances. *Vargas v. J Morales Inc.*, 138 Nev. 384, 388-89, 510 P.3d 777, 781 (2022). And relief may not be sought under NRCP 60(b)(6) where it would have been available under the provisions of NRCP 60(b)(1)-(5). *Id.*

The district court found that Willard's motion was based on the allegation of Moquin's mental illness and its effect on Moquin's representation of Willard. It therefore concluded that NRCP 60(b)(6) relief was precluded because the motion was based on another ground delineated in NRCP 60(b), namely, NRCP's 60(b)(1)'s "excusable neglect." The record supports the district court's ruling. Willard argued that Moquin's conditional guilty plea was new evidence of the mental illness that purportedly resulted in Moquin's failures throughout the district court proceedings. In other words, Willard argued in his NRCP 60(b)(6) motion that this additional evidence reinforced his argument for excusable neglect. As NRCP 60(b)(1) and NRCP 60(b)(6) are mutually exclusive, NRCP 60(b)(6) relief was not available for this repackaged claim of excusable

[5]Berry-Hinckley also argues that Willard's motion was not filed within a reasonable time, as it was filed more than two years after the conditional guilty plea on which it was predicated. A motion for NRCP 60(b)(6) relief must be "made within a reasonable time." NRCP 60(c)(1). The reasonableness of the timing of an NRCP 60(b)(6) motion depends on the facts of the case and may include, but is not limited to, considerations such as "whether the parties have been prejudiced by the delay and whether a good reason has been presented for failing to take action sooner." *See United States v. Boch Oldsmobile, Inc.*, 909 F.2d 657, 660-61 (1st Cir. 1990) (interpreting the federal analog to NRCP 60(b)(6)). Given that the district court denied the motion on a different basis and did not make findings as to whether the NRCP 60(b)(6) motion was filed within a reasonable time, we decline to address this matter for the first time on appeal. See *Wynn Resorts, Ltd. v. Eighth Judicial Dist. Court*, 133 Nev. 369, 386, 399 P.3d 334, 349 (2017) (declining to consider an issue that would require the appellate court to engage in factfinding, which is more properly the province of district courts).

neglect. Willard therefore has not shown that the district court abused its discretion in denying NRCP 60(b)(6) relief.[6]

CONCLUSION

The district court did not abuse its discretion in denying Willard's requests for relief under NRCP 60(b). The district court's findings as to NRCP 60(b)(1) and NRCP 60(b)(6) are supported by substantial evidence. As to NRCP 60(b)(5), we hold that orders of dismissal are not prospective within the meaning of that rule. Accordingly, NRCP 60(b)(5) was not an appropriate vehicle by which Willard could seek relief. In light of the foregoing, we affirm the district court's orders denying Willard's motions to set aside the sanctions order.

Cadish, Pickering, Herndon, Lee, Parraguirre, and Bell, JJ., concur.

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[6]Willard presents a number of arguments challenging the district court's sanctions order. Willard summarily argues that "[b]ecause the district court denied relief on remand, [Willard's] additional contentions are again ripe for this court's consideration in this appeal." We disagree. Willard voluntarily dismissed his challenge to the district court's sanctions order in his previous appeal, and he cannot revive those claims now. *Willard v. Berry-Hinckley Indus.*, 136 Nev. 467, 471 n.7, 469 P.3d 176, 180 n.7 (2020). Furthermore, Willard failed to appeal the final judgment in this case, and the sanctions order is not reviewable in this appeal from the orders denying post-judgment relief. *Holiday Inn Downtown v. Barnett*, 103 Nev. 60, 63, 732 P.2d 1376, 1378-79 (1987).

LAWRENCE F. PANIK, an Individual, Appellant, *v.*
TMM, INC., a Nevada Corporation, Respondent.

No. 84679

November 30, 2023 538 P.3d 1149

Appeal from a district court order denying an anti-SLAPP special motion to dismiss. Eighth Judicial District Court, Clark County; Gloria Sturman, Judge.

Reversed and remanded.

Weide & Miller, Ltd., and *F. Christopher Austin*, Las Vegas, for Appellant.

Lex Tecnica Ltd. and *Adam R. Knecht* and *Vincent J. Garrido*, Las Vegas, for Respondent.

Before the Supreme Court, Stiglich, C.J., and Lee and Bell, JJ.

OPINION

By the Court, Stiglich, C.J.:

Nevada's anti-SLAPP statutes are intended to protect citizens' First Amendment rights to petition the government for redress of grievances and to free speech by limiting the chilling effect of civil actions that are based on the valid exercise of those rights in connection with an issue of public concern (SLAPP actions). 1997 Nev. Stat., ch. 387, at 1363 (preamble to bill enacting anti-SLAPP statute). To achieve that intended goal, the statutes allow defendants to file a special motion to dismiss to obtain an early and expeditious resolution of a meritless claim for relief that is based on protected activity, as defined in NRS 41.637. NRS 41.650; NRS 41.660.

In this opinion, we clarify that the anti-SLAPP statutes do not exclude any particular types of claims for relief from their scope because the focus is on the defendant's activity, not the form of the plaintiff's claims for relief. The district court thus erred in concluding that the claims against appellant Lawrence F. Panik "do not fall within the categories of claims subject to the [a]nti-SLAPP statute," without further analysis. And because we conclude that Panik established by a preponderance of the evidence that respondent TMM, Inc. (TMMI) brought its claims based upon Panik's "good faith communication[s] . . . in direct connection with an issue of public concern," NRS 41.660(1), we reverse the district court's

order and remand with instructions to address prong two of the anti-SLAPP analysis.[1]

FACTS AND PROCEDURAL HISTORY

Panik is the president and CEO of nonparty Dimension, Inc. In 2000, Panik and several other nonparties invested in a company, Digital Focus, Inc. (DFI), to purchase the license to a computer code (the Code). DFI later transferred its interest in the Code license to nonparty Digital Focus Media, Inc. (DFMI), Dimension's predecessor-in-interest. TMMI purchased DFI and sued Dimension and DFMI in 2013 seeking to establish its rights to the Code license (the 2013 lawsuit). The district court found that Dimension owned the rights to the Code license, and this court affirmed. *See TMM, Inc. v. Dimension, Inc.*, Nos. 72025 & 72779, 2018 WL 6829001 (Nev. Dec. 27, 2018) (Order of Affirmance).

In 2019, Dimension brought the underlying action (the 2019 lawsuit) against TMMI for abuse of process relating to the 2013 lawsuit. During settlement discussions, TMMI discovered that Dimension was in possession of several Code derivatives that TMMI contends belong to it. Settlement discussions ceased, and TMMI filed counterclaims against Dimension, alleging that Dimension converted the disputed Code derivatives from TMMI. TMMI later filed a third-party complaint against Panik, asserting claims for trade libel, misappropriation of trade secrets, conversion, injunctive relief, abuse of process, and alter ego liability. TMMI alleged that Panik made statements to "current and prospective [TMMI] shareholders, directors, [and] officers" that Dimension, not TMMI, owns the exclusive rights to the Code and its derivatives and that TMMI was defrauding its shareholders, directors, and officers by claiming it owned the disputed derivatives. Panik filed an anti-SLAPP special motion to dismiss, arguing that TMMI filed its third-party claims in retaliation for Panik's alleged statements concerning the rights to the Code derivatives. Panik now appeals from the district court's order denying that motion.

DISCUSSION

We review a district court's "decision to grant or deny an anti-SLAPP special motion to dismiss de novo." *Smith v. Zilverberg*, 137 Nev. 65, 67, 481 P.3d 1222, 1226 (2021). We also review a district court's interpretation of a statute de novo. *Zohar v. Zbiegien*, 130 Nev. 733, 737, 334 P.3d 402, 405 (2014). Nevada's anti-SLAPP statutes direct the district court to conduct a two-prong analysis,

[1]Pursuant to NRAP 34(f)(1), we have determined that oral argument is not warranted.

where it must first "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim[s are] based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). To meet the burden under the first prong, the defendant must show "that the comments at issue fall into one of the four categories of protected communications enumerated in NRS 41.637."[2] *Stark v. Lackey*, 136 Nev. 38, 40, 458 P.3d 342, 345 (2020). Once the defendant establishes that the communications fall within one of those categories, they must then demonstrate "that the communication 'is truthful or [wa]s made without knowledge of its falsehood.'" *Id.* (quoting NRS 41.637). "[I]f the district court finds the defendant has met his or her burden" under the first prong, "the court must then 'determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on [its] claim[s].'" *Id.* (quoting NRS 41.660(3)(b)).

The district court erred in its interpretation and application of the anti-SLAPP statutes

Panik argues that the district court failed to apply the correct standard under the first prong of the anti-SLAPP analysis when it summarily concluded that the claims against Panik "do not fall within the categories of claims subject to the [a]nti-SLAPP statute." We agree.

