REPORTS OF CASES

DETERMINED BY THE

SUPREME COURT

AND THE

COURT OF APPEALS

OF THE

STATE OF NEVADA

Volume 140

ALEJANDRO LOPEZ AGUILAR, AN INDIVIDUAL, APPELLANT, *v.* LUCKY CAB CO., A NEVADA CORPORATION; AND ADUGNA DEMESASH, AN INDIVIDUAL, RESPONDENTS.

No. 84647

ALEJANDRO LOPEZ AGUILAR, AN INDIVIDUAL, APPELLANT, *v.* LUCKY CAB CO., A NEVADA CORPORATION; AND ADUGNA DEMESASH, AN INDIVIDUAL, RESPONDENTS.

No. 85538

January 4, 2024 540 P.3d 1064

Consolidated appeals from district court orders dismissing a complaint with prejudice and denying costs and interest. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed and remanded with instructions.

J. Cogburn Law and *Jamie S. Cogburn* and *Joseph J. Troiano*, Henderson, for Appellant.

Lemons, Grundy & Eisenberg and *Robert L. Eisenberg*, Reno; *Emerson Law Group* and *Phillip R. Emerson*, Henderson, for Respondents.

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

OPINION

By the Court, CADISH, C.J.:

Litigation concerning offers of judgment often occurs after an offeree rejects an offer and the offeror seeks to impose NRCP 68(g) penalties. That is not the case here. In this case, we instead clarify the amount an offeror must pay in exchange for dismissal under NRCP 68(d) when they convey an offer that is exclusive of allowances such as costs, expenses, interest, and attorney fees. Because such an exclusive offer in effect promises to pay any such recoverable amounts separately from the offer amount, we hold that the offeror cannot obtain such dismissal of the complaint unless the offeror pays both the offer amount and any additional allowances.

FACTS AND PROCEDURAL HISTORY

These consolidated appeals arise from a personal injury claim against respondents Lucky Cab Co. and Adugna Demesash (collectively, Lucky Cab). Before trial, Lucky Cab conveyed an NRCP 68 offer of judgment to appellant Alejandro Lopez Aguilar. In part, the offer of judgment stated that Lucky Cab "offers to allow [Aguilar] to take judgment against [Lucky Cab] in the total lump sum amount of ONE HUNDRED FIFTY THOUSAND ONE AND 00/100 DOLLARS ($150,001.00) which amount excludes prejudgment interest, attorney's fees and all costs incurred to date." Aguilar accepted the offer. The following week, Lucky Cab sent to Aguilar both a check for $150,001 and a stipulation and order for dismissal. Aguilar neither processed the check nor consented to the stipulated dismissal, arguing that Lucky Cab did not pay the full amount of the offer to obtain dismissal because it had not yet paid any costs or prejudgment interest. Lucky Cab filed a motion to dismiss Aguilar's complaint and sought to shorten time to obtain dismissal within NRCP 68(d)(2)'s 21-day window.

The district court resolved the motion in two stages. The district court initially granted dismissal with prejudice, reasoning that Lucky Cab was entitled to dismissal once it tendered payment within NRCP 68(d)(2)'s dismissal window. It reserved the costs and interest issue for a later determination. Aguilar filed a motion for costs and interest, which the district court denied. In the district court's view, the dismissal of Aguilar's complaint foreclosed a separate award in addition to the $150,001 because it meant Aguilar was not a prevailing party.

On appeal, the crux of Aguilar's argument is that Lucky Cab effectively promised both $150,001 *and* a separate award of costs

and interest because the amount of Lucky Cab's offer was exclusive of such costs and interest. Lucky Cab answers that the offer only promised $150,001, such that it should be entitled to dismissal once it paid that amount. In support, it points out that NRCP 68(d)(2) does not discuss cost awards upon dismissal like NRCP 68(d)(3) does upon entry of judgment. It adds that any "exclusive" versus "inclusive" language is not relevant to NRCP 68(d)'s dismissal procedure and matters only at the penalty stage, where the court must compare a rejected offer of judgment to the judgment ultimately obtained.

Standard of review

We typically review cost awards for an abuse of discretion. *U.S. Design & Constr. Corp. v. Int'l Bhd. of Elec. Workers*, 118 Nev. 458, 462, 50 P.3d 170, 173 (2002). We review interest awards for error. *Schiff v. Winchell*, 126 Nev. 327, 329, 237 P.3d 99, 100 (2010). Whether NRCP 68 authorizes a cost or interest award raises a legal question, however, subject to de novo review. *Albios v. Horizon Cmtys., Inc.*, 122 Nev. 409, 417, 132 P.3d 1022, 1028 (2006); *Pub. Emps.' Ret. Sys. of Nev. v. Gitter*, 133 Nev. 126, 132, 393 P.3d 673, 680 (2017). Our review of the language of an offer of judgment conveyed under NRCP 68 is also a legal question requiring de novo review. *See State Drywall, Inc. v. Rhodes Design & Dev.*, 122 Nev. 111, 119, 127 P.3d 1082, 1087 (2006) (applying de novo review to the language of an offer of judgment).

DISCUSSION

Interpretation of Nevada's Rules of Civil Procedure begins with the text. *See Vanguard Piping Sys., Inc. v. Eighth Jud. Dist. Ct.*, 129 Nev. 602, 607, 309 P.3d 1017, 1020 (2013). We will adhere to the text alone if it reveals a "clear and unambiguous" meaning. *Id.* If the text is instead ambiguous, we will "resort to the rules of construction." *Id.* Our goal is to assess "what reason and public policy would indicate the [drafters] intended" and construe the text harmoniously. *Barbara Ann Hollier Tr. v. Shack*, 131 Nev. 582, 588-89, 356 P.3d 1085, 1089 (2015) (internal quotation marks omitted); *Canarelli v. Eighth Jud. Dist. Ct.*, 127 Nev. 808, 814, 265 P.3d 673, 677 (2011).

Under NRCP 68(a), "any party may serve an offer in writing to allow judgment to be taken in accordance with its terms and conditions."[1] While an offer of judgment may specify otherwise, the default offer amount made under this rule includes costs, expenses, interest, and recoverable attorney fees. NRCP 68(a). In the event an offer is accepted, NRCP 68(d)(2)-(3) gives an offeror two options:

[1]While this opinion generally presumes that a defendant is the offeror and a plaintiff is the offeree, consistent with the parties' positions below, we recognize that either party may make an offer of judgment.

dismissal or entry of a judgment. NRCP 68(d)(2) provides that, within 21 days, the offeror "may pay the amount of the offer and obtain dismissal of the claims, rather than entry of a judgment." But "[i]f the claims are not dismissed," NRCP 68(d)(3) provides that "the clerk must enter judgment" in accordance with the accepted offer and "[t]he court must allow costs in accordance with NRS 18.110 unless the terms of the offer preclude a separate award of costs."

The "amount of the offer" an offeror must pay to obtain NRCP 68(d)(2) dismissal turns on how the offeror drafts the offer. As noted, offers of judgment typically preclude a separate award of allowances, such as costs, expenses, interest, and attorney fees. NRCP 68(a); *see also Fleischer v. August*, 103 Nev. 242, 246, 737 P.2d 518, 521 (1987) (observing that "defense counsel" clarified "that the $50,000.00 offer was for a lump sum, which included costs"). Alternatively, offers of judgment can be drafted to exclude such allowances, thus allowing for a separate award of these allowances. *See Albios*, 122 Nev. at 415, 132 P.3d at 1026 (discussing an offer of judgment "for $100,000, exclusive of attorney fees and costs"). Offers that preclude a separate award of such allowances are said to be "inclusive" of those allowances; offers that allow a separate award of such allowances are said to be "exclusive" of those allowances. *See Albios*, 122 Nev. at 426, 132 P.3d at 1033 (explaining that an offer excluding "attorney fees and costs . . . was insufficient to alert the [offerees] to the fact that prejudgment interest would also be excluded" and adding prejudgment interest into the NRCP 68(g) comparison as a result).

To that end, the "amount of the offer" that is inclusive of all allowances is exactly that number written in the offer of judgment. For example, an offeree who accepts an offer of judgment for $50,000 inclusive of all costs, expenses, interest, and allowable attorney fees can expect only $50,000—nothing more and nothing less. *See Fleischer*, 103 Nev. at 245-46, 737 P.2d at 521 (explaining that "it was improper . . . to have entered judgment in excess of" $50,000 where the offer was "a lump sum of $50,000.00, an amount which included costs" (emphasis omitted)). The inclusive language tells the offeree that the $50,000 allocates, i.e., *includes*, a valuation for both their claims and their costs, expenses, interest, and allowable attorney fees.

In contrast, the "amount of the offer" that is exclusive of all allowances is not necessarily simply that number in the offer of judgment. The exclusive language tells the offeree that the offer does not allocate, i.e., *excludes*, a valuation for their costs, expenses, interest, and allowable attorney fees. It does not say that such allowances, to which judgment holders are typically entitled as of course, *see, e.g.*, NRS 17.130; NRS 18.020, are waived. Thus, if that $50,000 example offer is written exclusive of all costs, expenses, interest, and allowable attorney fees, the offeree who accepts it can expect more than

$50,000 so long as they establish that those additional allowances are recoverable. *See Albios*, 122 Nev. at 426, 132 P.3d at 1033; *see also Schwickert, Inc. v. Winnebago Seniors, Ltd.*, 680 N.W.2d 79, 88 (Minn. 2004) ("The failure of the Rule 68 offer to expressly include prejudgment interest in the lump sum offered means that prejudgment interest is separately recoverable against [the offerors] as a cost and disbursement in addition to the lump sum."). "Recoverable," in this sense, refers to those allowances that the offeree would be entitled to if a judgment were entered based on that offer.

Of course, we recognize that a party whose case gets dismissed typically would not be entitled to costs, expenses, interest, or attorney fees. *See, e.g.*, *MB Am., Inc. v. Alaska Pac. Leasing Co.*, 132 Nev. 78, 89, 367 P.3d 1286, 1292-93 (2016); *145 E. Harmon II Tr. v. Residences at MGM Grand Tower A Owners' Ass'n*, 136 Nev. 115, 120, 460 P.3d 455, 459 (2020). And as Lucky Cab points out, we recognize that most of those allowances are reserved for prevailing parties. *See* NRS 18.010; NRS 18.020; *Alaska Pac. Leasing*, 132 Nev. at 89, 367 P.3d at 1292-93; *see also Albios*, 122 Nev. at 428, 132 P.3d at 1034-35 (reviewing prejudgment interest awarded to the prevailing party under NRS 17.130). But NRCP 68 is a unique rule that alters typical litigation procedures, allowing dismissal of the claims upon acceptance of an offer of judgment in certain circumstances rather than requiring entry of a judgment against the offeror. *See Quinlan v. Camden USA, Inc.*, 126 Nev. 311, 314, 236 P.3d 613, 615 (2010) (noting that "NRCP 68 offer[s] a tool not available at common law"). In this unique context, acceptance of an offer effectively renders the offeree a prevailing party. *See Delta Air Lines, Inc. v. August*, 450 U.S. 346, 363 (1981) (Powell, J., concurring) ("A Rule 68 offer of judgment is a proposal of settlement that, by definition, stipulates that the plaintiff shall be treated as the prevailing party."). As a prevailing party, the offeree is entitled to recoverable allowances, whether those allowances are included or excluded from the offer and regardless of whether the offeror pays and obtains dismissal or instead allows entry of a judgment. Therefore, when an offeree accepts an offer that excludes allowances, the offeror must separately pay the amount of pre-offer costs, expenses, and interest that the offeree would otherwise be entitled to as a prevailing party. It must also pay attorney fees, so long as law or contract supplies a basis for those fees.

Accordingly, we reject Lucky Cab's attempts to render an offer's exclusive or inclusive language a nullity when an offeror pays the principal amount of its offer within 21 days of acceptance. We will not endorse a reading of NRCP 68—a rule largely designed to promote settlement and compromise—legitimizing this loophole. *See Beattie v. Thomas*, 99 Nev. 579, 588, 668 P.2d 268, 274 (1983) (noting that "the purpose of NRCP 68 is to encourage settlement"); *see also Alaska Pac. Leasing*, 132 Nev. at 89, 367 P.3d at 1292. The

rule is clearly intended to ultimately provide a judgment, including the allowances normally attendant thereto, to an accepting offeree and thereby end the case. Reading subsection (d) as adjusting the amount due the offeree depending on whether the offeror ultimately elects to obtain a dismissal rather than entry of judgment would ignore the rule's purpose and intent and invite discord with the rule's other subsections. Indeed, NRCP 68(g) recognizes that an offer may do one of two things: preclude a separate award of allowances (an inclusive offer) or provide that such allowances will be added by the court (an exclusive offer). Not only would Lucky Cab's preferred interpretation lead to inconsistent results under the same offer's language depending on the stage of litigation, but it would also allow an offeror "to have its cake and eat it too." *Cf. Rateree v. Rockett*, 668 F. Supp. 1155, 1159 (N.D. Ill. 1987) (rejecting an interpretation of an offer of judgment that would allow the offeror to unfairly argue that the plain language excluded fees and costs had the offeree rejected it but included fees and costs once the offeree accepted it). We decline to read the rule in such a dissonant manner. *See Canarelli*, 127 Nev. at 814, 265 P.3d at 677.