"When interpreting a statute, we look to its plain language. If a statute's language is plain and unambiguous, we enforce the statute as written, without resorting to the rules of construction." *Zilverberg*, 137 Nev. at 72, 481 P.3d at 1230 (citation omitted). Nevada's anti-SLAPP statutes provide immunity "from any civil action for claims based upon" a person's protected good faith communications. NRS 41.650; *see also* NRS 41.660(1)(a) (providing that, when "an action is brought against a person based upon a [protected] good faith communication," that person "may file a special motion to dismiss" the action). The statute's plain language directs courts to examine the substance of the defendant's communications, not the title of the plaintiff's claims for relief. NRS 41.660(3)(a) ("If a special motion to dismiss is filed . . . , the court shall . . . [d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication

[2]The four categories of protected communications are any (1) communication "aimed at procuring any governmental or electoral action"; (2) communication to government or political entities "regarding a matter reasonably of concern to" that entity; (3) "[w]ritten or oral statement made in direct connection with an issue under consideration by a legislative, executive or judicial body, or any other official proceeding authorized by law;" and (4) "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum." NRS 41.637.

in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern . . . ."). As the California Supreme Court has explained in discussing California's similar anti-SLAPP statute, "[t]he . . . statute's definitional focus is not the form of the plaintiff's cause of action but, rather, the defendant's *activity* that gives rise to his or her asserted liability—and whether that activity constitutes protected speech or petitioning." *Navellier v. Sletten*, 52 P.3d 703, 711 (Cal. 2002).[3]

NRS 41.660(3)(a) affords the defendant (the moving party) the opportunity to establish that the plaintiff's claims for relief are based upon protected good faith communications. That first step in the anti-SLAPP analysis necessarily looks beyond the form of the plaintiff's claims for relief, which makes sense given the purpose of the anti-SLAPP statutes' special-motion-to-dismiss procedure—to provide a mechanism for the expeditious resolution of meritless SLAPPs regardless of the form the SLAPP takes. *See* NRS 41.660(2) (allowing a defendant 60 days after service of a complaint based on the defendant's good faith communication in furtherance of petitioning or speech rights to file a special motion to dismiss). If the focus were instead on the form of the plaintiff's claims for relief, the plaintiff would be completely in control of the anti-SLAPP statutes' application. This would allow the plaintiff to circumvent the Legislature's intent to limit the chilling effect that SLAPPs have on the rights to petition and to speech and frustrate the quick resolution of meritless SLAPPs. Accordingly, "[c]onsistent with the broad construction that the anti-SLAPP statute is to receive, [the statute] may apply to *any* cause of action." Thomas R. Burke, *Anti-SLAPP Litigation* § 4.1 (2022) (observing that anti-SLAPP protections have been extended to over 40 different types of claims). Indeed, we have recognized that anti-SLAPP protections may apply in cases involving a variety of claims for relief. *See, e.g.*, *Zilverberg*, 137 Nev. at 66-69, 481 P.3d at 1226-28 (defamation per se, conspiracy, and injunctive relief); *Abrams v. Sanson*, 136 Nev. 83, 85, 458 P.3d 1062, 1065 (2020) (defamation, intentional and negligent infliction of emotional distress, false light, business disparagement, civil conspiracy, and concert of action); *Delucchi v. Songer*, 133 Nev. 290, 292, 396 P.3d 826, 828 (2017) (defamation and intentional infliction of emotional distress).

Here, rather than evaluating the statements that are the basis of TMMI's third-party claims against Panik, the district court considered whether those claims were of the type entitled to anti-SLAPP protections. Because the statutes do not limit anti-SLAPP protections to only certain claims for relief, the district court erred

[3]Given "the similarities between California's and Nevada's anti-SLAPP statutes," this court has "routinely look[ed] to California courts for guidance in this area." *Coker v. Sassone*, 135 Nev. 8, 11, 432 P.3d 746, 749 (2019).

when it denied Panik's motion based on its finding that "the subject claims do not fall within the categories of claims subject to the [a]nti-SLAPP statute."

Panik met his burden under the first prong

Panik further argues that he met his burden under the first prong of the anti-SLAPP analysis. Under that prong, Panik was required to demonstrate by a preponderance of the evidence that his statements fell within one of the four statutorily defined categories of protected speech. *See* NRS 41.637. TMMI alleged that Panik made statements to its shareholders, directors, and officers challenging TMMI's claim to the Code derivatives.[4] We agree with Panik that such statements were "made in direct connection with an issue under consideration by a . . . judicial body," NRS 41.637(3), and thus fall within one of the statute's categories. Indeed, the statements were directly connected to the ultimate issue in TMMI's counterclaims in the 2019 lawsuit, and Panik made those statements to people with an interest in the litigation—TMMI directors, officers, shareholders, and potential shareholders. *See Patin v. Lee*, 134 Nev. 722, 726, 429 P.3d 1248, 1251 (2018) (explaining that for a statement to be protected under NRS 41.637(3), "the statement must (1) relate to the substantive issues in the litigation and (2) be directed to persons having some interest in the litigation").

Panik also met his burden to establish that his statements were "truthful or made without knowledge of [their] falsehood." NRS 41.637; *see also Coker v. Sassone*, 135 Nev. 8, 12, 432 P.3d 746, 749 (2019) (recognizing this as part of the movant's burden). In particular, Panik offered the final judgment from the 2013 lawsuit, which held that Dimension was the sole owner of the Code license, as well as several addendums to the original Code license agreement that support his belief that Dimension is the sole owner of any Code derivatives, including those at dispute in TMMI's counterclaims. Panik also provided a declaration stating that he believes the statements concerning Dimension's exclusive rights are true. That evidence, "absent [any] contradictory evidence in the record," is sufficient to meet Panik's burden of showing that the statements were made in good faith. *See Stark*, 136 Nev. at 43, 458 P.3d at 347 (holding that "an affidavit stating that the defendant believed the communications to be truthful . . . is sufficient to meet [his] burden absent contradictory evidence in the record").

[4]While the parties dispute whether Panik made the challenged statements, the court "must evaluate the communication as it is alleged in the plaintiff's complaint and in any of the plaintiff's clarifying declarations." *Spirtos v. Yemenidjian*, 137 Nev. 711, 715-16, 720, 499 P.3d 611, 616-17, 620 (2021) ("[A] moving party's denial that he or she made the alleged statements has no relevance . . . .").

The district court applied an incorrect standard in evaluating TMMI's claims under the second prong

Finally, Panik argues that the district court also erred when it evaluated TMMI's claims under the second prong because the court applied the wrong test, finding "that [TMMI's] claims [were] prompted by TMMI's good faith belief in material issues of fact." We agree.

The language in the district court's order indicates that the court treated Panik's motion as one for summary judgment. Doing so ignores the statute's direction that, on the second prong analysis, the court must "determine whether the plaintiff has demonstrated with prima facie evidence a probability of prevailing on [its] claim[s]." NRS 41.660(3)(b). As explained in *Coker*, while the previous version of NRS 41.660 "instructed courts to treat [a] special motion to dismiss as a motion for summary judgment, . . . [i]n 2013, the Legislature removed [that] language . . . and set forth [the] specific burden-shifting framework" noted above. 135 Nev. at 10, 432 P.3d at 748.

Because the statute no longer directs district courts to treat a special motion to dismiss as one for summary judgment, the relevant inquiry is not whether the plaintiff can establish a genuine issue of material fact, but whether the plaintiff can produce prima facie evidence in support of its claims. *Compare* NRCP 56 (directing the district court to "grant summary judgment if the movant shows that there is no genuine dispute as to any material fact"), *with* NRS 41.660(3)(b) (requiring the plaintiff to demonstrate "a probability of prevailing on [its] claim[s]" with prima facie evidence). In conducting the second prong analysis, the district court must "review each claim and assess the plaintiff's probability of prevailing," which "is determined by comparing the evidence presented with the elements of the claim." *Zilverberg*, 137 Nev. at 70-71, 481 P.3d at 1229. The district court's analysis here did not comport with NRS 41.660's burden-shifting framework, as it failed to consider whether TMMI produced prima facie evidence sufficient to demonstrate that its third-party claims against Panik "have minimal merit." *Id.* at 70, 481 P.3d at 1229; *see also Abrams*, 136 Nev. at 91, 458 P.3d at 1069 (adopting California's "minimal merit" burden under the second prong of the analysis).

CONCLUSION

Nevada's anti-SLAPP statutes make clear that on prong one of the analysis, the district court's focus in evaluating a special motion to dismiss must be on the defendant's communications rather than the form of the plaintiff's claims. We conclude that Panik has met the burden under the first prong of the anti-SLAPP analysis by

demonstrating that the claims in the complaint are based on "good faith communication[s] . . . in direct connection with an issue of public concern." NRS 41.660(1). Because Panik satisfied the burden under the first prong and the district court did not apply the correct analysis under the second prong of the anti-SLAPP analysis, we reverse the district court's order and remand this matter with instructions for the district court to determine, consistent with NRS 41.660(3)(b), whether TMMI "has demonstrated with prima facie evidence a probability of prevailing on [its] claim[s]."[5]

LEE and BELL, JJ., concur.

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[5]Given our disposition, we deny Panik's request for an award of attorney fees, costs, and an additional award under NRS 41.670(1), as that statute only authorizes the court to make such an award after it grants a special motion to dismiss.

MARIA LOPEZ, Appellant, *v.* PEDRO LOPEZ, Respondent.

No. 84950-COA

November 30, 2023 541 P.3d 117

Appeal from a district court decree of divorce. Eighth Judicial District Court, Family Division, Clark County; Dawn Throne, Judge.

Affirmed.

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

Leavitt Law Firm and *Dennis M. Leavitt* and *Frank A. Leavitt*, Las Vegas, for Respondent.

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

OPINION

By the Court, Gibbons, C.J.:

In this appeal, we examine the district court's authority in a divorce action to resolve community property disputes over property held in a revocable inter vivos trust. Our analysis brings us to an issue of first impression: whether a revocable inter vivos trust holding community property must be named as a necessary party in a divorce action where the divorcing spouses are co-trustees, co-settlors, and beneficiaries. Because we conclude that the spouses are the materially interested parties, and that divorce revokes every devise given by a settlor to their former spouse in a revocable inter vivos trust, we hold that the parties are not required to name such a revocable inter vivos trust as a necessary party in a divorce action where the spouses are co-settlors, co-trustees, and beneficiaries. We accordingly uphold the district court's distribution decisions and, ultimately, affirm its decree of divorce.

FACTS AND PROCEDURAL HISTORY

Appellant Maria Lopez and respondent Pedro Lopez were married in Mexico in 1995. After they were married, the parties moved to the United States and created the P & D Family Trust, a revocable inter vivos trust over which they, as co-settlors and co-trustees, retained the right to revoke, alter, or amend at any point during their lifetimes.[1] During their marriage, the parties collectively placed

[1]Maria and Pedro, and their children in the co-trustees' discretion, are the trust beneficiaries.

eight properties into the P & D Family Trust. Of those eight properties, Maria and Pedro had jointly purchased seven; they rented out six and used one as their marital residence. Maria's father purchased the eighth property and gave it to Maria's brother. That property is currently titled in the name of both Maria's brother and the family trust.[2] Maria, a licensed realtor, managed the six rental properties and oversaw rent collection.

Around 2008, Maria and Pedro defaulted on their mortgage payments for three of the trust properties that they controlled (Grizzly Forest, Abrams Avenue, and San Gervasio). After defaulting, Maria and Pedro sold Grizzly Forest and Abrams Avenue via short sales to third-party buyers with whom they had close relationships, and they financed these short sales with personal funds. Specifically, Maria and Pedro gave Maria's sister $280,000 to purchase Grizzly Forest and a close family friend $80,000 to purchase Abrams Avenue. Maria contends that the funds came from her separate property, while Pedro argues that the funds came from their community assets. Almost immediately after Maria's sister and the parties' friend purchased the properties, they gifted the properties back to Maria, in her name alone, titled as her sole and separate property. As to San Gervasio, Maria alleges that she used her inheritance to pay off the mortgage, after which Pedro signed over his community interest in the property to Maria.[3] Pedro denies conveying his interest in San Gervasio to Maria and alleges that Maria forged his signature on the deed.[4]

Throughout the parties' marriage, Maria and Pedro each maintained separate and joint bank accounts. The parties, particularly Maria, were neither forthcoming nor transparent regarding their funds—each made several transfers from the joint accounts to their separate accounts without telling the other. Shortly before the divorce, Maria also deviated from her historical practice of depositing rental payments into the parties' joint accounts and instead began placing the proceeds in her separate accounts.

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[2]The district court excluded this jointly titled property from its community property distributions, and we therefore do not include it in our references to trust property.

[3]In its decree of divorce, the district court referred to Maria as San Gervasio's short sale buyer. However, it is undisputed that Maria paid off the San Gervasio mortgage and did not purchase the property via a short sale. Thus, the court's characterization of Maria as a short sale buyer is inaccurate, but this does not change our analysis or conclusion.

[4]At trial, the district court questioned Pedro regarding a grant, bargain, and sale deed that purported to convey Pedro's interest in San Gervasio to Maria. Notably, however, the record does not contain this deed. The only San Gervasio deed in the record is a subsequent quitclaim deed that Maria signed but Pedro did not.

Pedro filed for divorce in April 2021. During the case management conference (CMC), the district court urged the parties to comply with their mandatory NRCP 16.2 financial disclosure requirements and produce accurate and thorough financial disclosure forms (FDFs).[5] Throughout the CMC and later hearings, Maria represented that the Grizzly Forest, Abrams Avenue, and San Gervasio properties were her separate property and should not be included in the court's community property distribution decisions. She also argued that the district court did not have the authority to make distributions of the family trust's assets because it did not have jurisdiction over the family trust. Additionally, Maria claimed a prenuptial agreement existed that the parties signed in Mexico; the agreement supposedly demonstrated that Maria had $80,000 in personal savings and a $250,000 inheritance from her father that were to remain her separate property throughout the marriage. Pedro denied the agreement's existence and expressed his concern that Maria would attempt to fabricate a document with her sister, an attorney in Mexico, to use at trial. The district court repeatedly cautioned Maria that she would need to produce the prenuptial agreement before trial with an official translation for the court to admit it into evidence. The district court also expressed frustration that neither party had engaged in sufficient discovery; subpoenaed bank records; or obtained formal appraisals for their real property, which at that point had approximately $3 million in equity.

Prior to trial, the district court held a hearing to resolve all pending motions. At that hearing, the district court found that both Maria's and Pedro's FDFs were inadequate and did not provide the court with a sufficient basis from which it could distribute the parties' community assets. The district court noted that any party claiming family trust property to be his or her separate property would need

[5]Pursuant to NRCP 16.2(c)(1), each party must complete, file, and serve a General Financial Disclosure Form "within 30 days of service of the summons and complaint, unless" the court requires, or the parties request, a Detailed Financial Disclosure Form (DFDF) pursuant to 16.2(c)(2). Here, the district court did not require, and the parties did not request, a DFDF, but NRCP 16.2 and the court's admonitions subjected the parties to relevant discovery. Concurrent with the filing of the financial disclosure form, each party must also provide "financial statement(s), document(s), receipt(s), or other information or evidence relied upon to support the figure represented on the form." NRCP 16.2(d)(2). Specifically, each "party must provide copies of all monthly or periodic bank, checking, savings, brokerage, investment, cryptocurrency, and security account statements in which any party has . . . an interest," as well as "credit card [and] debt statements," real property documents, property debt statements, loan applications, promissory notes, deposits, receivables, retirement assets, insurance and insurance policies, the values of all real property, tax returns, proof of income, personalty, and "a copy of every other document or exhibit . . . that a party expects to offer as evidence at trial in any manner." NRCP 16.2(d)(3)(A)-(P).

to overcome the presumption of community property by clear and convincing evidence. The district court also acknowledged Pedro's concern that Maria had yet to produce the prenuptial agreement.

At trial, Maria argued that the Grizzly Forest, Abrams Avenue, and San Gervasio properties were her separate property because she financed the Grizzly Forest and Abrams Avenue short sales with separate property and paid off the San Gervasio mortgage with funds from her inheritance. The district court was unconvinced and found that Maria had not produced adequate tracing evidence (through her NRCP 16.2 disclosures or otherwise) sufficient to show that the funds used to finance the short sales and pay off the mortgage came from anywhere other than the parties' community assets.[6] The district court also conveyed its strong belief that the parties had used "straw-buyers" to engage in mortgage fraud. The judge emphasized her distaste for the parties' behavior and expressed her distrust for both parties.

During Maria's cross-examination of Pedro, she questioned him about the alleged prenuptial agreement, and Pedro flatly denied its existence. After Pedro's denial, Maria proffered an unsigned physical document, written in Spanish, purporting to be a copy of the alleged prenuptial agreement. Pedro objected to its admission, and Maria responded that she had been able to obtain the document from Mexico only two days before trial. Maria did not explain why she did not disclose the document to Pedro in those two days or how she was finally able to procure it. Pedro argued that the document was untimely and not properly authenticated. The district court agreed, stating that because Maria had not produced the document prior to trial as the court had instructed, and because the document was in Spanish, with no signatures, and without any translation, the document was inadmissible. The district court explained that allowing Maria to cross-examine Pedro on an unproduced document that had not been properly authenticated or translated would amount to trial by ambush.

When questioning Maria about the bank accounts, the district court instructed Maria to open and display her online banking information, which revealed that Maria had understated the total amount in the accounts by almost $342,000 during her testimony.[7] The district court called this a material misrepresentation that Maria made in an attempt to defraud Pedro.

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[6]The district court also found that all assets in both parties' bank accounts were community property because the accounts were created after the marriage, there was significant commingling of community and alleged separate funds in the accounts, and there was no tracing evidence to distinguish the alleged separate funds.

[7]Maria claimed at trial that one of her separate accounts had around $80,000 in it and that her other separate account had $10,000 in it. However, at trial,

In its findings of fact, conclusions of law, and decree of divorce, the district court deemed all family trust properties to be community property and ordered them distributed equally between the parties because neither party offered a compelling reason for an unequal distribution. This appeal followed.