Applying these principles here, Lucky Cab drafted an exclusive offer when it conveyed an offer of judgment for $150,001, as it specified that that "amount excludes prejudgment interest, attorney's fees and all costs incurred to date." By this explicit language, the $150,001 amount excluded and made no provision for prejudgment interest, attorney fees, and costs. Aguilar was therefore permitted to accept the $150,001 and expect an additional payment of pre-offer costs and interest that would be recoverable had a judgment been entered.[2] Lucky Cab, on the other hand, was not entitled to NRCP 68(d)'s dismissal until the parties agreed to or the district court resolved Aguilar's request for those allowances.

Critically, the use of "excludes" in this offer indicated that Lucky Cab was willing to pay $150,001 for Aguilar's claims as well as a separate amount for costs, interest, and attorney fees to which he may be entitled. If Lucky Cab intended to pay no more than $150,001 in total for both the claims and any costs, interest, and attorney fees, it should have drafted an offer that included these allowances in the amount of the offer.[3] *See Collins v. Minn. Sch.*

[2]Aguilar points out that the offer also excluded attorney fees. Yet, Aguilar neither argued for attorney fees in his motion for costs and interest below nor offered a legal basis for such attorney fees here, and thus we need not address the matter. *See Thomas v. City of N. Las Vegas*, 122 Nev. 82, 93-94, 127 P.3d 1057, 1065-66 (2006).

[3]The offer also stated that it was offering a "total lump sum" of $150,001, and the phrase "lump sum" can reference an inclusive offer. *See Fleischer*, 103 Nev. at 243, 245, 737 P.2d at 519, 521. However, Lucky Cab does not present cogent argument that the offer was too ambiguous to be enforceable as written, and we therefore need not consider that issue. *Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006). More importantly,

of Bus., Inc., 655 N.W.2d 320, 330 (Minn. 2003) (stating that if the offeror "did not intend to be liable for attorney fees, it should have drafted the offer with greater precision"). In so holding, we remind offerors that the language they choose to use in their offer of judgment is critical to both NRCP 68(g)'s penalty stage and NRCP 68(d)'s dismissal stage.

CONCLUSION

An offer of judgment that explicitly excludes costs, expenses, interest, and attorney fees promises two sums of money if accepted: (1) the principal amount for the claim(s), which is specifically identified in the offer of judgment; and (2) a separate amount for recoverable costs, expenses, interest, and attorney fees. Under NRCP 68(d)(2), an offeror who drafts one of these exclusive offers cannot obtain dismissal unless the offer is accepted and the offeror pays both the principal offer and, if the parties agree or the offeree establishes that they would otherwise be legally recoverable, an additional allowance for costs, expenses, interest, and attorney fees. Here, however, the district court dismissed the case without Lucky Cab paying the pre-offer costs and interest that were promised and that Aguilar would otherwise be entitled to as a prevailing party.

We therefore reverse the district court's order dismissing Aguilar's complaint, vacate the order denying costs and interest, and remand for the district court to determine the amount of awardable pre-offer costs and interest and enter an order accordingly establishing the amount Lucky Cab must pay to obtain dismissal.[4]

Pickering and Bell, JJ., concur.

---

notwithstanding this language in the offer, its arguments in district court and at oral argument made clear that it intended to convey an exclusive offer to get the benefits in the comparison with the final judgment under NRCP 68(g) if the offer was rejected. NRCP 68(g) ("If the offer provided that costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees, would be added by the court, the court must compare the amount of the offer with the principal amount of the judgment, without inclusion of costs, expenses, interest, and if attorney fees are permitted by law or contract, attorney fees.").

[4]Under the facts of this case, where Lucky Cab did tender the $150,001 in a timely manner and sought judicial clarification so it could obtain dismissal within 21 days of acceptance of the offer rather than having a judgment entered, we deem it appropriate to allow it to obtain dismissal following the district court's costs and interest determination. Insofar as the parties have raised any other arguments not specifically addressed in this opinion, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given the disposition of this appeal.

BRYCE EDWARD DICKEY, Appellant, *v.* THE STATE OF NEVADA, Respondent.

No. 85331

January 4, 2024 540 P.3d 442

Appeal from a judgment of conviction, pursuant to a jury verdict, of first-degree murder with the use of a deadly weapon and sexual assault with the use of a deadly weapon. Fourth Judicial District Court, Elko County; Mason E. Simons, Judge.

Affirmed.

Matthew Pennell, Public Defender, Elko County, for Appellant.

Aaron D. Ford, Attorney General, Carson City; and *Tyler J. Ingram*, District Attorney, Elko County, for Respondent.

Before the Supreme Court, Cadish, C.J., and Pickering and Bell, JJ.

OPINION

By the Court, Bell, J.:

Tragically, sixteen-year-old Gabrielle (Britney) Ujlaky lost her life in March 2020, the victim of homicide. A jury convicted appellant Bryce Edward Dickey of sexually assaulting and murdering Britney. Dickey now asserts his criminal convictions should be reversed, in part because the court permitted Dickey's ex-girlfriend to testify at trial that Dickey choked her during otherwise consensual sex. Dickey also raises concerns regarding testimony of expert witnesses.

Although we conclude the district court erred in admitting other act evidence for identification purposes, in admitting highly prejudicial evidence regarding the timing of one of the other acts, and in failing to narrowly tailor its subsequent limiting instruction regarding the testimony, we conclude that these errors are harmless. We take this opportunity, however, to clarify that the balancing test for propensity evidence of other sexual offenses admissible under NRS 48.045(3) does not apply to the admission of other act evidence concerning identity or intent under NRS 48.045(2). Likewise, the failure of the district court to make a proper finding regarding an expert witness also constituted harmless error. We conclude that the district court did not abuse its discretion by admitting expert testimony about rigor mortis or by denying a motion for a mistrial. Additionally, sufficient evidence supported the sexual assault conviction. Accordingly, we affirm Dickey's convictions.

FACTS AND PROCEDURAL HISTORY

On March 8, 2020, Britney Ujlaky's family reported her missing. According to the family, Bryce Dickey gave Britney a ride, but she never arrived home. Dickey initially claimed he dropped Britney off at Spring Creek High School and witnessed Britney leave with a man in a green truck.

Three days after she disappeared, volunteers discovered Britney's body in a remote area outside Elko. Britney was partially clothed, and her body had been wrapped in a blue tarp. Autopsy results revealed Britney died from a stab wound to her neck and strangulation, possibly with a cord of some kind.

Officers collected evidence from the scene, including a used condom in a nearby bush that matched a box of condoms from Dickey's truck. The found condom contained DNA evidence: Dickey's DNA on the inside and Britney's on the outside. Dickey's DNA was also found on swabs taken from Britney's neck and fingernails, as well as on chewing tobacco found near Britney's body.

Dickey initially denied having any sexual encounter with Britney. Dickey's story later shifted. Dickey told police that he and Britney engaged in consensual oral sex while Dickey was wearing a condom. During that interview, Dickey claimed after the sexual encounter he dropped Britney off near a trailer park with a man named Chaz Randall.

The State charged Dickey with open murder, including first-degree murder with the use of a deadly weapon, and sexual assault with the use of a deadly weapon. Dickey entered a not guilty plea, and the case proceeded to trial.

Prior to trial, the State filed a notice of intent to call expert witnesses forensic pathologist Dr. Julie Schrader and intelligence analyst Mike Soto. The notice provided, "Dr. Schrader is expected to testify and offer opinions in the area of forensic pathology and will testify regarding the autopsy of [the victim], her cause(s) of death, and all observations and conclusions underlying those opinions." The State attached Dr. Schrader's forensic report to the notice. The State's notice also indicated that Soto would "testify and offer his opinion about [Dickey's] and Britney's geolocation data derived from Snapchat," attaching a report from the Rocky Mountain Information Network overlaying data from the social media company Snapchat onto a map. That data consisted of latitudes, longitudes, and timestamps from Britney's and Dickey's Snapchat accounts.

At trial, the State presented testimony from Dr. Schrader regarding Britney's autopsy, the cause of Britney's death, and rigor mortis. The State also called Soto to testify regarding the geolocation data from Snapchat, placing Dickey and Britney at the location where Britney's body was eventually discovered. Additional evidence presented at trial included surveillance footage from an apartment

complex that showed Dickey's truck drove past Britney's high school without stopping on the day Britney was reported missing and testimony from Dickey's ex-girlfriend about four instances when Dickey choked the ex-girlfriend without consent while the couple engaged in otherwise consensual sex. Dickey choked the ex-girlfriend on multiple occasions after she expressly told him not to. The last, and most violent, of these incidents occurred on the night of a candlelight vigil in Britney's honor.

Before her testimony, the ex-girlfriend entered the courtroom in violation of the exclusionary rule and watched a small portion of Detective Nicholas Stake's testimony. As a result, Dickey requested the court preclude the ex-girlfriend's testimony or declare a mistrial. Outside the presence of the jury, the ex-girlfriend testified she was unaware witnesses were excluded from entering the courtroom. The ex-girlfriend heard about five minutes of Detective Stake's testimony regarding weather conditions when Britney's body was discovered. The courtroom bailiff also testified, corroborating the ex-girlfriend's testimony. The district court admonished the State to make witnesses aware of the exclusionary rule but ultimately denied Dickey's motion for a mistrial and allowed the ex-girlfriend to testify.

At the close of trial, the jury found Dickey guilty of first-degree murder with the use of a deadly weapon and sexual assault with the use of a deadly weapon. Dickey was sentenced to life with the possibility of parole after a minimum of 46 years. Dickey now appeals.

DISCUSSION

Dickey appeals on numerous grounds, including that the district court (1) erred in admitting evidence of other acts between Dickey and the ex-girlfriend, (2) gave incorrect jury instructions with respect to the admitted other acts testimony, (3) erred in denying Dickey's motion for a mistrial when the ex-girlfriend violated the exclusionary rule, and (4) admitted deficient expert testimony. Dickey also claims (5) insufficient evidence exists to support his conviction for sexual assault and (6) cumulative error warrants reversal. We disagree that any error present is reversible and affirm the district court's judgment of conviction.

The district court erred in analyzing other act evidence

Dickey contends the district court abused its discretion by admitting the ex-girlfriend's testimony that Dickey choked her without consent during otherwise consensual sex. Dickey asserts the ex-girlfriend's testimony constituted impermissible character evidence under NRS 48.045(1). Alternatively, Dickey asks this court to find the district court erred in finding the ex-girlfriend's testimony was not substantially more prejudicial than probative. This court reviews

the admission of evidence for an abuse of discretion. *See Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008).

The district court granted the State's motion to admit the ex-girlfriend's testimony under NRS 48.045(2), which allows other acts to be admitted for certain nonpropensity purposes. Other act evidence carries a presumption of inadmissibility. *Ledbetter v. State*, 122 Nev. 252, 259, 129 P.3d 671, 677 (2006). Before the admission of other act evidence, a court must hold an evidentiary hearing outside the presence of the jury. Based on the evidence presented, the court may find the presumption rebutted and admit other act evidence if the act is (1) relevant, (2) proven by clear and convincing evidence, and (3) not substantially more prejudicial than probative. *Petrocelli v. State*, 101 Nev. 46, 51, 692 P.2d 503, 507 (1985); *see also Ledbetter*, 122 Nev. at 259, 129 P.3d at 677 (applying the same analysis as in *Petrocelli*, citing to *Tinch v. State*, 113 Nev. 1170, 1176, 946 P.2d 1061, 1064-65 (1997)). If the *Petrocelli* requirements are met, the evidence may be admitted for limited nonpropensity purposes as found by the court. Here, after an evidentiary hearing, the district court determined the ex-girlfriend's testimony was properly offered to prove Dickey's identity and intent.

We cannot say the district court properly applied *Petrocelli*. The district court erred in admitting the evidence to prove identity, in applying the *Franks* test to determine whether the evidence was more prejudicial than probative, and in allowing the admission of prejudicial evidence of low probative value. *See Franks v. State*, 135 Nev. 1, 6, 432 P.3d 752, 756 (2019). Nevertheless, because we conclude the ex-girlfriend's testimony was admissible under a *Petrocelli* analysis to prove intent, we affirm the district court's decision to admit the evidence and deem the errors harmless given the overwhelming evidence of guilt.

Under Petrocelli*, the ex-girlfriend's testimony was properly admitted to prove Dickey's intent but not to prove his identity*

NRS 48.045(2) allows litigants to present evidence of other acts when offered for certain limited nonpropensity purposes including "proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident." The State moved to admit the ex-girlfriend's testimony for the limited purposes of proving identity and intent. Notably, the State did not request to admit the evidence for propensity under NRS 48.045(3).

Identity

First, we address whether the ex-girlfriend's testimony could be properly admitted to prove identity under NRS 48.045(2). For identity purposes, other acts have probative value "only to the extent that [d]istinctive 'common marks' give logical force to the inference

of identity. If the inference is weak, the probative value is likewise weak, and the court's discretion should be exercised in favor of exclusion." *Mayes v. State*, 95 Nev. 140, 142, 591 P.2d 250, 252 (1979) (quoting *People v. Banks*, 465 P.2d 263, 271 (Cal. 1970)).

Here, the sole act of choking during sex does not qualify as a distinctive common mark creating a logical inference that a separate instance of choking was done by the same person. Discrepancies between Dickey's conduct towards the ex-girlfriend and the strangulation of Britney further undercut any inference regarding identity: Britney's autopsy suggested she was strangled with a ligature; the ex-girlfriend testified Dickey choked her with his hand. Because the ex-girlfriend's testimony is not reasonably probative of the identity of Britney's attacker, her testimony was not properly admitted for that purpose.

Intent

We now consider whether the evidence was properly admitted to prove intent. At trial, Dickey's sole defense to the sexual assault charge was consent. Consequently, Dickey placed the element of intent at issue. As we held in *Williams v. State*, "[t]he crucial question in determining if a sexual assault has occurred is whether the act [was] committed without the consent of the victim, and the intent of the accused is relevant to the issue of consent or [the] lack thereof." 95 Nev. 830, 833, 603 P.2d 694, 697 (1979) (internal citation omitted). A defendant's assertion of consent in a sexual assault case "place[s] in issue [intent as] a necessary element of the offense," which opens the door to the admission of other act evidence as rebuttal. *Id.*; *see also Mayer v. State*, 86 Nev. 466, 468, 470 P.2d 420, 421 (1970) (admitting evidence of defendant's possession of marijuana as probative to the issue of intent in a separate charge of selling narcotics because willfulness was a required element).

The ex-girlfriend's testimony is relevant and probative of intent as it presents evidence of Dickey's increasing violence around sex and intent to engage in the choking activity in the face of explicit nonconsent. Just as in the *Williams* case evidence of "sexual misconduct with other persons was admitted as being relevant to prove his intent to have intercourse with the victim without her consent," evidence of Dickey's willingness to choke a sexual partner without consent is relevant to prove his intent to strangle Britney without her consent as part of their sexual interaction. *Williams*, 95 Nev. at 833, 603 P.2d at 697; *see* NRS 48.015 (defining relevant evidence as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence"). The question of admission to prove intent is a closer one than in *Williams*. Still, here as in *Williams*, the State offered the ex-girlfriend's testimony not

for propensity purposes, but to demonstrate that choking a woman without consent during sex was an established element of Dickey's sexual proclivities and supported a finding that he intended to ignore Britney's lack of consent to choking during sex. Therefore, we cannot say the district court abused its discretion in admitting the ex-girlfriend's testimony as at least minimally probative of intent.

The ex-girlfriend's testimony sufficiently established the other act by clear and convincing evidence. *See Rose v. State*, 123 Nev. 194, 203, 163 P.3d 408, 414 (2007) (citing *LaPierre v. State*, 108 Nev. 528, 531, 836 P.2d 56, 58 (1992)) (the victim's testimony alone is sufficient to establish guilt of sexual assault beyond a reasonable doubt, so long as the testimony includes "*some* particularity regarding the incident"). The district court found the ex-girlfriend's testimony credible, and we do not disturb this determination. *Mitchell v. State*, 124 Nev. 807, 816, 192 P.3d 721, 727 (2008) (this court "will not reweigh the evidence or evaluate the credibility of witnesses" on appeal).

Finally, we examine whether the ex-girlfriend's testimony was substantially more prejudicial than probative. *See Petrocelli*, 101 Nev. at 51, 692 P.2d at 507; *Tinch*, 113 Nev. at 1176, 946 P.2d at 1064-65. While *Petrocelli* itself does not contain explicit factors to consider regarding the probative value of evidence, this court outlined the following factors in *Randolph v. State*:

> When balancing probative value against the danger of unfair prejudice, courts consider a variety of factors, "including the strength of the evidence as to the commission of the other crime, the similarities between the crimes, the interval of time that has elapsed between the crimes, the need for the evidence, the efficacy of alternative proof, and the degree to which the evidence probably will rouse the jury to overmastering hostility."

136 Nev. 659, 665, 477 P.3d 342, 349 (2020) (quoting *State v. Castro*, 756 P.2d 1033, 1036 (Haw. 1988)) (analyzing admissibility under NRS 48.045(2)).

Following the *Randolph* factors here, first, the ex-girlfriend testified under oath regarding the instances of choking. Nothing in the record suggests that her testimony inaccurately described the prior acts. Second, Dickey's choking of the ex-girlfriend was arguably similar to the offense against Britney, as both involved elements of choking along with sexual contact. Yet, we acknowledge that the acts against the ex-girlfriend and Britney are not identical. Britney was likely strangled with an object, while the ex-girlfriend testified Dickey choked her with his hand.

Third, the ex-girlfriend testified that the four instances of choking occurred within the year preceding Dickey's arrest. As to the

fourth and fifth factors, Britney's consent, or lack of consent, to sexual contact with Dickey is an essential question in this case. No other testimony, save Dickey's own, provided any direct evidence towards the issue of consent. The ex-girlfriend's testimony presented evidence of Dickey's past violence around sex, including intent to engage in the choking activity without consent.

When considering the sixth and final factor, we are compelled to make further distinctions regarding the ex-girlfriend's testimony. The first three instances of choking to which the ex-girlfriend testified would not, on their own, support a finding of undue prejudice. Accordingly, under *Petrocelli*, the ex-girlfriend's testimony regarding the first three instances of choking was properly admitted on this issue of intent.

We must take note, though, of the particularly inflammatory testimony concerning the last instance of choking, which occurred on the night of a candlelight vigil held to honor Britney. Pointing out the timing of this particular incident was highly prejudicial. Also, given the admission of the other act testimony for intent, the timing of the event possesses virtually no probative value. As a result, the district court erred in allowing testimony regarding the specific timing of this incident. Nonetheless, the weight of independent, cumulative evidence against Dickey renders this error harmless. *See Tavares v. State*, 117 Nev. 725, 732, 30 P.3d 1128, 1132 (2001) (holding an error is harmless unless it has a "substantial and injurious effect or influence in determining the jury's verdict" (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946))).

The district court also improperly applied the balancing test outlined in *Franks*, 135 Nev. at 6, 432 P.3d at 756, to make its prejudice findings. *Franks* interpreted NRS 48.045(3), which allows evidence of other sexual offenses to be admitted for propensity purposes in "a criminal prosecution for a sexual offense." At no point did the State seek admissibility under NRS 48.045(3), and the evidence was not admitted for propensity purposes. Thus, the district court improperly applied the *Franks* test.

Today, we make clear that *Franks* and *Petrocelli* are not interchangeable standards. Parties have an obligation to clearly identify the exception to the general principle of inadmissible character evidence under which they are seeking admission. While we recognize that, in practice, the inquiries the district courts must undertake are relatively similar, the blended application of two distinct statutory schemes collapses the broader, nonpropensity analysis of *Petrocelli* and the limited-scope propensity analysis of *Franks*. This confusion complicates appellate review and risks the improper use of NRS 48.045(3) beyond the narrow scope intended by the Legislature.

The *Franks* test for determining prejudice when admitting a prior sexual offense for the purpose of propensity contains a slightly narrower and more stringent test than the one used to determine the

prejudicial impact of other act evidence admitted in nonpropensity contexts. *See United States v. LeMay*, 260 F.3d 1018, 1027 (9th Cir. 2001) ("Because of the inherent strength of the evidence [of prior sexual offenses] . . . a court should pay careful attention to both the significant probative value and the strong prejudicial qualities of that evidence." (quoting *Doe v. Glanzer*, 232 F.3d 1258, 1268 (9th Cir. 2000))); *see also Alfaro v. State*, 139 Nev. 216, 228-29, 534 P.3d 138, 150-51 (2023) (applying the *Franks* test). In this regard, any error would tend to help, rather than harm, Dickey. Thus, the error is harmless.

We likewise determine the district court's error in admitting the ex-girlfriend's testimony to prove identity was harmless given the quantity of evidence supporting the State's case against Dickey and its proper use to prove intent. *See Fiegehen v. State*, 121 Nev. 293, 296, 113 P.3d 305, 307 (2005) (finding harmless error where overwhelming evidence of guilt existed, including an identification and DNA evidence at the crime scene). The State's evidence at trial included DNA and geolocation data placing Dickey at the scene of the crime, inconsistent statements to police that could reasonably impact Dickey's credibility with the jury, and a used condom proving Dickey had sexual contact with Britney.

The district court's errors in providing limiting jury instructions were harmless

Dickey next contends that the district court erred by giving the jury an overly broad limiting instruction regarding the ex-girlfriend's testimony. The instruction failed to limit use of the other act evidence to establishing identity or intent—the only purposes for which the district court allowed the evidence. After admitting the ex-girlfriend's testimony for the limited purposes of identity and intent, the district court administered the following jury instruction:

> Evidence has been received tending to show that the defendant committed wrongs or acts other than that for which he is on trial.
>
> Such evidence was not received and may not be considered by you to prove that he is a person of bad character or that he has a disposition to commit such crimes.
>
> Such evidence was received and may be considered by you only for the limited purpose of determining if it tends to prove motive, opportunity, intent, preparation, plan, knowledge, identity, absence of mistake or accident, or a common scheme or plan.
>
> . . . .

The district court offered this instruction once immediately prior to the ex-girlfriend's testimony and once at the close of trial.

When admitting evidence for limited purposes under NRS 48.045(2), limiting instructions must instruct the jury to consider only those purposes for which the evidence was actually admitted. Any instruction to consider purposes for which admission was not granted constitutes an error subject to NRS 178.598 harmless error review. *Allred v. State*, 120 Nev. 410, 415, 92 P.3d 1246, 1250 (2004); *see also Tavares*, 117 Nev. at 732, 30 P.3d at 1132.

The district court erred by including all potential purposes listed for admission of other act evidence under NRS 48.045(2), instead of limiting its instruction to only the purposes for which the court found the evidence admissible—identity and intent. Additionally, given the error in admitting the evidence for purposes of identity, a proper limiting instruction in this case should have informed the jury that it could consider the other act evidence for the purpose of intent only.

As a result, we must consider whether such an error is harmless. We consider whether the district court's instruction to consider the ex-girlfriend's testimony for the purposes of intent, motive, opportunity, preparation, plan, knowledge, absence of mistake or accident, and common scheme or plan had a substantial and injurious impact on the verdict. We conclude it did not.

Substantial, independent evidence exists to support Dickey's convictions. When considering the ex-girlfriend's testimony, we cannot say that instructing the jury on all potential purposes for the admission of other acts under NRS 48.045(2) altered the outcome of this case. Accordingly, we hold the error in the provided jury instructions harmless.

The district court did not abuse its discretion in declining to declare a mistrial based on a violation of the exclusionary rule

"The decision to grant a mistrial is within the sound discretion of the trial court and will not be overturned absent an abuse of discretion." *Romo v. Keplinger*, 115 Nev. 94, 96, 978 P.2d 964, 966 (1999) (internal quotation marks omitted). Violations of the rule excluding witnesses from the courtroom can warrant a mistrial. *Id.* Here, the ex-girlfriend entered the courtroom during trial and heard testimony from other witnesses before she testified, which violated the exclusionary rule. *See* NRS 50.155(1) (providing that "at the request of a party the judge shall order witnesses excluded so that they cannot hear the testimony of other witnesses"). On learning of this violation, the district court admonished the State and permitted examination of the ex-girlfriend outside the presence of the jury. This examination revealed minimal basis for harm, as the testimony the ex-girlfriend witnessed was irrelevant to her own. The district court took remedial measures to avoid prejudice from the ex-girlfriend's violation and found no bad faith existed on the part of

the State. The violation could not have impacted the ex-girlfriend's unrelated testimony. Consequently, the district court did not abuse its discretion by denying Dickey's motion for a mistrial.

Any other alleged violations of the exclusionary rule were either not raised before the district court or not adequately briefed before this court, and so we decline to reach them. *Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987) ("It is appellant's responsibility to present relevant authority and cogent argument; issues not so presented need not be addressed by this court.").

The district court properly admitted Dr. Schrader's expert testimony; it erred when it failed to conduct a Hallmark *analysis on a proposed expert witness, but this error was harmless*

Dickey next argues the district court abused its discretion when it admitted (1) Dr. Schrader's testimony with respect to rigor mortis, as the State's NRS 174.234 notice procedures were insufficient, and (2) Soto's expert testimony about geolocation data placing Dickey with Britney at the time and place of her death when he was not qualified to offer expert testimony.

Notice of Dr. Schrader's rigor mortis testimony

Nevada law requires a party in a criminal case to notify the opposing party of their intent to call an expert witness 21 days before trial. NRS 174.234(2) (held unconstitutional on other grounds in *Grey v. State*, 124 Nev. 110, 118, 178 P.3d 154, 160 (2008)). This notice must include "[a] brief statement regarding the subject matter on which the expert witness is expected to testify and the substance of the testimony." NRS 174.234(2)(a). The State served timely notice of its intent to use Dr. Schrader as an expert, including a copy of Dr. Schrader's autopsy report and a statement announcing the State's intent to examine Dr. Schrader regarding the contents of the attached report. Dickey did not object to Dr. Schrader's testimony during trial and therefore failed to preserve the alleged error for appeal. *Jeremias v. State*, 134 Nev. 46, 50, 412 P.3d 43, 48 (2018). Additionally, given that the attached autopsy report discussed rigor mortis, the State provided adequate notice to the defense regarding the potential for this testimony. The district court did not err in allowing Dr. Schrader's testimony when Dickey failed to object, and the State provided adequate, timely notice under NRS 174.234.