ANALYSIS

On appeal, Maria argues that the district court (1) did not have authority to distribute the P & D Family Trust's assets; (2) made an unequal distribution of property and abused its discretion because it distributed the Grizzly Forest, Abrams Avenue, and San Gervasio properties as community property and not Maria's separate property; and (3) abused its discretion when it did not allow Maria to question Pedro on cross-examination about the alleged prenuptial agreement. Maria also claims (4) that, on remand, this case should be reassigned to a new judge because of alleged prejudicial comments the district court judge made during the trial.[8]

The district court had authority to distribute the P & D Family Trust's assets

Maria argues that the district court erred when it exercised authority over the family trust's assets. Because the trust was a revocable inter vivos trust established after marriage, and the parties were co-settlors, co-trustees, and beneficiaries, we conclude that the district court did not err in concluding it had authority to distribute trust assets.

The trust's distributions were immediately revoked upon divorce

Maria argues that the district court did not have authority to distribute the family trust's assets because the trust was not irrevocable. Pedro responds that the family trust was revocable upon divorce and that the district court automatically had authority to distribute the community assets in the family trust upon its revocation.

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the district court challenged Maria to reveal her online banking records, which showed that her accounts contained $311,839 and $120,115, respectively.

[8]Maria additionally argues that the district court abused its discretion when it used Zillow estimates that Pedro presented instead of actual appraisal values as the basis for its property valuations. However, despite the district court's pretrial warnings that without appraisal values it would be forced to either order the sale of the properties and divide the proceeds or use Zillow estimates in lieu of appraisals, neither party obtained appraisal values for trial. At trial, therefore, the parties stipulated to the use of Zillow estimates to avoid the sale of the properties. Maria, a licensed realtor, also declined to offer her opinion on the value of the properties. Thus, we conclude that the district court did not abuse its discretion by using the Zillow estimates.

NRS 111.781(1) establishes that unless "otherwise provided by the express terms of a governing instrument," divorce revokes any revocable disposition of property made to a former spouse, including dispositions made pursuant to a trust. *In re Colman Family Revocable Living Tr., Dated June 23, 2011*, 136 Nev. 112, 113-14, 460 P.3d 452, 454 (2020) (summarizing NRS 111.781); *see also* NRS 163.565 (stating that unless otherwise provided, divorce "revokes every devise, beneficial interest or designation to serve as trustee given by the settlor to the former spouse of the settlor in a revocable inter vivos trust"); NRS 133.115 (stating the same as applied to wills—namely, that divorce operates to revoke "every devise, beneficial interest or designation to serve as personal representative given to the testator's former spouse in a will"). The theory underlying this principle is that revocable trusts with dispositions between spouses generally become ineffective once there remains no surviving spouse to benefit post-divorce. *See Colman*, 136 Nev. at 112-13, 460 P.3d at 453. NRS 125.150(1)(b) additionally grants courts in divorce actions express authority to make equal dispositions of any community property transferred into irrevocable trusts, which by their nature are much more restrictive than inter vivos trusts.

Here, the parties did not offer the family trust as an exhibit at trial, nor does it appear in the record on appeal, and we cannot verify its provisions. Regardless, neither party argues that the trust's express terms would have precluded the district court from removing and distributing the family trust's community property. Instead, Maria contends that, pursuant to NRS 111.781 and NRS 125.150, district courts have express authority to distribute community assets placed in irrevocable trusts but not those placed in revocable inter vivos trusts. Yet, Maria's argument fails to account for the distinct nature of revocable inter vivos trusts that makes these statutes inapplicable. Unlike property transferred to irrevocable trusts—and in contrast to the general principle that settlors no longer own trust property once they transfer that property into a trust—property transferred to or held in a revocable inter vivos trust is considered to remain with the settlor because "any interest of other beneficiaries is purely potential and can evaporate at the settlor's whim." 90 C.J.S. *Trusts* § 254 (2020) (also noting that a "settlor may be the owner of property in a revocable trust of which the settlor is the trustee"); *see also Linthicum v. Rudi*, 122 Nev. 1452, 1453, 148 P.3d 746, 747 (2006) (concluding that "a beneficiary's interest in a revocable inter vivos trust is contingent at most"); *see, e.g.*, *Wishengrad v. Carrington Mortg. Servs.*, 139 Nev. 116, 123, 529 P.3d 880, 886 (2023) (noting that, with respect to real property held in a revocable inter vivos trust, the trustees "hold legal title" and the beneficiaries "are the equitable owners"). Further, dispositions between spouses from a revocable trust are immediately revoked upon divorce unless

the instrument expressly states otherwise. *Colman*, 136 Nev. at 114, 460 P.3d at 454. Thus, the district court automatically assumed the authority to distribute the family trust's community assets contemporaneous with Maria and Pedro's divorce.

The trust was not a necessary party to the divorce action

Maria also implies that the family trust should have been joined as a necessary party in order to distribute the trust's assets. NRCP 19 requires that all necessary parties be joined in an action, so long as the party's joinder does not deprive the court of subject matter jurisdiction. A necessary party includes a party without whom the court cannot accord complete relief and a party whose interest in the action is such that the party's ability to protect its interests will be impeded if that party is not joined. NRCP 19(a)(1).

In a divorce action, the spouses are the materially interested parties. Where the spouses are the co-settlors, co-trustees, and beneficiaries of a revocable inter vivos trust, the court's distribution of the trust's joint assets will not impede the trust's interests because the necessary parties are already named in the litigation.[9] *See, e.g.*, *Tsai v. Hsu*, No. 50549, 2010 WL 3270973, at *4-5 (Nev. Apr. 29, 2010) (Order of Affirmance) (concluding that a revocable inter vivos trust between spouses was not a necessary party to a divorce proceeding because the husband and wife (both co-trustees) were already parties to the litigation, and the district court's distribution of the trust's assets did not substantially affect the rights of nonparties).

Here, neither Pedro nor Maria filed a motion under NRCP 19 to join the trust separately as a necessary party, and this court is therefore not required to consider the argument on appeal. *Diamond Enters., Inc. v. Lau*, 113 Nev. 1376, 1378, 951 P.2d 73, 74 (1997); *see also Rose, LLC v. Treasure Island, LLC*, 135 Nev. 145, 152-53, 445 P.3d 860, 866-67 (Ct. App. 2019) (noting that in contrast to federal courts, Nevada permits parties to raise NRCP 19 challenges for the first time on appeal, but only so long as the parties raise the challenges in good faith and not merely in response to an adverse ruling).

However, even if considered on the merits, the trust in this case is not a necessary party to the action because Maria and Pedro, like the co-trustees in *Tsai*, were both existing parties to the divorce action and the trust's co-trustees, co-settlors, and beneficiaries. The parties' status as co-trustees is particularly noteworthy. Legal proceedings involving a trust must be "brought by or against the trustees in their own name[s]." *Americold Realty Tr. v. Conagra*

[9]This case does not present a situation where the revocable inter vivos trust's settlor(s), trustee(s), and beneficiary(ies) are unnamed third parties who may have an interest in the trust's assets if that trust were to become subject to litigation. We therefore need not address whether a revocable inter vivos trust would be a necessary party to divorce litigation in that scenario.

Foods, Inc., 577 U.S. 378, 383 (2016). Consequently, to join the trust would require naming Maria or Pedro in their co-trustee capacities, which would be redundant because Maria and Pedro were already parties to the litigation. *See id*.

Joining the family trust was also not a prerequisite for complete relief, as neither Maria's nor Pedro's interests were impeded by not naming the family trust as a separate party. In fact, the district court's disposition of the trust's assets was a necessary part of the divorce's execution because all revocable distributions between Maria and Pedro in the family trust were revoked upon divorce. *See* NRS 111.781(1). Thus, we conclude that the family trust was not a necessary party and failing to name the family trust in the action did not preclude the district court's ability to distribute the trust's assets.[10]

Accordingly, we conclude that the district court had authority to distribute the family trust's assets because the divorce revoked the trust's distributions between Maria and Pedro, Maria and Pedro were the co-settlors, co-trustees, and beneficiaries, and the trust was not a necessary party.[11]

The district court did not make an unequal distribution or abuse its discretion when it distributed Grizzly Forest, Abrams Avenue, and San Gervasio as community property

Maria argues that the district court abused its discretion when it deemed three trust properties that were allegedly purchased with her separate property funds to be community property and then distributed those properties as community assets. By doing so, Maria contends that the court made an unequal distribution without a

[10]This conclusion is consistent with trust law, in which the United States Supreme Court has clarified that "[t]raditionally, a trust was not considered a distinct legal entity, but a 'fiduciary relationship' between multiple people." *See Americold*, 577 U.S. at 383 (quoting *Klein v. Bryer*, 177 A.2d 412, 413 (Md. 1962)).