Soto's opinion testimony about geolocation data

Dickey also challenges the qualification of Soto as an expert witness. Dickey argues the district court erred in admitting Soto's testimony over Dickey's objection, implying that the district court was required to qualify Soto as an expert under *Hallmark v. Eldridge*. Dickey argued that Soto failed to employ a reliable

methodology per NRS 50.275. *See Hallmark v. Eldridge*, 124 Nev. 492, 498, 189 P.3d 646, 650 (2008) (clarifying that to testify as an expert witness, the witness must (1) be qualified in an area of specialized knowledge, (2) use that knowledge to assist the trier of fact, and (3) limit their testimony to matters within the scope of that knowledge). The district court made no such findings, concluding only that Soto's testimony was a product of reliable methodology.

Here, our ability to review the district court's action is complicated by the district court's unclear response to Dickey's objection. By finding Soto's testimony was the product of reliable methodology, the district court seems to understand its ruling to allow Soto to offer expert testimony despite the State's assertion Soto need not be so qualified. *See id.* at 500, 189 P.3d at 651 (requiring district courts qualifying experts to consider factors including whether the testimony is a "product of reliable methodology"). To the extent the district court's action qualified an expert witness, we review that decision for abuse of discretion. *Id.* at 498, 189 P.3d at 650.

First, we make clear that when a party objects to the qualifications of a witness on the basis that the witness is not qualified to offer the proffered opinion under *Hallmark*, the district court is required to either conduct a full *Hallmark* analysis or to make clear expert qualification is not necessary. Because Dickey properly raised an objection based on Soto's qualifications to testify on the geolocation data, and because it appears the district court dispatched this objection through an incomplete *Hallmark* analysis, we conclude the district court erred in failing to conduct a complete *Hallmark* analysis regarding Soto's testimony.

Nevertheless, we conclude the error was harmless, because under our prior caselaw, Soto's testimony did not require specialized knowledge. *See* NRS 178.598 ("Any error, defect, irregularity or variance which does not affect substantial rights shall be disregarded."). Soto plotted geolocation data on a map and adjusted the data to the local time. In *Burnside v. State*, a detective was similarly permitted to testify to a map he created from cell phone location data without being qualified as an expert. 131 Nev. 371, 383, 352 P.3d 627, 636 (2015). This court held "the map and the detective's testimony were not based on specialized knowledge." *Id.* Soto's testimony is indistinguishable from the testimony in *Burnside*. In both cases, the witness plotted data obtained from another source onto a map. Thus, the district court did not abuse its discretion because Soto's testimony was admissible as lay testimony, without requiring an expert-witness analysis.

Sufficient evidence existed for a rational jury to convict Dickey of sexual assault

Dickey asserts that insufficient evidence supports the sexual assault conviction. We "will not disturb a judgment of conviction in

a criminal case on the basis of insufficiency of the evidence so long as the jury verdict is supported by substantial evidence." *Mitchell v. State*, 105 Nev. 735, 737, 782 P.2d 1340, 1342 (1989). "In determining the sufficiency of the evidence below, the critical question is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Mejia v. State*, 122 Nev. 487, 492, 134 P.3d 722, 725 (2006) (internal quotation marks omitted).

Dickey argues a rational jury could not have found forced penetration because the autopsy reported a lack of genital trauma. Sexual assault occurs when one person "[s]ubjects another person to sexual penetration . . . against the will of the victim." NRS 200.366(1)(a). The plain language of the statute neither requires force nor physical injury.

The State presented substantial circumstantial evidence sufficient to support the jury's guilty verdict of sexual assault. *See Wilkins v. State*, 96 Nev. 367, 374, 609 P.2d 309, 313 (1980) (allowing a jury to rely on circumstantial evidence to support a verdict). Dr. Schrader testified a sexual assault may occur with no physical findings whatsoever and lack of injury does not equate with consent. Dickey admitted to having oral sex with Britney, despite first denying any sexual contact and claiming Britney was like a little sister. Geolocation data placed Dickey and Britney together at the location where Britney's body was later discovered, and a condom with both their DNA profiles was found at the scene. Finally, Britney's body was found in a state of undress. The jury could have reasonably relied on this evidence to conclude, as the State argued in its closing, that Britney was given a choice between death and performing oral sex on Dickey, after which Dickey killed her to prevent her from speaking out. *See Mitchell*, 105 Nev. at 737, 782 P.2d at 1342 (upholding a jury verdict of sexual assault when there was no evidence of physical trauma to the victim's genitalia, but the victim was found in a remote area and in a state of undress). Likewise, the jury here could have rejected Dickey's assertion of consensual sex given the circumstances of Britney's death and Dickey's changing versions of the events.

The facts presented at trial provided substantial evidence for a reasonable jury to find Dickey guilty of sexual assault under Nevada law. Accordingly, sufficient evidence existed to convict Dickey on this count.

Cumulative error does not warrant reversal

Lastly, Dickey claims the cumulative errors in his case warrant reversal. A defendant's right to a fair trial may be violated by the cumulative effect of errors even when any one error, individually, is

harmless. *See Hernandez v. State*, 118 Nev. 513, 535, 50 P.3d 1100, 1115 (2002). When evaluating a claim of cumulative error, relevant factors include "(1) whether the issue of guilt is close, (2) the quantity and character of the error, and (3) the gravity of the crime charged." *Mulder v. State*, 116 Nev. 1, 17, 992 P.2d 845, 854-55 (2000).

On this record we have found four instances of error that could have impacted Dickey's conviction: (1) the district court improperly admitted the ex-girlfriend's testimony for purposes of identity; (2) the district court improperly admitted the ex-girlfriend's testimony that Dickey choked her on the night of Britney's candlelight vigil; (3) the jury was given erroneous instructions to consider the ex-girlfriend's testimony, generally, for motive, opportunity, preparation, plan, knowledge, absence of mistake or accident, and common scheme or plan; and (4) the district court failed to engage in a full *Hallmark* analysis for Soto. We determined each of those errors harmless and there is nothing cumulative in the nature of those errors to warrant reversal. Here, despite the grave nature of the crime, evidence of guilt was overwhelming. Errors did not impugn the overall integrity of the trial and were not the by-product of any bad faith on the part of the State. We are not convinced the cumulative weight of these errors deprived Dickey of his constitutional right to a fair trial.

CONCLUSION

Parties must make clear the specific bases for admission of other act evidence under *Petrocelli* and NRS 48.045(2). The court, after an evidentiary hearing, must determine whether any of those bases apply, being careful to analyze the foundation for each basis. Courts must take care not to mix the *Franks* and *Petrocelli* analyses, as the tests, instructions, and use of evidence differ for other act evidence and other sexual offense evidence. Any limiting instruction given regarding the admission of other act evidence must specify only the bases determined by the court.

A district court also must engage in a thorough *Hallmark* analysis, either in writing or on the record, when a party has challenged the qualifications of an expert. Prior caselaw of this court supports a determination that a witness plotting known coordinates on a map does not require expert testimony. Despite a few harmless errors by the trial court in these regards, the State presented overwhelming evidence to support the jury's conviction of Dickey for murder and sexual assault. Accordingly, concluding no reversible error exists, we affirm the district court's judgment.

Cadish, C.J., and Pickering, J., concur.

KATHRYN ABBOTT; AND ANDREW DODGSON-FIELD, APPELLANTS, *v.* CITY OF HENDERSON, AN AGENCY AND/OR POLITICAL SUBDIVISION OF THE STATE OF NEVADA, RESPONDENT.

No. 84439

January 25, 2024 542 P.3d 10

Appeal from a district court summary judgment in a negligence action. Eighth Judicial District Court, Clark County; Eric Johnson, Judge.

Affirmed.

The702Firm and *Michael C. Kane* and *Bradley J. Myers*, Las Vegas, for Appellants.

Nicholas G. Vaskov, City Attorney, and *Wade B. Gochnour* and *Brandon P. Kemble*, Assistant City Attorneys, Henderson, for Respondent.

Before the Supreme Court, EN BANC.

OPINION

By the Court, BELL, J.:

In *Boland v. Nevada Rock & Sand Co.*, this court set out the test for determining when an owner or occupant of land is protected from liability for another's recreational use of that land under NRS 41.510. 111 Nev. 608, 611, 894 P.2d 988, 990 (1995). In that opinion, we determined NRS 41.510's protections applied to "rural, semi-rural, or nonresidential" property. *Id.* at 612, 894 P.2d at 991. Later that year, the legislature amended NRS 41.510 to apply to "any premises." We now recognize that *Boland* has been superseded by statute to the extent *Boland* limited NRS 41.510's application to "rural, semi-rural, or nonresidential" property. As to the underlying case, we hold the district court properly found that the park was covered by NRS 41.510's protection and that Appellant Kathryn Abbott was engaged in a recreational activity at the time of her injury on the property. We also conclude the Abbotts failed to present evidence to establish a genuine dispute of material fact regarding whether Respondent City of Henderson willfully or maliciously failed to guard or warn against a dangerous condition. Therefore, we affirm the district court's order granting summary judgment in favor of Henderson.

FACTS AND PROCEDURAL HISTORY

In September 2019, Kathryn Abbott slipped while assisting her youngest child on the slide at Vivaldi Park in Henderson. A rubber surface, called Pour-in-Place, surrounded the slide at the park playground. Abbott asserts the adjacent sand was not raked level to the Pour-in-Place, exposing a 90-degree drop-off of about four inches from the edge of the Pour-in-Place to the ground. This drop-off was created when the original slide at Vivaldi Park was replaced in 2012: Henderson employees did not bevel the edge of the new Pour-in-Place to slope gently to the ground. Abbott alleges that the steep drop-off of the Pour-in-Place caused her to fall and fracture her leg in multiple places.

Abbott and her husband, Andrew Dodgson-Field (collectively, Abbott), filed a complaint against the City of Henderson, alleging negligence arising from premises liability and loss of consortium, respectively. In its answer, Henderson asserted an affirmative defense of immunity pursuant to NRS 41.510. Henderson later moved for summary judgment, asserting various grounds for immunity. In its motion, Henderson relied on depositions from numerous park employees demonstrating Henderson's comprehensive plan for park maintenance, including daily, weekly, and monthly visits to inspect the parks for necessary repairs. Abbott opposed, relying on those same depositions to demonstrate Henderson's willful creation of the drop-off hazard and its knowledge that the sand meant to mitigate the risk created by this drop-off was routinely and easily displaced from the lip of the Pour-in-Place, exposing a trip hazard.

The district court found Henderson was immune from suit under Nevada's recreational use statute, NRS 41.510, and granted Henderson's motion for summary judgment. In doing so, the district court rejected Abbott's arguments that as a residential playground, Vivaldi Park fell outside the purview of NRS 41.510; Abbott's use of the playground was not a "recreational activity" as defined by the statute; and Henderson acted willfully when it created the drop-off and failed to properly maintain the sand as necessary. Abbott appealed. The court of appeals reversed and remanded. We granted Henderson's subsequent petition for review under NRAP 40B and now vacate the court of appeals' order.

DISCUSSION

Nevada's recreational use statute provides that "an owner of any estate or interest in any premises, or a lessee or an occupant of any premises, owes no duty to keep the premises safe for entry or use by others for participating in any recreational activity . . . ." NRS 41.510(1). We have previously held that for the statute to apply, "(1) respondents must be the owners, lessees, or occupants of the

premises where [the injury took place]; (2) the land where [the injury took place] must be the type of land the legislature intended NRS 41.510 to cover; and (3) [the injured party] must have been engaged in the type of activity the legislature intended NRS 41.510 to cover." *Boland*, 111 Nev. at 611, 894 P.2d at 990. NRS 41.510(3)(a)(1) provides an exception to immunity where landowners participate in "[w]illful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." Because Henderson's ownership of the park was uncontested, we consider whether the district court properly concluded that Vivaldi Park is the type of property covered by the statute, that Abbott's activities qualified as recreational activities, and that Henderson did not intentionally create a hazard constituting willful conduct.

Standard of review

This court reviews a grant of summary judgment de novo. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). Summary judgment is only appropriate where, construing all evidence in the light most favorable to the nonmoving party, there is no genuine dispute as to any material fact, and the moving party is entitled to judgment as a matter of law. *Id.*; *see* NRCP 56(a). Questions of law are reviewed de novo, *Martin v. Martin*, 138 Nev. 786, 789, 520 P.3d 813, 817 (2022), as are questions involving statutory interpretation. *Webb v. Shull*, 128 Nev. 85, 88, 270 P.3d 1266, 1268 (2012).