[11]Maria also argues that the district court did not have authority to distribute the family trust's assets because the trust was not a named party pursuant to *Klabacka v. Nelson*, 133 Nev. 164, 394 P.3d 940 (2017). We conclude that *Klabacka* is inapposite. *Klabacka* involved the jurisdictional issue of whether a district court judge sitting in the family division had subject matter jurisdiction over the divorcing parties' irrevocable self-settled spendthrift trusts (SSSTs). *Id.* at 169, 394 P.3d at 945. Irrevocable SSSTs are afforded special statutory protection in Nevada and are subject to specialized proceedings that make them wholly distinct from the revocable inter vivos trust at issue here. *Id.* at 173, 394 P.3d at 948. Additionally, *Klabacka* is factually distinct from this case because the parties in *Klabacka* voluntarily added the SSSTs as necessary parties in their divorce proceeding. *Id.* at 165, 394 P.3d at 943. Consequently, *Klabacka* has no bearing on whether the district court in this case acted properly in distributing the family trust's assets, and we reject this portion of Maria's argument.

compelling reason. Because Maria and Pedro purchased the properties while they were married and Maria failed to overcome the community presumption by clear and convincing evidence, we conclude that the district court did not abuse its discretion—or make an unequal distribution—by distributing the three disputed properties as community property.[12]

All P & D Family Trust properties were community property

Maria and Pedro purchased the properties in the family trust jointly during their marriage, which raises a presumption that the properties are community property. *See* NRS 123.220(1). Maria, however, alleges that three of the properties—Grizzly Forest, Abrams Avenue, and San Gervasio—were gifted to her by the new purchasers as separate property prior to the parties' divorce. To that end, Maria argues that it was Pedro's burden to show that these three properties were transmuted back to community property from separate property. Pedro argues that Maria is attempting to improperly shift the burden to him to prove transmutation and that the burden is instead on Maria to overcome the initial presumption of community property by clear and convincing evidence. We agree with Pedro and conclude that the district court could reasonably find that Maria did not meet her burden to overcome the initial presumption of community property.

Properties acquired during marriage are presumed to be community property, and this presumption can be overcome only by clear and convincing evidence. *Todkill v. Todkill*, 88 Nev. 231, 236, 495 P.2d 629, 631-32 (1972). Regarding marital rights, we will uphold the district court's property characterizations, so long as those characterizations are supported by substantial evidence. *Waldman v. Maini*, 124 Nev. 1121, 1128, 195 P.3d 850, 855 (2008).

NRS 123.220(1) provides that "[a]ll property, other than [separate property outlined] in NRS 123.130, acquired after marriage by either spouse or both spouses, is community property unless

[12]Maria also argues that the district court abused its discretion when it included two of her separate bank accounts as part of its equalization payment. We conclude that the district court did not abuse its discretion in including those accounts in the equalization payment primarily for the same reason she could not overcome the community presumption for the disputed properties—namely, as will be discussed below, the district court could reasonably find that insufficient evidence supports a finding of separate funds. Maria's evidence to support a separate property finding is the fact that the accounts were titled in her name. However, an account's titling is not determinative of the character of the funds contained therein, and a separate account may contain solely community assets if there is no tracing evidence to support otherwise. *See Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713, 715 (1976). Other than her contested testimony, Maria adduced no evidence that the funds contained anything but community funds; therefore, the accounts were properly characterized as community property.

otherwise provided by . . . [a]n agreement in writing between the spouses." When reviewing tracing evidence to support a finding of separate property, function takes precedence over form, and nominal changes from community to separate property are not, without additional evidence, enough to overcome the initial presumption of community property. *See Peters v. Peters*, 92 Nev. 687, 690, 557 P.2d 713, 715 (1976). The appearance of a signature on a stock transfer, for example, is not evidence of transmutation from community to separate property without additional evidence. *See Sprenger v. Sprenger*, 110 Nev. 855, 858, 878 P.2d 284, 286-87 (1994).

Regarding real property, sufficient tracing evidence requires a party to prove the source of purchasing funds by clear and convincing evidence. *See Colman*, 136 Nev. at 114, 460 P.3d at 454 (citing *Verheyden v. Verheyden*, 104 Nev. 342, 344-45, 757 P.2d 1328, 1330-31 (1988)). To that end, even a deed that places title in one spouse as that spouse's separate property is insufficient to overcome the community presumption if the party cannot also show that the home was purchased with separate funds. *Pascua v. Bayview Loan Servicing, LLC*, 135 Nev. 29, 33, 434 P.3d 287, 290 (2019); *see also Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987) (holding that a deed reciting that a husband owned his estate as separate property was not, of itself, enough to overcome the community presumption).

Here, it is undisputed that the parties originally purchased the properties jointly—with community funds—during their marriage, which raises a presumption that the properties are community property. Thus, Maria had the burden to overcome the community presumption by clear and convincing evidence. In reviewing the record, the district court's determinations will be upheld if they are supported by substantial evidence, and when "conflicting evidence exists, all favorable inferences must be drawn towards the prevailing party." *Quintero v. McDonald*, 116 Nev. 1181, 1183, 14 P.3d 522, 523 (2000) (quoting *Yamaha Motor Co., U.S.A. v. Arnoult*, 114 Nev. 233, 238, 955 P.2d 661, 664 (1998)).

As noted above, when Maria and Pedro defaulted on the mortgages for three properties around 2008, they sold Grizzly Forest and Abrams Avenue via short sales to third-party buyers who then gifted the properties back to Maria as Maria's "sole and separate property." Maria and Pedro financed those third-party purchases with their personal funds; however, Maria argues that these funds came from her separate property, and Pedro counters that the sales were financed with community assets.

To overcome the community property presumption, Maria needed to show at the outset that the funds used to purchase the properties at the short sales came from her separate property. However, Maria did not proffer any tracing evidence, either during discovery or trial,

sufficient to show that her separate funds financed the short sales. If anything, the parties' banking records show significantly commingled funds, with both Maria and Pedro consistently transferring joint account funds to their separate accounts. "Once an owner of separate property funds commingles these funds with community funds, the owner assumes the burden of rebutting the presumption that all the funds in the account are community property." *See Malmquist v. Malmquist*, 106 Nev. 231, 245, 792 P.2d 372, 381 (1990). Maria's FDFs failed to adequately account for her assets and debts, and, as will be addressed below, the alleged prenuptial agreement was inadmissible to support her separate property claims. The district court also determined that all assets in every bank account—both joint and separate—belonged to the community.

Additionally, because substantial evidence supports the district court's findings that community funds financed the short sales, the fact that the third-party buyers gifted the properties back to Maria as her "sole and separate property" is of little consequence. Function takes precedence over form, and without proof that the funds used to purchase the properties came from a separate property source, nominally titling the properties as Maria's separate property was insufficient for Maria to overcome the community presumption. *See Peters*, 92 Nev. at 690, 557 P.2d at 715. This conclusion is particularly relevant in this case because the district court found that the third parties who purchased the homes were "straw buyers" who facilitated the nominal changes in title.

As to San Gervasio, Maria alleges that she paid off the mortgage with inherited funds and that, after the mortgage was satisfied, Pedro transferred his interest in the property to Maria. Pedro disputes the validity of the deed and argues that his signature was forged, as he testified at trial. The same findings that applied to Grizzly Forest and Abrams Avenue regarding the insufficiency of Maria's tracing evidence apply to San Gervasio as well. The district court determined that Maria used community funds to pay off the San Gervasio mortgage and that Pedro's testimony was more credible than Maria's at trial.[13] Given Maria's lack of tracing evidence, coupled with the district court's credibility determinations and conclusion that Pedro did not voluntarily relinquish his community interest to Maria, there is substantial evidence to support the finding that the funds used to finance the two short sale purchases and pay off the San Gervasio mortgage were derived from community assets.

[13]To support its credibility determinations, the district court found that Pedro's testimony regarding the rental payment structure aligned with the banking records, while Maria's did not, and that Maria materially misrepresented the funds in her bank accounts. We will not reweigh the district court's witness credibility determinations on appeal. *See Castle v. Simmons*, 120 Nev. 98, 103, 86 P.3d 1042, 1046 (2004).

Accordingly, we conclude that the district court did not abuse its discretion by characterizing the Grizzly Forest, Abrams Avenue, and San Gervasio properties as community property because its determinations are supported by substantial evidence that Maria failed to overcome the initial community property presumption. Therefore, because all of the property was community property, Maria's argument that the district court made an unequal distribution absent a compelling reason necessarily fails.

The district court did not abuse its discretion when it disallowed questioning about the alleged prenuptial agreement

Maria argues that the district court erred when it denied her the opportunity to question Pedro about the alleged prenuptial agreement on cross-examination because it was corroborative of her claims regarding her separate property, and once Pedro denied the agreement's existence, the alleged prenuptial agreement was admissible as evidence of a prior inconsistent statement. Pedro responds that the alleged prenuptial agreement was not properly authenticated and that to permit questioning about the agreement would have amounted to trial by ambush. Additionally, Pedro asserts that because Maria did not attempt to introduce the alleged agreement as a prior inconsistent statement at trial, this court need not consider that portion of her argument on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued below are "deemed to have been waived and will not be considered on appeal"). We agree with Pedro on all accounts.

The alleged prenuptial agreement was not properly authenticated

Proper authentication or identification is a condition precedent to admissibility and requires the proponent to show that the documentary evidence is what the proponent claims it to be. NRS 52.015(1). "[W]e review a district court's decision to admit or exclude evidence for abuse of discretion." *M.C. Multi-Family Dev., LLC v. Crestdale Assocs., Ltd.*, 124 Nev. 901, 915, 193 P.3d 536, 545 (2008).

We conclude that the district court did not abuse its discretion when it excluded evidence of the alleged prenuptial agreement. Maria had ample time and opportunity to obtain and produce this document prior to trial, yet she did not. Maria also knew that Pedro would likely object to the document's authenticity; on multiple occasions at pretrial conferences, Pedro indicated that he believed Maria was attempting to fabricate the document with her sister, an attorney in Mexico. At trial, Maria presented an unsigned document, written entirely in Spanish, and without any translation. NRS 123A.040 requires a premarital agreement to be in writing and signed by both parties. Maria not only failed to offer any authority

to support or explain how the unsigned document would be controlling, or even corroborative, but she also did not testify to the document's authenticity in any meaningful way. Namely, she did not explain the circumstances surrounding how she obtained the document or the details regarding when and how she and Pedro entered into this alleged agreement before their marriage.

Further, Maria included neither the document nor a translation as proposed exhibits from trial in the record on appeal. *See* NRAP 30(b)(3) (stating an appellant must include any "portions of the record essential to determination of issues raised in appellant's appeal"); *Cuzze v. Univ. & Cmty. Coll. Sys. of Nev.*, 123 Nev. 598, 603, 172 P.3d 131, 135 (2007) (providing that we presume the missing portion of the record supports the district court's ruling); *see also* NRS 47.040(1)(b) (stating that error may not be predicated on a ruling excluding evidence unless a substantial right of a party is affected and the substance of the evidence was made known to the court by offer of proof). Therefore, we cannot assess the alleged document's authenticity or how it may have been a prior inconsistent statement. Consequently, we will not disturb the district court's findings that the alleged agreement was not properly authenticated and unduly prejudicial because these findings are supported by substantial evidence. *See Colman*, 136 Nev. at 113, 460 P.3d at 454.

Maria's cross-examination of Pedro about the alleged prenuptial agreement would have constituted trial by ambush

The district court also ruled that Maria's use of the alleged prenuptial agreement would have constituted "trial by ambush" and therefore also excluded it on those grounds. NRCP 16.2(d)(3)(P)'s mandatory disclosure requirement requires a party to provide a copy of every document or exhibit "that a party expects to offer as evidence at trial in any manner." This rule serves to prevent trial by ambush. "Trial by ambush traditionally occurs where a party withholds discoverable information and then later presents this information at trial, effectively ambushing the opposing party through gaining an advantage by surprise attack." *Turner v. State*, 136 Nev. 545, 553, 473 P.3d 438, 447 (2020) (quoting *Land Baron Invs., Inc. v. Bonnie Springs Family Ltd. P'ship*, 131 Nev. 686, 701 n.14, 356 P.3d 511, 522 n.14 (2015)).[14]

While we review a district court's decision to admit or exclude evidence for an abuse of discretion, *see Klabacka v. Nelson*, 133

[14]The surprise attack is one that is so fundamentally unfair as to require a mistrial. *See, e.g.*, *Bubak v. State*, No. 69096, 2017 WL 570931, at *4-5 (Nev. Ct. App. Feb. 8, 2017) (Order of Reversal and Remand). In *Bubak*, the district court denied a motion to continue stemming from the late discovery of inculpatory evidence. We concluded that trial by ambush occurred because the denial directly undermined the defendant's ability to cross-examine a witness and precluded his right to a fair trial. *Id.* at *3, *5-6.

Nev. 164, 174, 394 P.3d 940, 949 (2017), we review decisions related to trial by ambush for palpable error, *see Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492-93, 117 P.3d 219, 226-27 (2005) (stating it was not palpable error for the district court to overrule an objection of "trial by ambush" when it admitted the challenged document after finding the document had been provided to the objecting party during discovery). Judges may "exercise reasonable control over the mode and order of" evidence presentation and witness interrogation. NRS 50.115(1). We will not disturb the district court's findings if they are supported by substantial evidence. *See Colman*, 136 Nev. at 113, 460 P.3d at 454.

Here, Maria has not demonstrated that the district court abused its discretion. Maria's argument that she was attempting to introduce or use the document solely on cross-examination is unpersuasive because at no point did Maria explicitly mention impeachment. *See* NRS 50.085(3). Maria also did not preserve the error for review on appeal or otherwise explain how cross-examination about this unsigned document would have changed the trial's result. *See Wyeth v. Rowatt*, 126 Nev. 446, 465, 244 P.3d 765, 778 (2010) ("To establish that an error is prejudicial, the movant must show that the error affects the party's substantial rights so that, but for the alleged error, a different result might reasonably have been reached."); *cf.* NRCP 61 (stating that an error in excluding evidence is not grounds for disturbing a judgment unless justice so requires). She did not, for instance, argue that she could impeach Pedro's credibility with the unsigned document itself, as he had previously denied its existence. Nor did Maria attempt at trial to make an offer of proof or submit supplemental briefing to discuss the issue and argue how she would be prejudiced by the district court's denial. *See* NRS 47.040(1)(b) (stating that error may not be predicated upon a ruling excluding evidence unless the offer made the substance of the evidence known to the court).

The district court's decision also acted as a permissible discovery sanction because the court had previously ordered Maria to timely disclose the agreement at the CMC and the January 2022 hearing on all pending motions.[15] *See* NRCP 37(b)(1)(B) (providing that a court may disallow evidence as a discovery sanction); *see also APCO*

[15]At the July 2021 CMC, the district court said that the agreement needed to be produced with an official translation before the court could admit it into evidence, and at the January 2022 hearing on all pending motions, the court stated that it was "too late" for Maria to produce the agreement, as she had already had ten months to obtain the document and had not done so. *See* NRCP 16.2(j)(2)(E) (noting that each party must serve "a written list of all documents not provided under NRCP 16.2(d)" with an "explanation as to why each document was not provided"); NRCP 16.2(j)(4)(A)(viii) (providing that a CMC order may include any other necessary orders); *see also* EDCR 5.404(a)(2) (providing that a CMC order can direct disclosures and discovery requirements).

Constr., Inc. v. Zitting Bros. Constr., Inc., 136 Nev. 569, 576, 473 P.3d 1021, 1028 (2020). Accordingly, we conclude that the district court did not abuse its discretion when it did not allow Maria to question Pedro on cross-examination about the alleged prenuptial agreement.

This case will not be reassigned to a new judge

Maria argues that this case should be reassigned to a new judge because the district court judge presiding over the case expressed a serious personal distaste towards the parties' property transactions and found both parties not credible, although she found Pedro to be more credible than Maria.

The reassignment issue is moot because we are affirming the judgment of the district court. However, even if these parties were to appear before the district court again, reassignment to a new judge would not be required. We presume judges are unbiased, and Maria has not shown bias sufficient to warrant disqualification. *See Millen v. Eighth Judicial Dist. Court*, 122 Nev. 1245, 1254, 148 P.3d 694, 701 (2006). Specifically, because the judge's comments in this case reflected opinions the judge formed during litigation—and did not originate from an extrajudicial source—Maria has not demonstrated a basis for reassignment. *See In re Petition to Recall Dunleavy*, 104 Nev. 784, 789-90, 769 P.2d 1271, 1275 (1988) ("The personal bias necessary to disqualify 'must stem from an extrajudicial source and result in an opinion on the merits on some basis other than what the judge learned from his participation in the case.'" (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 583 (1966))). Additionally, regarding the judge's opinions, Maria has not established any "deep-seated favoritism or antagonism." *Canarelli v. Eighth Judicial Dist. Court*, 138 Nev. 104, 105, 506 P.3d 334, 336 (2022); *see also Cameron v. State*, 114 Nev. 1281, 1283, 968 P.2d 1169, 1171 (1998) (noting that generally, a judge's remarks "made in the context of a court proceeding are not considered indicative of improper bias or prejudice unless they show that the judge has closed his or her mind to the presentation of all the evidence"). Accordingly, this case need not be reassigned to a new judge.

CONCLUSION

Because we hold that the revocable inter vivos family trust did not need to be named in the divorce action or joined as a necessary party, we conclude that the district court had authority to distribute the trust's assets between the parties as community property. We also conclude that the district court did not abuse its discretion in finding that Maria failed to overcome the community property presumption by clear and convincing evidence and therefore had authority to equally divide the family trust's assets. Finally, we

conclude that the district court did not abuse its discretion in denying Maria the ability to question Pedro about the alleged prenuptial agreement on cross-examination because doing so would have allowed the use of a properly excluded document and amounted to trial by ambush. Accordingly, we affirm the district court's decree of divorce.[16]

BULLA and WESTBROOK, JJ., concur.

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[16]In light of this decision, the partial stay entered on October 11, 2022, regarding the trust and real property, is necessarily lifted.

TASHAMI J. SIMS, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 84904-COA

December 7, 2023 541 P.3d 130

Appeal from a judgment of conviction, entered pursuant to a guilty plea, of assault with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Jasmin D. Lilly-Spells, Judge.

Affirmed.

Zaman Legal LLC and *Waleed Zaman*, Las Vegas, for Appellant.