The plain text of NRS 41.510 provides no limitation on the type of land appropriate for protection

In two published opinions, this court has considered the type of land the legislature intended to cover under NRS 41.510. First, in *Brannan v. Nevada Rock & Sand Co.*, this court considered a landowner's liability for injuries suffered when a plaintiff rode a motorcycle in "an uninhabited area of desert." 108 Nev. 23, 24, 823 P.2d 291, 291-92 (1992). In *Brannan*, this court applied the statute to occupiers of "open land." *Id.* at 25, 823 P.2d at 292. In 1995, in *Boland*, this court considered an injury that occurred in a small mining basin and engaged in a land-type analysis, concluding "the intent of the legislature is that the property be used for recreation." 111 Nev. at 612, 894 P.2d at 991. This court then held that to establish immunity under NRS 41.510, "the type of property should be rural, semi-rural, or nonresidential." *Id.*

After the *Boland* decision, the legislature made two significant changes to the text of NRS 41.510. First, the legislature expanded the kinds of owners eligible for immunity from "an owner, lessee or occupant of premises" to "an owner *of any estate or interest in any*

premises, or a lessee or *an* occupant of *any* premises." 1995 Nev. Stat., ch. 311, § 1, at 790. Second, the legislature expanded the list of eligible recreational activities from nine covered activities to at least twenty. *Id.* These changes remain in effect in the current statute. *See* NRS 41.510.

When the legislature alters a statute, that alteration "must be given effect by the courts." *Orr Ditch & Water Co. v. Just. Ct. of Reno Twp.*, 64 Nev. 138, 164, 178 P.2d 558, 571 (1947). By its plain text, NRS 41.510 now applies to "any premises." *See Young v. Nev. Gaming Control Bd.*, 136 Nev. 584, 586, 473 P.3d 1034, 1036 (2020) ("[W]e will interpret a statute or regulation by its plain meaning unless the statute or regulation is ambiguous."). Accordingly, we determine that the statute has superseded *Boland*'s land-type limitations holding, and we now clarify that NRS 41.510 protections can apply to any premises.

Abbott's assertion that the land at issue must be undeveloped is belied by the plain language of the statute, which expressly contemplates immunity for injuries caused by structures. *See* NRS 41.510(1) (providing that landowners owe no duty to protect or warn recreational users of "any hazardous condition, activity or use of any structure on the premises"); *see also Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 879, 362 P.3d 83, 85 (2015) (holding when a statute's plain meaning is clear, this court will not go beyond the text). Given the plain language of the statute, the district court properly concluded that Vivaldi Park is a premises included in NRS 41.510's statutory protections.

Abbott was engaged in a recreational activity when she injured herself at Vivaldi Park

While the legislature did not include any limiting language with respect to the type of land eligible for protections, it did enable other constraints to immunity, namely, limiting protections to injuries incurred during participation in a "recreational activity." The legislature defined "recreational activity" through a nonexhaustive list:

> (a) Hunting, fishing or trapping;
> (b) Camping, hiking or picnicking;
> (c) Sightseeing or viewing or enjoying archaeological, scenic, natural or scientific sites;
> (d) Hang gliding or paragliding;
> (e) Spelunking;
> (f) Collecting rocks;
> (g) Participation in winter sports, including cross-country skiing, snowshoeing or riding a snowmobile, or water sports;
> (h) Riding animals, riding in vehicles or riding a road, mountain or electric bicycle;
> (i) Studying nature;

(j) Gleaning;
(k) Recreational gardening; and
(l) Crossing over to public land or land dedicated for public use.

NRS 41.510(4).

We are convinced walking and assisting a child playing on a playground is similar to picnicking, hiking, riding a bicycle, and crossing over public land. Courts in several other jurisdictions have concluded that walking is a recreational activity sufficient to provide recreational use protections.[1] Likewise, *Curran v. City of Marysville* concluded a child's "playground activity" was a recreational activity sufficient for protections in consideration of "the ever broadening effect of the Legislature's amendments to the statutory language." 766 P.2d 1141, 1143-44 (Wash. Ct. App. 1989). Federal circuit courts have similarly suggested that recreational activities are defined broadly.[2] *See Leigh-Pink v. Rio Props., LLC*, 138 Nev. 530, 537, 512 P.3d 322, 328 (2022) (where "the plain language of a statutory term is in accord with the term's definition at common law, we elect to interpret them similarly"). Finally, the Nevada Legislature made clear through both the plain text and legislative history that the enumerated list is expansive. *See* Hearing on A.B. 313 Before the Assemb. Comm. on Judiciary, 68th Leg. (Nev., Apr. 6, 1995) (emphasizing the nonexhaustive nature of the list). Accordingly, we conclude that Abbott was engaged in "recreational activities" as contemplated by NRS 41.510.

Abbott's suggested application of the doctrine of *noscitur a sociis*, or the principle that words are known by the company they keep, does not change our conclusion. To the extent principles of *noscitur a sociis* support a reading of "recreational activity" as one that requires undeveloped space or use of land in its natural state, that reading is contravened by the express text of the statute, which contemplates immunity for injuries associated with the "use of any structure on the premises." NRS 41.510(1). Walking or assisting a child playing on a playground would be considered recreational

[1]*See Wringer v. United States*, 790 F. Supp. 210, 212-13 (D. Ariz. 1992); *Lewis v. City of Bastrop*, 280 So. 3d 907, 910 (La. Ct. App. 2019); *Richard v. La. Newpack Shrimp Co.*, 82 So. 3d 541, 546 (La. Ct. App. 2011); *Moskalik v. Mill Creek Metroparks*, 50 N.E.3d 946, 954 (Ohio Ct. App. 2015); *Lasky v. City of Stevens Point*, 582 N.W.2d 64, 66 (Wis. Ct. App. 1998).

[2]*See Palmer v. United States*, 945 F.2d 1134, 1137 (9th Cir. 1991) (determining that a plaintiff who entered a park to watch his granddaughter's soccer game exuded behavior "consistent with relaxation and recreation," such that Hawaii's recreational use statute applied); *Schneider v. United States, Acadia Nat'l Park*, 760 F.2d 366, 368 (1st Cir. 1985) (concluding that drinking coffee was a recreational activity for purposes of Maine's recreational use statute; reasoning that "[a]ny number of clearly recreational activities suggest themselves, from bird-watching to sunbathing, to playing ball on the beach").

both under the common law and under interpretations of analogous recreational use statutes from other jurisdictions. We see no reason to depart from these authorities. Walking or assisting a child playing on a playground constitutes a recreational activity under NRS 41.510. We therefore agree with the district court that the land at issue is eligible for protection and Abbott's activity fits within the meaning of "recreational activity."

Henderson did not willfully or maliciously fail to guard against the dangerous condition

Otherwise immune entities are nevertheless liable where they participate in "willful or malicious failure to guard, or to warn against, a dangerous condition, use, structure or activity." NRS 41.510(3)(a)(1). This court has determined willful or malicious conduct is "intentional wrongful conduct, done *either* with knowledge that serious injury to another will probably result, *or* with a wanton or reckless disregard of the possible result." *Boland*, 111 Nev. at 612-13, 894 P.2d at 991 (quoting *Davies v. Butler*, 95 Nev. 763, 769, 602 P.2d 605, 609 (1979)). Willfulness is generally a question of fact; however, where plaintiffs present no evidence of willful conduct, summary judgment is appropriate. *Id.* at 613, 894 P.2d at 992.

Abbott argues that Henderson willfully created the hazardous condition. Yet, willful conduct with respect to the baseline condition necessary for injury is not the same as willful failure to guard against the hazard. *See, e.g.*, *Kendall v. State*, No. 64550, 2015 WL 1441865, at *3 (Nev. Mar. 26, 2015) (Order Affirming in Part, Reversing in Part, and Remanding) ("The record shows merely that Kendall willfully drove the vehicle and does not suggest, to any degree, that he willfully or maliciously crashed the vehicle or otherwise caused damage."); *In re Breen*, 30 Nev. 164, 176, 93 P. 997, 1000 (1908) (stating where a lawyer intentionally criticized the court, he did not "willfully or maliciously" bring the court into disrepute).

Willfulness, here, requires "a design to inflict injury." *Crosman v. S. Pac. Co.*, 44 Nev. 286, 301, 194 P. 839, 843 (1921); *see also Mitrovich v. Pavlovich*, 61 Nev. 62, 67, 114 P.2d 1084, 1086 (1941) (finding no willful conduct when the defendant crashed the car he was driving, even though the defendant lacked a driver's license, had only driven twice in his life before, and had never driven on a highway). Here, Abbott failed to present admissible evidence that Henderson had such a design. Henderson maintains the park: workers go to each of Henderson's parks daily to pick up trash and perform regular upkeep, a park facilities maintenance person inspects each park weekly, and a certified playground inspector visits each playground monthly to make any necessary repairs. Contrary to Abbott's assertion, the evidence before the district court demonstrated that

Henderson exercised some level of care with respect to the park, and Abbott failed to provide any evidence of a design to cause an injury or a reckless disregard to the risk of injury. *See Bearden v. City of Boulder City*, 89 Nev. 106, 110, 507 P.2d 1034, 1036 (1973) ("To be wanton such conduct must be beyond the routine.").

Additionally, Abbott presented no evidence of any prior accidents related to the unbeveled surface, although the surface had been in place for over seven years. In the face of Henderson's maintenance procedure and the lack of any evidence that Henderson willfully or maliciously created a dangerous condition, no genuine dispute of material fact remained, and Henderson was entitled to judgment as a matter of law. Thus, the district court properly granted summary judgment in favor of Henderson.

CONCLUSION

The plain text of NRS 41.510 contains no land-type limitation. To the extent *Boland* suggested otherwise, we hold *Boland* is superseded by statute. Thus, the district court properly concluded that NRS 41.510's protections applied to Vivaldi Park. Additionally, the district court properly concluded that walking and assisting a child on a park playground are recreational activities under the statute. Finally, Abbott failed to demonstrate a genuine dispute of material fact regarding whether the City of Henderson willfully or maliciously failed to guard or warn against a dangerous condition. Accordingly, we affirm the judgment of the district court.

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

ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Appellant, *v.* LINCOLN COUNTY WATER DISTRICT; VIDLER WATER COMPANY, INC.; COYOTE SPRINGS INVESTMENT, LLC; NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2; APEX HOLDING COMPANY, LLC; DRY LAKE WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, dba NV ENERGY; NEVADA POWER COMPANY, dba NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; and CITY OF NORTH LAS VEGAS, Respondents.

No. 84739

SOUTHERN NEVADA WATER AUTHORITY, Appellant, *v.* LINCOLN COUNTY WATER DISTRICT; VIDLER WATER COMPANY, INC.; COYOTE SPRINGS INVESTMENT, LLC; NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2; APEX HOLDING COMPANY, LLC; DRY LAKE WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, dba NV ENERGY; NEVADA POWER COMPANY, dba NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; and CITY OF NORTH LAS VEGAS, Respondents.

No. 84741

CENTER FOR BIOLOGICAL DIVERSITY, Appellant, *v.* LINCOLN COUNTY WATER DISTRICT; VIDLER WATER COMPANY, INC.; COYOTE SPRINGS INVESTMENT, LLC; NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2; APEX HOLDING COMPANY, LLC; DRY LAKE WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, dba NV ENERGY; NEVADA POWER COMPANY, dba NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; and CITY OF NORTH LAS VEGAS, Respondents.

No. 84742

MUDDY VALLEY IRRIGATION COMPANY, Appellant, *v.* LINCOLN COUNTY WATER DISTRICT; VIDLER WATER COMPANY, INC.; COYOTE SPRINGS INVESTMENT, LLC; NEVADA COGENERATION ASSOCIATES NOS. 1 AND 2; APEX HOLDING COMPANY, LLC; DRY LAKE WATER, LLC; GEORGIA-PACIFIC GYPSUM, LLC; REPUBLIC ENVIRONMENTAL TECHNOLOGIES, INC.; SIERRA PACIFIC POWER COMPANY, dba NV ENERGY; NEVADA POWER COMPANY, dba NV ENERGY; THE CHURCH OF JESUS CHRIST OF LATTER-DAY SAINTS; MOAPA VALLEY WATER DISTRICT; WESTERN ELITE ENVIRONMENTAL, INC.; BEDROC LIMITED, LLC; and CITY OF NORTH LAS VEGAS, Respondents.

No. 84809

COYOTE SPRINGS INVESTMENT, LLC; LINCOLN COUNTY WATER DISTRICT; and VIDLER WATER COMPANY, INC., Appellants, *v.* ADAM SULLIVAN, P.E., NEVADA STATE ENGINEER, DIVISION OF WATER RESOURCES, DEPARTMENT OF CONSERVATION AND NATURAL RESOURCES, Respondent.

No. 85137

January 25, 2024 542 P.3d 411

Consolidated appeals from a district court order granting petitions for judicial review in a water law matter and from a post-judgment order denying motions for attorney fees. Eighth Judicial District Court, Clark County; Bita Yeager, Judge.

Affirmed in part, reversed in part, and remanded.

[Rehearing denied March 7, 2024]

Aaron D. Ford, Attorney General, *Heidi Parry Stern*, Solicitor General, *Jeffrey M. Conner* and *Kiel B. Ireland*, Deputy Solicitors General, and *James N. Bolotin*, Senior Deputy Attorney General, Carson City, for Adam Sullivan, P.E., Nevada State Engineer.

Taggart & Taggart, Ltd., and *Paul G. Taggart* and *Thomas P. Duensing*, Carson City; *Steven C. Anderson*, Las Vegas, for Southern Nevada Water Authority.

Scott Lake, Reno, for Center for Biological Diversity.

Dotson Law and *Robert A. Dotson* and *Justin C. Vance*, Reno; *Steven D. King*, Dayton, for Muddy Valley Irrigation Company.