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

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

OPINION

Per Curiam:

Criminal defendants have the unqualified right to represent themselves at trial so long as their waiver of the right to counsel is knowing, voluntary, and intelligent. To protect this fundamental right, district courts should generally conduct a *Faretta*[1] canvass when a competent defendant makes a timely and unequivocal request for self-representation. *See O'Neill v. State*, 123 Nev. 9, 17, 153 P.3d 38, 43 (2007). In this case, we address, for the first time, whether an unequivocal request for self-representation can be subsequently abandoned by the defendant, obviating the need for a *Faretta* canvass. We conclude that a defendant can abandon an unequivocal request to represent themselves where the district court has not conclusively denied the request and the totality of the circumstances, including the defendant's conduct, demonstrates that the defendant has abandoned their request. As discussed in detail below, we further conclude that appellant Tashami J. Sims unequivocally requested to represent himself, the district court did not conclusively deny the request, and Sims subsequently abandoned his request. Therefore, we affirm the judgment of conviction.

PROCEDURAL AND FACTUAL HISTORY

Sims pleaded guilty to assault with the use of a deadly weapon. The district court set a sentencing date of April 25, 2022. Sims'

[1]*Faretta v. California*, 422 U.S. 806 (1975).

counsel was unable to appear on that date because of a personal matter, and an associate of counsel's appeared instead. At that hearing, the district court indicated it was still waiting for an update from the mental health court as to whether that specialty court would accept Sims. Based on these circumstances, associated counsel asked that the sentencing hearing be continued for 7 to 10 days.

Sims did not want the hearing continued, and when he learned that associated counsel was not prepared to go forward with the sentencing on that date, Sims stated, "Okay. Well, I'll go pro per." The district court informed Sims that sentencing was not going forward that day, and Sims reiterated that he could represent himself at sentencing:

> THE DEFENDANT: I can—I can go pro per and then I'll go do my own sentencing. And I'll do it just like that. 'Cause I don't want—we've been doing this—we just waived it.
>
> THE COURT: I understand Mr. Sims, but we're only going to continue it 'till like Wednesday to see an update. It's not going to be—
>
> THE DEFENDANT: That's still—Your Honor, I'm just trying to see if I got accepted. If I didn't get accepted then I'm ready to proceed right now.
>
> THE COURT: Okay. We are not proceeding today. So I can continue it to Wednesday or we can continue it for a minute for you to find out.
>
> THE DEFENDANT: I would like—I would like to exercise my *Faretta* rights.
>
> THE COURT: Mr. Sims, it's not happening right now.
>
> THE DEFENDANT: So I can't—
>
> THE COURT: Continue it to Wednesday.
>
> THE DEFENDANT: So I can't go pro per right now?
>
> THE COURT: No, Sir.

Two days later, Sims appeared at the continued sentencing hearing with associated counsel and before the same judge who had presided over the previous hearing. A continuance was again granted to allow the State to procure the victim witnesses and for Sims to provide further evidence to the specialty court regarding his mental health history. Associated counsel stated he talked with Sims and they were collaborating to get Sims' mental health records to the mental health court. The district court asked Sims if this was correct, and he agreed. Sims did not reassert his request to represent himself, and the sentencing hearing was continued a final time to May 25, 2022.

At the final sentencing hearing, the district court asked if there was "[a]ny legal reason or cause why we can't move forward." Counsel answered in the negative. Shortly thereafter, Sims was allowed to speak, and again, he did not reassert his request to represent himself. Instead, he explained he has a history of drug abuse and mental health issues and that he wanted to be placed in either the mental health court or drug court. Counsel stated that the mental health court had rejected Sims but that the drug court had accepted him and argued that Sims should participate in the drug court. Although the district court thought Sims could benefit from treatment, it determined that Sims was a danger to society and sentenced him to 20 to 72 months in prison.

ANALYSIS

Sims argues the district court erred by not conducting a *Faretta* canvass prior to denying his unequivocal request to represent himself. Criminal defendants have a Sixth Amendment right to represent themselves so long as the waiver of the right to counsel is intelligent and voluntary. *See O'Neill*, 123 Nev. at 17, 153 P.3d at 43. Upon invocation of the right to self-representation, the district court should conduct a *Faretta* canvass to ensure the waiver of the right to counsel is made knowingly, voluntarily, and intelligently. *Id.* "A district court may . . . deny a defendant's request for self-representation where the request is untimely, the request is equivocal, the request is made solely for the purpose of delay, the defendant abuses his right by disrupting the judicial process, or the defendant is incompetent to waive his right to counsel." *Id.* at 17, 153 P.3d at 44 (internal quotation marks omitted).

The parties do not dispute that Sims' request to represent himself was unequivocal. Further, the State does not allege, and the record does not reflect, the existence of any of the reasons listed in *O'Neill* for denying a defendant's request to represent themselves. Rather, the State argues that Sims abandoned his request for self-representation by not renewing the request in subsequent hearings.[2] Sims replies that his failure to reiterate his request for

[2]The State also argues that Sims is not entitled to relief because he did not knowingly and voluntarily waive his right to counsel. In explanation, the State emphasizes that (a) Sims said he wanted to represent himself in order to avoid any delay in sentencing but (b) the sentencing court was determined to continue the hearing regardless. The State's argument necessarily fails. It wrongly suggests that a defendant may automatically negate their right to self-representation by stating a motive. *See Buhl v. Cooksey*, 233 F.3d 783, 794 (3d Cir. 2000) ("[A] defendant's constitutional right of self-representation is not automatically negated by his/her motivation for asserting it."). More importantly, the State's circular argument overlooks that the very purpose of a *Faretta* canvass is to determine whether a request for self-representation

self-representation did not absolve the district court of its initial duty to conduct a *Faretta* canvass and, in turn, the district court's failure to conduct a canvass was reversible error.

The improper denial of a defendant's right to self-representation at trial is a structural error that is not subject to harmless error analysis when the error is both preserved and not abandoned. *United States v. Williams*, 29 F.4th 1306, 1313 (11th Cir. 2022); *see also United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006) (explaining structural error and listing the right to self-representation as an example); *McKaskle v. Wiggins*, 465 U.S. 168, 177 n.8 (1984). "[O]nce a defendant affirmatively states his desire to proceed pro se, a court should cease other business and make the required inquiry . . . ." *United States v. Rice*, 776 F.3d 1021, 1025 (9th Cir. 2015) (alteration in original) (quoting *Raulerson v. Wainwright*, 469 U.S. 366, 369 (1984) (Marshall, J., dissenting)); *see also Batchelor v. Cain*, 682 F.3d 400, 412 (5th Cir. 2012) (providing that "the trial court should have initiated a colloquy"). However, it does not necessarily follow that a failure to conduct a *Faretta* canvass is the equivalent of denying a defendant the right of self-representation. *See Hooks v. State*, 124 Nev. 48, 52, 176 P.3d 1081, 1083 (2008) (concluding that "the district court's failure to conduct a thorough canvass does not per se require reversal"); *Hymon v. State*, 121 Nev. 200, 212-13, 111 P.3d 1092, 1101 (2005); *see also Rice*, 776 F.3d at 1025-26 (concluding no Sixth Amendment violation occurred despite the court's failure to immediately conduct a *Faretta* canvass). Rather, "the primary focus must be on whether the defendant had a fair chance to present his case in his own way." *McKaskle*, 465 U.S. at 177.

Just as "a defendant's 'pre-trial decision to proceed with counsel does not constitute an absolute waiver of his right to represent himself,'" once the right to self-representation has been asserted, it "may be waived through conduct indicating that one is vacillating on the issue or has abandoned one's request altogether." *Williams v. Bartlett*, 44 F.3d 95, 100 (2d Cir. 1994) (quoting *United States v. Matsushita*, 794 F.2d 46, 51 (2d Cir. 1986)); *see also Brown v. Wainwright*, 665 F.2d 607, 611 (5th Cir. 1982). This is because, whereas the right to counsel is presumed, *see* U.S. Const. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence."), the right to represent oneself must be affirmatively asserted, *see O'Neill*, 123 Nev. at 17, 153 P.3d at 44 (providing a trial court may deny an equivocal request for self-representation). Accordingly, it stands to reason

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constitutes a knowing, voluntary, and intelligent waiver of the right to counsel. *See O'Neill*, 123 Nev. at 17, 153 P.3d at 43. Because the purpose of the canvass is to determine the validity of the waiver, a canvass cannot be avoided by a predetermination that the waiver is not valid. In light of these considerations, the State's argument is unpersuasive.

that the right to self-representation is more easily lost than is the right to counsel. *Brown*, 665 F.2d at 611 ("Since the right of self-representation is waived more easily than the right to counsel at the outset, before assertion, it is reasonable to conclude it is more easily waived at a later point, after assertion.").