Dylan V. Frehner, District Attorney, Lincoln County; *Great Basin Law* and *Wayne O. Klomp*, Reno, for Lincoln County Water District.

Allison MacKenzie, Ltd., and *Karen A. Peterson* and *Alida C. Mooney*, Carson City, for Vidler Water Company, Inc.

Robison, Sharp, Sullivan & Brust and *Kent R. Robison* and *Hannah E. Winston*, Reno; *Brownstein Hyatt Farber Schreck, LLP*, and *Bradley J. Herrema*, Las Vegas; *Coulthard Law PLLC* and *William L. Coulthard*, Las Vegas; *Wingfield Nevada Group* and *Emilia K. Cargill*, Coyote Springs, for Coyote Springs Investment, LLC.

Dyer Lawrence, LLP, and *Francis C. Flaherty* and *Sue S. Matuska*, Carson City, for Nevada Cogeneration Associates Nos. 1 and 2.

Kaempfer Crowell and *Severin A. Carlson* and *Sihomara L. Graves*, Reno, for The Church of Jesus Christ of Latter-Day Saints.

Marquis Aurbach and *Christian T. Balducci*, Las Vegas, for Apex Holding Company, LLC, and Dry Lake Water, LLC.

McDonald Carano LLP and *Lucas Foletta*, *Sylvia Harrison*, and *Jane Susskind*, Reno, for Georgia-Pacific Gypsum, LLC, and Republic Environmental Technologies, Inc.

Parsons Behle & Latimer and *Gregory H. Morrison*, Reno, for Moapa Valley Water District.

Schroeder Law Offices, P.C., and *Laura A. Schroeder*, *Caitlin R. Skulan*, and *Therese A. Ure Stix*, Reno, for Bedroc Limited, LLC, City of North Las Vegas, and Western Elite Environmental, Inc.

Timothy M. Clausen and *Michael D. Knox*, Reno, for Sierra Pacific Power Company.

Before the Supreme Court, En Banc.

OPINION

By the Court, Lee, J.:

This case examines whether the State Engineer has the authority to redesignate multiple existing hydrographic basins as one "superbasin" based on a shared source of water for purposes of the water's administration and management. We also look at whether the State

Engineer complied with due process in creating the superbasin at issue here.

In Order 1309, the State Engineer determined that the waters of seven basins were interconnected in a manner such that withdrawals from one basin affected the amount of water in the other basins. Consequently, the State Engineer combined those basins, for administration purposes, into one superbasin. Further, the previously granted appropriations of water exceeded the rate of recharge in the superbasin, now known as the Lower White River Flow System (LWRFS). The State Engineer found that permitted groundwater pumping from that flow system may reduce the amount of water available to parties with vested surface water rights, including rights to waters from the Muddy River, a vital source of water for Las Vegas. Additionally, the State Engineer determined that no more than 8,000 afa, and perhaps less, could be appropriated from the flow system without affecting the vested rights and other public interests.

Respondents, owners of water rights throughout the new superbasin, petitioned for judicial review in the district court, alleging that the State Engineer lacks authority to conjunctively manage surface waters and groundwater and to jointly administer the multiple basins that form the LWRFS. They also asserted that the State Engineer violated their due process rights in issuing Order 1309. The district court largely agreed with respondents and granted their petitions for judicial review. The State Engineer and others interested in the flow of water throughout the LWRFS appealed.

We hold that the State Engineer has authority to conjunctively manage surface waters and groundwater and to jointly administer multiple basins and thus was empowered to issue Order 1309. We also conclude that the State Engineer did not violate due process protections because respondents received notice and had an opportunity to be heard. Accordingly, we reverse the district court's order insofar as it granted respondents' petitions for judicial review and dismissed appellants' petitions for judicial review and remand this matter to the district court for further proceedings as to the State Engineer's factual determinations. We further affirm in part and reverse in part the district court's conflicting order on whether appellants had notice that the State Engineer would adjudicate the absence of a conflict to Muddy River rights. Finally, we do not reach the merits of the attorney fees issue here, given our reversal of the order granting petitions for judicial review.

FACTS AND PROCEDURAL HISTORY

In 2001, the State Engineer considered pending applications to appropriate groundwater from several basins that sit just north of Las Vegas. The groundwater is from an underground water resource

known as the carbonate rock aquifer system, or the LWRFS, a large area of underground water whose rate of recharge and boundaries were unknown at the time. The State Engineer held those applications in abeyance and instead issued Order 1169. In Order 1169, he opined that groundwater in the various basins originated from the same carbonate rock aquifer system and that pumping groundwater from one basin might reduce the flow of water to other basins, including to the springs supplying the fully appropriated Muddy River.[1] He indicated that it was unclear how much additional groundwater could be appropriated without causing adverse effects throughout the LWRFS. In order to determine the effects of additional pumping, the State Engineer ordered water rights holders in Coyote Springs Valley, one of the subject basins, to conduct a pump test to obtain further information by stressing the aquifer. During the pump test, the water rights holders in Coyote Springs Valley pumped at least 50% of their permitted water rights over a period of two years.

Based on the results of the pump test, the State Engineer issued Order 1169A in 2012. In that order, the State Engineer determined that the increased pumping resulted in an unprecedented decrease in water flow to the highest elevation springs fed by the carbonate rock aquifer system.

The State Engineer found that the pump test measurably reduced flows in the headwater springs that feed the Muddy River, which was fully appropriated for use prior to 1905 under the Muddy River Decree. Rights holders under the Muddy River Decree hold prestatutory vested water rights, and the State Engineer is statutorily required to not impair these types of water rights. Further, the springs and tributary headwaters of the Muddy River are the only habitat of the Moapa Dace, a fish protected under the Endangered Species Act. As a result, the State Engineer acknowledged that groundwater pumping in the subject basins could negatively impact Muddy River surface water rights holders and the public interest.

Moreover, the State Engineer found that the pump test impacts were widespread, extending far beyond the Coyote Springs Valley pump test sites to multiple nearby basins, including Kane Springs Valley, Hidden Valley, Garnet Valley, the Muddy River Springs Area, California Wash, and a small part of the Black Mountains Area (the Subject Basins), all of which, with the exception of Kane Springs Valley, the State Engineer had previously designated as individual basins for the purposes of administration. As a result, he concluded the pump test provided clear proof of the close hydrologic connection of the Subject Basins, with the notable omission of Kane Springs Valley. The State Engineer then determined that

[1]"'Aquifer' means a geological formation or structure that stores or transmits water, or both." NRS 534.0105.

all the Subject Basins, except Kane Springs Valley and the Black Mountains Area, shared the same perennial yield and held no unappropriated groundwater.[2] He consequently denied hundreds of applications for further appropriations of groundwater throughout the Subject Basins based on his conclusion that there was no unappropriated water remaining in the source of supply.[3]

Thereafter, in 2019, the State Engineer began addressing concerns that the carbonate aquifer was over-appropriated by *existing* groundwater rights. He issued Order 1303, designating the Subject Basins, with the exception of Kane Springs Valley, as a "joint administrative unit for purposes of administration of water rights" called the "Lower White River Flow System." Instead of administering water rights separately within each of the previously recognized six basins, the State Engineer reordered and administered water rights throughout the newly created LWRFS based upon the respective priority dates throughout the entirety of the LWRFS.

The State Engineer further solicited reports from water rights holders on the following topics: (a) the geographic boundary of the LWRFS; (b) information related to the pump test, Muddy River headwater spring flow, and aquifer recovery; (c) the long-term annual quantity of groundwater that may be pumped from the LWRFS; (d) the effect of moving water rights between wells on senior decreed rights to the Muddy River; and (e) any other matter believed to be relevant. Lastly, Interim Order 1303 announced a future administrative hearing and held applications to change existing groundwater rights in abeyance, issued a temporary moratorium on development and construction, and allowed rights holders to use the order to support extensions of time and prevent forfeitures.

Order 1309

Following the anticipated administrative hearing, and based on the scientific evidence and testimony presented, the State Engineer in 2020 issued the order challenged herein, Order 1309. Order 1309 in pertinent part delineated the LWRFS, this time including Kane Springs Valley, as a single hydrographic basin and determined that

[2]It appears that the State Engineer suspected Kane Springs Valley and a portion of the Black Mountains Area were a part of the LWRFS but did not have enough information at the time to incorporate them in the LWRFS for the purposes of further administration. The Black Mountains Area was considered for management with the rest of the superbasin in Order 1303, and Kane Springs Valley was added in Order 1309.

[3]In issuing Order 1169A, the State Engineer found that the Muddy River was supplied by springs that recharge from groundwater in carbonate rocks and that the area of recharge included other nearby topographical areas throughout the LWRFS. As a result, groundwater pumping from the LWRFS in the Subject Basins may reduce the springs' discharge and thus reduces the flow of the Muddy River itself.

no more than 8,000 afa (and perhaps less) could be pumped from that flow system without adversely affecting the Muddy River and Moapa Dace, providing:

> 1. The Lower White River Flow System consisting of the Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley, and the northwest portion of the Black Mountains Area as described in this Order, is hereby *delineated as a single hydrographic basin*. The Kane Springs Valley, Coyote Spring Valley, Muddy River Springs Area, California Wash, Hidden Valley, Garnet Valley and the northwest portion of the Black Mountains Area are hereby established as *sub-basins within the Lower White River Flow System Hydrographic Basin*.
>
> 2. *The maximum quantity of groundwater that may be pumped* from the Lower White River Flow System Hydrographic Basin on an average annual basis *without causing further declines in Warm Springs area spring flow and flow in the Muddy River cannot exceed 8,000 afa and may be less.*
>
> 3. *The maximum quantity of water that may be pumped* from the Lower White River Flow System Hydrographic Basin *may be reduced* if it is determined that pumping will adversely impact the endangered *Moapa dace*.

(Emphases added.) Finally, Order 1309 lifted the moratorium on development and construction and also rescinded all other matters not addressed from Interim Order 1303, including the portion of Order 1303 that reordered rights throughout the LWRFS based on date of priority.

Petitions for judicial review

Water rights holders affected by Order 1309 petitioned the district court for judicial review under NRS 533.450, and the cases were consolidated. After oral argument, the district court granted respondents' petitions. The district court took judicial notice that, unlike the six other basins, Kane Springs Valley was not previously statutorily designated as a basin for administration. The district court found that the State Engineer exceeded his statutory authority when creating the LWRFS out of multiple distinct, already established hydrographic basins. The district court further found that the State Engineer lacked the statutory authority to conjunctively manage surface water and groundwater and to jointly administer multiple sub-basins within the LWRFS. Additionally, the district court determined that the State Engineer violated the water rights holders' constitutional right to due process by failing to provide adequate notice of the topics addressed at the hearing and a meaningful opportunity to be heard on the issues. The district court

declined to reach whether the factual findings in Order 1309 were supported by substantial evidence. The district court later filed an addendum to the order, granting in part and dismissing in part the petition from the Southern Nevada Water Authority (SNWA) and dismissing the petitions from the Muddy Valley Irrigation Company (MVIC) and the Center for Biological Diversity (CBD), which had primarily challenged Order 1309 only insofar as it determined that the 8,000 afa pumping cap did not impact vested water rights.

The State Engineer appealed from the district court's decisions, as did SNWA, MVIC, and CBD.[4] Respondents are parties with appropriations throughout the LWRFS whose petitions for judicial review were granted by the district court. Certain respondents have separately appealed from a post-judgment order denying their motions for attorney fees. The appeals have been consolidated for the purposes of briefing, oral argument, and disposition.

DISCUSSION

Prior appropriation doctrine

"As the driest state in the Nation," Nevada long ago adopted the prior appropriation doctrine to allocate its water, "this most precious of natural resources." *United States v. State Eng'r*, 117 Nev. 585, 592, 27 P.3d 51, 55 (2001) (Becker, J., concurring in part and dissenting in part). "The prior appropriation doctrine grants an appropriative right that may be described as a state administrative grant that allows the use of a specific quantity of water for a specific beneficial purpose if water is available in the source free from the claims of others with earlier appropriations." *Mineral County v. Lyon County*, 136 Nev. 503, 509, 473 P.3d 418, 423 (2020) (internal quotations and alterations omitted). "The doctrine of prior appropriation . . . is itself largely a product of the compelling need for certainty in the holding and use of water rights." *Arizona v. California*, 460 U.S. 605, 620 (1983), *decision supplemented*, 466 U.S. 144 (1984). Both surface water and groundwater are subject to the doctrine of prior appropriation. *Cappaert v. United States*, 426 U.S. 128, 142 (1976). "Nevada's supply of water, even with the most effective management tools, is often insufficient to supply the state's needs," and thus, "allowing water to be controlled by individual landowners was deemed to be harmful to the public at large." *United States v. State Eng'r*, 117 Nev. at 592, 27 P.3d at 55 (Becker, J., concurring in part and dissenting in part). As a result, "[t]he water of *all* sources of

[4]To the extent that SNWA and MVIC challenge two paragraphs in Order 1309 as an adjudication that the order does not conflict with their rights under the Muddy River Decree, the State Engineer has agreed with them that any such determination exceeded the scope of the hearing notice and thus violated due process. We agree that such an adjudication exceeded the scope of the hearing notice and therefore affirm the partial grant of SNWA's petition and reverse the dismissal of MVIC's petition as discussed in the conclusion.

water supply" in Nevada "belongs to the public," and the State Engineer administers water rights on the public's behalf. NRS 533.025 (emphasis added).

"The term 'water right' means generally the right to divert water by artificial means for beneficial use . . . ." *Application of Filippini*, 66 Nev. 17, 21, 202 P.2d 535, 537 (1949). The types of water rights recognized in Nevada may be thought of as two groups: (1) prestatutory "vested" rights that existed under common law prior to 1913, which may not be impaired by statutory law, and (2) statutorily granted rights, which include permitted and certificated rights. *See Andersen Fam. Assocs. v. Hugh Ricci, P.E.*, 124 Nev. 182, 188-89, 179 P.3d 1201, 1204-05 (2008). Relevant here, "vested water rights are subject to regulation under Nevada's statutory system, [but] such regulation may not impair the quantity or value of those rights." *Id.* at 190, 179 P.3d at 1206.

The State Engineer has authority to delineate the LWRFS as a single hydrographic basin for conjunctive management and joint administration

"[T]he scope of the State Engineer's authority here is a question of statutory interpretation, subject to de novo review." *Wilson v. Pahrump Fair Water, LLC*, 137 Nev. 10, 14, 481 P.3d 853, 856 (2021). "The Legislature has established a comprehensive statutory scheme regulating the procedures for acquiring, changing, and losing water rights in Nevada." *Id.* at 13, 481 P.3d at 856. "The State Engineer's powers thereunder are limited to only those . . . which the legislature expressly or implicitly delegates." *Id.* (internal quotations omitted). "[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty." *Stockmeier v. State, Bd. of Parole Comm'rs*, 127 Nev. 243, 248, 255 P.3d 209, 212 (2011).

The State Engineer has implied authority under NRS 533.085 to create the LWRFS and to determine the maximum amount that can be pumped

NRS 533.085 prohibits the impairment of vested water rights, regardless of the source of the water.[5] *See Andersen Fam. Assocs.*, 124 Nev. at 190, 179 P.3d at 1206. All statutorily granted water rights in Nevada are given subject to existing rights. NRS 533.030 ("Subject to existing rights . . . all water may be appropriated for beneficial use . . . ."); NRS 534.020 ("All underground

[5]NRS 533.085(1) states,

> Nothing contained in this chapter shall impair the vested right of any person to the use of water, nor shall the right of any person to take and use water be impaired or affected by any of the provisions of this chapter where appropriations have been initiated in accordance with law prior to March 22, 1913.

waters . . . subject to all existing rights to the use thereof, are subject to appropriation for beneficial use only under the laws of this State relating to the appropriation and use of water and not otherwise."). Because vested water rights by definition exist prior to the grant of statutorily granted water rights, all statutory rights are granted subject to vested rights, and no statutorily granted water right may impair vested water rights.

Rights under the Muddy River Decree are prestatutory vested rights under the protection of NRS 533.085 because the rights were appropriated before 1913. In order to protect prestatutory vested rights from impairment, the State Engineer must be able to determine the extent of the groundwater resource that feeds the Muddy River to determine which users are pumping from it and how much. *See Rasmussen v. Moroni Irrigation Co.*, 189 P. 572, 577 (Utah 1920) ("When therefore all of the water is appropriated by a prior appropriator which flows in a given stream at some point some distance down said stream, such appropriator acquires a right to all of the sources of supply of such stream whether visible or invisible, or whether underneath or on the surface."). The State Engineer concluded that the best available science, as presented at the Order 1309 hearing, established that the basins in the LWRFS all share the same, interconnected source of water. The State Engineer must then have the authority to determine the maximum amount that can be pumped from the LWRFS as a whole in order to determine whether water is available for further appropriation and to protect the flow of water to senior vested rights.[6] Therefore, in determining the amount of unappropriated water in the LWRFS and in accounting for the impact on the source of water, the State Engineer has the implied authority to conjunctively manage surface and groundwater and to jointly administer across multiple basins based on the interconnected source of water that flows to vested rights holders.

NRS 533.085 gives the State Engineer the statutory authority to conjunctively manage surface waters with groundwater. If statutory rights holders deplete groundwater resources such that the flow of water to the elevated springs that feed the Muddy River is reduced to the point of impairing vested rights, then the State Engineer has the authority to invoke NRS 533.085 to protect vested rights. *Cf. Andersen Fam. Assocs.*, 124 Nev. at 191, 179 P.3d at 1206 (stating that "a loss of priority can amount to a de facto loss of rights depending on water flow").

We likewise decline to hold that NRS 533.085 solely applies within a single previously delineated basin and cannot extend across multiple basins regardless of the location of the supply of water.

[6]We do not determine at this time exactly how the State Engineer is to manage previously granted appropriation rights throughout the sub-basins in the LWRFS, or whether he can apply a pump cap to individual users, as those issues are not before us.

Without this authority, junior rights holders could deplete the shared water resource according to their local priority and previously granted appropriation, regardless of the impact such appropriation has on vested rights holders outside of the local basin. This result would be contrary to both NRS 533.085 and the prior appropriation doctrine because it could impair the most senior prestatutory vested rights that rely on this supply of water. *See Andersen Fam. Assocs.*, 124 Nev. at 191, 179 P.3d at 1206; *see also Proctor v. Jennings*, 6 Nev. 83, 87 (1870) ("Priority of appropriation, where no other title exists, undoubtedly gives the better right.").

We further note the legislative policy declarations set forth in NRS 533.024(1)(c) and (e), which require the State Engineer to "consider the best available science in rendering decisions concerning the available surface and underground sources of water" and "[t]o manage conjunctively the appropriation, use and administration of all waters," support our interpretation. If the best available science indicates that groundwater and surface water in the LWRFS are interrelated and that appropriations from one reduces the flow of the other, then the State Engineer should manage these rights together based on a shared source of supply. Since the State Engineer must have the ability to conjunctively manage and jointly administer water across multiple basins in order to prevent the impairment of senior vested rights under NRS 533.085, we hold that he has the implied statutory authority to do so.

The State Engineer also has authority to issue Order 1309 pursuant to a multitude of other statutory provisions

Appellants point to a multitude of other statutory authority, including but not limited to NRS 534.080(1), NRS 533.370(2), NRS 534.030, NRS 534.110(6), NRS 534.110(3), and NRS 534.120, that give the State Engineer the power to conjunctively manage and jointly administer the subject basins. Respondents assert that no statute authorizes the State Engineer to redefine, combine, or delineate previously established basins into a new superbasin. We take this opportunity to interpret each statute in turn in order to clarify the State Engineer's authority to conjunctively manage and jointly administrate water.

Under NRS 534.080(1), the right to appropriate groundwater can be obtained only by complying with the provisions of NRS Chapter 533 "pertaining to the appropriation of water." NRS Chapter 533 addresses both surface water and groundwater, and several provisions implicitly require conjunctive management and joint administration. NRS 533.030(1) makes the appropriations of "all water" "[s]ubject to existing rights." Thus, any appropriation granted under NRS 534.080(1) is subject to existing surface water and groundwater rights. Any appropriation of groundwater under NRS 534.080(1) is likewise subject to nonimpairment of vested

rights under NRS 533.085 and is thus subject to conjunctive management and joint administration concepts based on a shared source of supply, as earlier discussed.

NRS 534.080(1)'s requirement to comply with NRS Chapter 533 also requires compliance with NRS 533.370(2). NRS 533.370(2) requires the State Engineer to reject applications for permitted water rights "where there is no unappropriated water in the proposed source of supply . . . *or where its proposed use or change conflicts with existing rights*." (Emphasis added.) We previously interpreted NRS 533.370(2) in *Eureka County v. State Engineer*, 131 Nev. 846, 856, 359 P.3d 1114, 1121 (2015), and held that the State Engineer must consider the effect that groundwater appropriations have on spring discharge. There, we determined that new groundwater appropriations that deplete springs were a "conflict" for the purposes of NRS 533.370(2). *Id.* at 852, 359 P.3d at 1118. Although we did not use the term "conjunctive management," it is clear the concept was recognized in that caselaw. *See id.*; *see also Cappaert*, 426 U.S. at 142 (noting that "Nevada itself may recognize the potential interrelationship between surface and groundwater since Nevada applies the law of prior appropriation to both").

We next turn to NRS 534.030 and NRS 534.110(6). NRS 534.030(1) and (2) give the State Engineer authority to designate an area as a "basin" for the purposes of further administration, and NRS 534.110(6) gives him authority to "conduct investigations in any basin or portion thereof" where replenishment appears inadequate and to restrict withdrawals to conform to priority rights. To determine whether these statutes support Order 1309, we must first determine the definition of "basin" as used in these statutes.

The State Engineer asserts that "basin" is broad and inclusive, and thus may include an aquifer and multiple previously delineated topographical basins. In its ruling, the district court narrowly defined "basin" as the 253 hydrographic areas originally established by the United States Geological Survey (USGS), which was adopted and published on a map by Nevada's Division of Water Resources in 1968. *See* NRS 532.170 (the State Engineer is authorized to enter into agreements with the USGS for "investigations related to the development and use of the water resources of Nevada"); Eugene F. Rush, *Water Resources Information Series, Report 6, Index of Hydrographic Areas in Nevada*, Nevada Department of Conservation and Natural Resources, Division of Water Resources (1968), http://images.water.nv.gov/images/publications/Information%20series/6.pdf (Rush Report). We disagree with the district court's interpretation that "basin" refers only to the 253 hydrographic areas or topographical "sub-basins," and we hold that "basin" includes the meaning the State Engineer ascribes to it.

"[A]n agency charged with the duty of administering an act is impliedly clothed with power to construe it as a necessary precedent

to administrative action." *State v. Morros*, 104 Nev. 709, 713, 766 P.2d 263, 266 (1988) (internal quotations omitted). However, this court will only "defer to an agency's interpretation of its governing statutes . . . if its interpretation is *reasonable*." *Pub. Emps.' Ret. Sys. of Nev. v. Nev. Pol'y Rsch. Inst., Inc.*, 134 Nev. 669, 673 n.3, 429 P.3d 280, 284 n.3 (2018).

Although used throughout NRS Chapters 532, 533, and 534, "basin" is not defined by statute. *See, e.g.*, NRS 534.030(1)(b) (describing the State Engineer's procedure to "designate the area by basin" for the purposes of administration); *see generally* NRS Chapters 532-534 (leaving "basin" undefined). The State Engineer's interpretation of "basin" reasonably fits within a dictionary definition as "an enclosed or partly enclosed water area" or "a broad area of the earth beneath which the strata dip [usually] from the sides toward the center." *See Basin*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2003). Further, statutes containing the word "basin" expressly contemplate underground water and thus should not be limited to solely a surface level or topographical meaning. *See* NRS 534.030(2) and (5) (discussing "groundwater basin[s]"); NRS 534.110(6) (stating the State Engineer "shall conduct investigations in any basin" where "the average annual replenishment to the groundwater supply may not be adequate").[7]

The State Engineer is charged with the duty of administering and construing his statutory authority and his interpretation is reasonable. *See Morros*, 104 Nev. at 713, 766 P.2d at 266. Therefore, "basin" as used by the State Engineer in water law may include an "aquifer" and may include multiple previously delineated basins as sub-basins.

Turning to NRS 534.110(6), it states in pertinent part,

> [T]he State Engineer shall conduct investigations in any basin or portion thereof where it appears that the average annual replenishment to the groundwater supply may not be adequate[,] . . . and if the findings of the State Engineer so indicate, . . . the State Engineer may order that withdrawals . . . be restricted to conform to priority rights . . . .

"[W]hen statutory language is clear and unambiguous, the court will not look beyond its plain meaning and will give effect to its apparent intent from the words used, unless that meaning was

[7]We likewise disagree with the district court's conclusion that "basin" is singular and that management of water was only authorized on a sub-basin within a basin approach. While this interpretation of basin as singular is a permissive way to manage water, it is not exclusive of the plural management of multiple basins. *See* NRS 0.030(1) ("Except as otherwise expressly provided in a particular statute or required by the context[,] . . . [t]he singular number includes the plural number, and the plural includes the singular."). Nor in context does the meaning of "basin" require the individual management of sub-basins and yet prohibit management of a larger basin composed of sub-basins.

clearly not intended." *Andersen Fam. Assocs.*, 124 Nev. at 187, 179 P.3d at 1204 (internal quotations omitted). NRS 534.110(6) is clear and unambiguous: the State Engineer shall conduct investigations in a basin or any portion where the groundwater replenishment may not be adequate for all permittees and all vested-right claimants and may order restrictions based on those findings.

In order to investigate a basin and determine if the replenishment to the groundwater supply is adequate, the State Engineer must be able to determine the boundaries of the basin that contains the groundwater supply, the boundaries of the area that replenishes the basin, and the rate of replenishment. *See* NRS 534.110(6); *Stockmeier*, 127 Nev. at 248, 255 P.3d at 212 ("[F]or implied authority to exist, the implicitly authorized act must be essential to carrying out an express duty."). "Basin," as discussed, may mean a large area and include aquifers or an area with multiple basins that share the same source of interconnected groundwater supply. We hold that NRS 534.110(6) gives the State Engineer the implied authority to make a factual finding as to the boundaries of the LWRFS and determine the maximum amount that can be pumped from the LWRFS without reducing the supply of groundwater.[8] He may then delineate the boundary of the basin for administration under NRS 534.030. All of this requires conjunctive management and joint administration.