However, as Sims points out, a defendant should not have to continuously reassert a right in order to preserve for review the denial of that right. *See Buhl*, 233 F.3d at 796 (stating that a defendant's failure to renew their request for self-representation "is irrelevant because the law imposes no such obligation as a condition precedent to preserving one's right to proceed pro se"). "[A] defendant is not required continually to renew a request once it is conclusively denied or to 'make fruitless motions or forego cooperation with defense counsel in order to preserve the issue on appeal.'" *Orazio v. Dugger*, 876 F.2d 1508, 1512 (11th Cir. 1989) (quoting *Dorman v. Wainwright*, 798 F.2d 1358, 1367 (11th Cir. 1986)). That is, once the district court has conclusively denied a request for self-representation, the issue is preserved for appeal. But where the district court has not conclusively denied a request for self-representation, the right to self-representation may be abandoned if the defendant does not reassert the request. *See Wilson v. Walker*, 204 F.3d 33, 38-39 (2d Cir. 2000).

Because Sims made an unequivocal request to represent himself, the district court, ideally, should have canvassed him as to the validity of his waiver. However, the district court did not. We therefore must determine whether the district court conclusively denied the request or if Sims abandoned that request.

The district court did not conclusively deny the request

First, this court must determine whether the district court conclusively denied Sims' request to represent himself. The weight of authority indicates that a trial-level court conclusively denies a request for self-representation when the reason given for denial would make any future request futile.

For example, the United States Court of Appeals for the Ninth Circuit reasoned that any future request by a defendant would be futile where the lower court had "made absolutely clear that [his] first choice, self-representation, was not an available option." *United States v. Arlt*, 41 F.3d 516, 522 (9th Cir. 1994). There, the lower court had denied a request for self-representation upon finding that the defendant could not represent himself competently because his motion was "rambling and illogical." *Id.* at 518. Similarly, in another case from the same circuit, the lower court denied the defendant's request for self-representation because the defendant was incapable of putting on an effective defense. *United States v. Hernandez*, 203 F.3d 614, 621-23 (9th Cir. 2000), *overruled on other grounds by*

Indiana v. Edwards, 554 U.S. 164, 177-78 (2008). The Ninth Circuit concluded that, given the reason for the denial, "there was no reason for Hernandez to believe that on the day of trial the judge would suddenly change his mind and decide that Hernandez had become a competent trial advocate." *Id.* at 622.

Other jurisdictions have employed similar reasoning. The United States Court of Appeals for the Second Circuit held that a lower court's ruling (that the defendant lacked the education to represent himself) "was categorical, and expressly relied on the advanced stage of proceedings and the defendant's lack of education—obstacles that were not going to be removed before trial." *Williams*, 44 F.3d at 101. And the California Supreme Court held that a trial court ruling that a defendant could not represent himself because he was facing the death penalty was "unequivocal, and foreclosed any realistic possibility defendant would perceive self-representation as an available option." *People v. Dent*, 65 P.3d 1286, 1289 (Cal. 2003).

The common theme in each of these cases is that the appellate courts concluded that the explanation given for denying a defendant the right of self-representation made it clear that any future request would be futile. A person's education, ability to put on a defense, and potential punishment are not subject to change before trial. Because any future requests would be futile, the lower court rulings constituted conclusive denials of the defendants' requests for self-representation.

Conversely, courts have held that the denial of the right to self-representation is not conclusive when a future request would not necessarily be futile. For example, the trial-level court does not conclusively deny a defendant the right to self-representation when the defendant is informed they can reassert the right at a later time. *See, e.g.*, *People v. Tena*, 67 Cal. Rptr. 3d 412, 422-23 (Ct. App. 2007); *Swan v. Commonwealth*, 384 S.W.3d 77, 92-93 (Ky. 2012) (observing the defendant was told to consult with counsel and to reassert the motion if necessary). A delayed ruling is also not a conclusive denial. *See, e.g.*, *Cheney v. State*, 236 So. 3d 500, 502-03 (Fla. Dist. Ct. App. 2018) (concluding that there was no conclusive denial when the defendant agreed to continue with counsel while being evaluated for a particular defense). In each of these examples, the reason given for denying the defendant the right of self-representation did not suggest that any future request would be futile. Therefore, none of the denials constituted conclusive denials of the defendants' requests for self-representation.

In the instant case, the district court's reason for denying Sims' request did not foreclose the possibility that a future request might be granted. Specifically, the district court denied the request "right now," indicating that the request could be revisited. And Sims appeared to understand that he could reassert his request in the

future because he clarified that he was not being allowed to represent himself "right now." We conclude the district court's denial of Sims' oral motion for self-representation was not a conclusive denial because the denial was not based on something that would render a future request futile.

Sims' conduct indicated he abandoned his request

Having concluded that Sims' request was unequivocal and that the district court did not conclusively deny it, this court must now consider whether Sims' conduct after the denial demonstrated that he abandoned his request. There are two competing approaches to determine whether a defendant, through their subsequent conduct, has demonstrated they have abandoned their request.

Some jurisdictions follow a per se rule when determining whether a defendant has abandoned their right to self-representation. Under this rule, if a defendant makes an unequivocal request to represent themselves, their failure to follow up on the request when they have the time and opportunity to do so constitutes an abandonment of the request. *People v. Kenner*, 272 Cal. Rptr. 551, 555 (Ct. App. 1990).[3] The attraction of this rule is that it creates an easy-to-apply, bright-line test: if the defendant makes a request that is not conclusively denied and the defendant does not reassert the request, it is abandoned. Two considerations militate against this approach. First, such a bright-line rule may inadvertently encourage trial courts to unduly defer ruling on a defendant's unequivocal request to represent themselves simply because the defendant may change their mind. Second, by virtue of its being a bright-line test, the per se rule does not allow for nuance or extenuating circumstances.

Indeed, other jurisdictions have found the per se rule to be too strict and instead look to the totality of the circumstances to determine whether a defendant has abandoned their request for self-representation. The Arizona Court of Appeals has adopted this approach and set forth several factors to consider, including

> the defendant's opportunities to remind the court of a pending motion, defense counsel's awareness of the motion, any affirmative conduct by the defendant that would run counter to a desire for self-representation, whether the defendant waited until after a conviction to complain . . . , and the defendant's experience in the criminal justice system and with waiving counsel.

McLemore, 288 P.3d at 786. They also consider whether there was a relatively short period of time between the request and subsequent hearings such that the defendant did not have time to forget about

[3]It was first referred to as the "per se" rule in *State v. McLemore*, 288 P.3d 775, 784-86 (Ariz. Ct. App. 2012).

their request. *Id*. at 786-87. Although lacking the simplicity of a per se rule, courts are familiar with reviewing the totality of the circumstances. *See, e.g.*, *Taylor v. State*, 132 Nev. 309, 320, 371 P.3d 1036, 1044 (2016) (applying a totality of the circumstances test to the reliability of pretrial identification procedures); *Stevenson v. State*, 131 Nev. 598, 603, 354 P.3d 1277, 1281 (2015) (applying a totality of the circumstances test to determine whether permitting withdrawal of a guilty plea before sentencing would be fair and just); *Harkins v. State*, 122 Nev. 974, 987, 143 P.3d 706, 714 (2006) (applying a totality of the circumstances test to determine whether a hearsay statement is testimonial for confrontation purposes); *Doyle v. State*, 116 Nev. 148, 158, 995 P.2d 465, 471 (2000) (applying a totality of the circumstances test to determine whether probable cause is present to support a search warrant); *Passama v. State*, 103 Nev. 212, 214, 735 P.2d 321, 323 (1987) (applying a totality of the circumstances test to determine whether a confession was voluntary). And it has the benefit of allowing courts to consider circumstances unique to a particular case.

Because it is both flexible and familiar, a test that considers the totality of the circumstances best serves the interests of both defendants who assert their right to represent themselves and the courts. Accordingly, we will review whether a defendant has abandoned their request for self-representation by considering the totality of the circumstances, including their conduct. We further adopt the factors set forth in *McLemore* to guide us in that consideration.

Applying the *McLemore* factors, we conclude Sims abandoned his request for self-representation. First, Sims had two opportunities to remind the district court in person of his request but did not, and nothing in the record before this court suggests that he attempted to file a written motion to dismiss counsel in the month between his initial request and his final sentencing hearing. *See* EDCR 3.70 (stating a defendant who has counsel may file a motion to withdraw counsel pursuant to N.R.Cr.P. 3(2)(B)(ii)). Second, the defense team knew of Sims' request because associated counsel was present when Sims made it. Third, Sims' actions of collaborating with counsel regarding his mental health records ran counter to a desire to represent himself. Fourth, Sims waited until after his conviction to complain about the denial of his request. Fifth, Sims has experience in the criminal justice system, although the record does not indicate whether Sims ever sought to represent himself in his prior cases. Finally, the time between hearings was relatively short: there were only 2 days between the initial request and the next hearing and 30 days between the initial request and sentencing, making it unlikely that Sims forgot his expressed desire to represent himself. Thus, the totality of the circumstances demonstrates Sims abandoned his request to represent himself.

CONCLUSION

A defendant may abandon an unequivocal request for self-representation where the district court did not conclusively deny the request. And we will consider the totality of the circumstances in determining whether a defendant has in fact abandoned such a request. Here, Sims made an unequivocal request to represent himself, which the district court did not conclusively deny. After considering the totality of the circumstances, we conclude that Sims abandoned his request for self-representation and, thus, that Sims is not entitled to relief for the district court's failure to conduct a *Faretta* canvass. Therefore, we affirm the judgment of conviction.