The State Engineer also has the express statutory authority to make the factual finding that the "area affected" by new appropriations is broader than a previously defined basin. NRS 534.110(3) states, "The State Engineer shall determine whether there is unappropriated water in the area affected and may issue permits only if the determination is affirmative." An "area affected" as used in NRS 534.110(3) is not limited to "aquifer" or "basin," because "aquifer" is used at NRS 534.110(2), and "basin" is used at NRS 534.110(6)-(8). *Andersen Fam. Assocs.*, 124 Nev. at 187-88, 179 P.3d at 1204 (stating "no statutory language should be rendered mere surplusage if such a consequence can properly be avoided"). The State Engineer must delineate the "area affected" to determine whether there is unappropriated water in the "area" in order to protect prior existing water rights. *See* NRS 533.030(1); *see also* NRS 533.085.[9]

Finally, we turn our attention to NRS 534.120(1), which states,

> Within an area that has been designated by the State Engineer, as provided for in this chapter, where, in the judgment of the State Engineer, the groundwater basin is being depleted, the

[8]The factual findings in Order 1309 do not by themselves re-prioritize the rights of individual permittees, and Order 1309 revoked the portions of Interim Order 1303 that re-prioritized rights.

[9]We note that the State Engineer has already effectively used this authority to protect existing rights holders throughout the LWRFS, including respondents, by denying applications for appropriations based on the results of Order 1169.

> State Engineer in his or her administrative capacity may make such rules, regulations and orders as are deemed essential for the welfare of the area involved.

We hold that the plain language of this statute supports the State Engineer's authority to issue Order 1309 in the six previously designated basins. NRS 534.120(1) is silent as to the specific ability of a State Engineer to redraw boundaries or group basins together. However, the clause enabling the State Engineer to "make such rules, regulations and orders as are deemed essential for the welfare of the area involved" is a broad delegation of authority, one that encompasses the creation of the LWRFS out of multiple sub-basins for future management and determining the maximum amount of water that can be pumped.[10]

We disagree with respondents' argument that an area must be designated as a critical management area under NRS 534.110(7) before the State Engineer is authorized to make orders under NRS 534.120(1). There is no indication that an "area" in NRS 534.120(1) has the exact same meaning as a "critical management area" under 534.110(7). Additionally, it would be illogical and unreasonable to require the State Engineer to define a "critical management area" without first making a factual finding as to the boundaries of the area containing groundwater.

The State Engineer has the implied authority to determine the boundaries of the source of water in order to protect the Moapa Dace against future appropriations

Finally, we turn to the statutory arguments regarding the protection of the Moapa Dace. Appellants assert that delineation of the LWRFS boundary was necessary to protect the State of Nevada from liability under the federal Endangered Species Act (ESA) for failing to protect the endangered Moapa Dace from groundwater pumping, citing NRS 533.367 and NRS 533.370(2). Respondents assert that the State Engineer lacks the authority to combine multiple basins in order to protect an endangered species and that the plain language of NRS 533.367 and NRS 533.370(2) does not provide the State Engineer with the authority to manage existing water rights.[11]

---

[10]Because Kane Springs was not previously designated a basin for administration, the State Engineer may not rest on his authority in NRS 534.120(1) to issue orders in that area and must instead rely on the previously discussed statutory authority.

[11]Respondents also assert that the Moapa Dace is already protected via a variety of agreements the parties entered into with the federal government. We note that not all of the appellants, and in particular the State Engineer, are party to all of the agreements cited; thus the Moapa Dace may not be fully protected by preexisting agreements.

NRS 533.367 states in pertinent part that "[b]efore a person may obtain a right to the use of water from a spring or water which has seeped to the surface of the ground, the person must ensure that wildlife which customarily uses the water will have access to it." Although the plain language of this statute places the onus on the person seeking the right to use water, there is no way for a person to know how much water they can take without impeding "access" to wildlife such as fish without first obtaining information on the flow of water from the source of supply from the State Engineer. Thus, NRS 533.367 impliedly requires the State Engineer to determine the amount of water in the source of supply to springs or seeps, in order to determine how much water can be drawn.

NRS 533.370(2) similarly provides that the State Engineer shall reject applications "where there is no unappropriated water in the proposed source of supply" or that "threaten[ ] to prove detrimental to the public interest." Both of these statutes require the State Engineer to determine the amount of water "in the proposed source of supply" in order to determine if an application would be a threat to the public interest.[12] The preservation of wildlife is part of the public interest. *See Pyramid Lake Paiute Tribe of Indians v. Washoe County*, 112 Nev. 743, 752, 918 P.2d 697, 702 (1996) (discussing whether the potential impact from pumping would impact wildlife and thus be detrimental to the public interest). The State Engineer has implied authority to make a factual determination as to the boundaries of the source of water in order to make determinations on new applications for appropriations.[13]

There is no due process violation because respondents received notice and had an opportunity to be heard on the State Engineer's order

Respondents assert that they lacked notice of the topics of the Order 1309 hearing and were not afforded a full and complete opportunity to address the implications of the State Engineer's decision to subject the basins to conjunctive management and joint administration. We review "constitutional challenges de novo, including a violation of due process rights challenge." *Eureka County v. Seventh Jud. Dist. Ct.*, 134 Nev. 275, 279, 417 P.3d 1121, 1124 (2018). "In Nevada, water rights are 'regarded and protected as real property.'" *Id.* (quoting *Application of Filippini*, 66 Nev. 17, 21-22, 202 P.2d 535, 537 (1949)). "Both the United States Constitution and the

[12]Neither of these statutes, however, permits the impairment of already existing rights in order to protect the Moapa Dace or avoid ESA liability.

[13]We note that the State Engineer's 8,000 afa pump cap does not reference the Moapa Dace and is not yet applied. We decline to extend our ruling to address whether the State Engineer may apply a pump cap for the benefit of an endangered species because that issue is not before us.

Nevada Constitution guarantee that a person must receive due process before the government may deprive him of his property." *Callie v. Bowling*, 123 Nev. 181, 183, 160 P.3d 878, 879 (2007). "Procedural due process requires that parties receive notice and an opportunity to be heard." *Eureka County*, 134 Nev. at 279, 417 P.3d at 1124 (internal quotations omitted). Due process attaches when there is even the "possible outcome" of curtailment; thus water rights holders must be noticed. *Id*. at 279-80, 417 P.3d at 1125.

Apart from respondents in Kane Springs Valley, all respondents were afforded adequate notice, through Interim Order 1303, of the topics of the Order 1309 hearing. Interim Order 1303 contemplated all of the issues under contention in Order 1309. Thus, respondents other than those from Kane Springs Valley received constitutionally adequate notice.

With regard to the respondents with wells in Kane Springs Valley, their inclusion in the Order 1309 hearing was not contemplated in Interim Order 1303. They likewise did not participate in the Order 1169 pump test. However, Kane Springs Valley respondents participated in the administrative hearing due to a request from the SNWA to the State Engineer to consider including Kane Springs in the Order 1309 hearing and the LWRFS in late 2018. The record also reflects that the Kane Springs Valley respondents received over one month of formal notice of the potential inclusion of Kane Springs Valley, with time allotted for a presentation through a Notice of Hearing dated August 23, 2019. Thus, all of the respondents received constitutionally adequate notice.

We likewise hold that all of the respondents had an adequate opportunity to be heard on the factual issues. There are no policy or management issues resolved in Order 1309 such that respondents needed the opportunity to be heard on those issues. No deprivation of priority property rights occurred because Order 1309 rescinded the portion of Interim Order 1303 that reordered priority rights. Additionally, there was no loss of flow to any respondent as a result of Order 1309, much less the "possible outcome" of curtailment, because the findings of the State Engineer were purely factual. The Order 1309 hearing resulted in factual findings as to the boundaries of the LWRFS and the maximum amount of water that could be pumped, and the State Engineer did not consider capping or curtailing any individual user as a result of the hearing. Further, the record is clear that all respondents, including the Kane Springs Valley respondents, were able to provide meaningful input on the factual issues at the administrative hearing.[14] *Cf. Sw. Gas Corp. v.*

[14]Respondent Nevada Cogeneration Associates Nos. 1 and 2 asserts that the State Engineer violated due process by improperly shifting the burden of proof regarding the delineation of the boundary for the LWRFS. We conclude there was no such burden shifting.

Pub. Utils. Comm'n of Nev., 138 Nev. 37, 46, 504 P.3d 503, 511-12 (2022) (holding the due process claims failed because the issue was raised in the prefiled direct testimony, providing notice that the issue would be considered, and the appellant was afforded the opportunity to argue against it at the hearing). Any findings regarding the maximum amount that can be pumped from the LWRFS were not contemplated for the actual management of individual users and were instead made for future proceedings.[15]

Finally, appellants assert that the district court erred when it held that the State Engineer violated respondents' due process rights by not disclosing the criteria he used to evaluate hydrologic connections before the Order 1309 hearing. Respondents assert that the State Engineer failed to give notice of the six criteria he used for determining the boundary of the new basin.

The "opportunity to be heard" is "a right that includes the ability to challenge the evidence upon which the State Engineer's decision may be based." *Eureka County v. State Eng'r*, 131 Nev. 846, 855, 359 P.3d 1114, 1120 (2015). "The Due Process Clause forbids an agency to use evidence in a way that forecloses an opportunity to offer a contrary presentation." *Id.* (quoting *Bowman Transp., Inc. v. Arkansas-Best Freight Sys., Inc.*, 419 U.S. 281, 288 n.4 (1974)). However, the Due Process Clause does "not preclude a factfinder from observing strengths and weaknesses in the evidence that no party identified." *Bowman Transp., Inc.*, 419 U.S. at 288 n.4.

Here, respondents are not alleging that they lacked access to the underlying data or the factual issues; rather, they assert that they did not have access to the State Engineer's method of interpreting, analyzing, and weighing facts prior to the hearing. The Due Process Clause does not require the State Engineer to explain how he will analyze and weigh evidence prior to the evidence being submitted at a hearing. *See id.* Therefore, the district court erred by finding violations of due process.

CONCLUSION

The State Engineer did not exceed his statutory authority in issuing Order 1309. The State Engineer has statutory authority to combine multiple basins into one hydrographic "superbasin" based on a shared source of water. Additionally, respondents' due process rights were not violated because they received notice and had the opportunity to be heard at the Order 1309 hearing. Accordingly, we

[15]We note that the inclusion of Kane Springs Valley and part of the Black Mountain Area appears to be in part for the opportunity to conduct additional studies on their hydrologic connection to the LWRFS. This appears to be an acknowledgment from the State Engineer that the parties raised factual issues that merit further study, which further strengthens our holding that there was sufficient opportunity to be heard.

reverse the district court's order granting respondents' petitions for judicial review. For the same reason, we reverse the district court's order dismissing MVIC and CBD's petitions for judicial review and reverse the district court's order to the extent it dismissed in part SNWA's petition for judicial review, directing the district court to grant those petitions insofar as they assert the State Engineer has the statutory authority to make the findings in Order 1309.

Additionally, we agree with appellants SNWA, MVIC, and the State Engineer that the adjudication of an absence of conflict between current groundwater pumping and rights under the Muddy River Decree exceeded the scope of the hearing notice. We therefore affirm the district court's decision to the extent it granted SNWA's petition and reverse the dismissal of MVIC's petition, directing the district court to grant it in part on remand. We remand for the district court to continue its review under NRS 533.450 to determine whether substantial evidence supports Order 1309 and for further proceedings in accordance with this opinion. We likewise lift our Order Granting Stay filed October 3, 2022.

Finally, we do not reach the issue of attorney fees in Docket No. 85137 because our decision in this matter renders the issue moot. *See Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 606, 245 P.3d 572, 574-75 (2010) (dismissing appeal where subsequent events rendered the case moot).

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

JAMIE MARIE CHITTENDEN, Appellant, *v.* JUSTICE COURT OF PAHRUMP TOWNSHIP, Respondent.

No. 85383-COA

January 25, 2024 544 P.3d 919

Appeal from a district court order denying a petition for a writ of mandamus. Fifth Judicial District Court, Nye County; Kimberly A. Wanker, Judge.

Affirmed.

The Law Firm of Nathan L. Gent, PLLC, and *Nathan L. Gent*, Pahrump, for Appellant.

Aaron D. Ford, Attorney General, Carson City; *Brian Kunzi*, District Attorney, and *Bradley J. Richardson*, Deputy District Attorney, Nye County, for Respondent.

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

OPINION

By the Court, Westbrook, J.:

In this decision, we address NRS 171.196(2)'s requirement that a preliminary hearing be set within 15 days of a criminal defendant's initial appearance on a felony or gross misdemeanor charge unless good cause exists for the delay.[1] We conclude that when deciding whether good cause exists, the justice court must balance the defendant's constitutional right to conditional pretrial liberty against the interests of the State and the needs of the court. Further, the court must make findings on the record to justify any delay of the preliminary hearing and undertake efforts to ensure that the hearing is held as soon as practicable.

In this case, appellant Jamie Marie Chittenden filed a petition for a writ of mandamus in the district court seeking dismissal of the charges against her because the justice court scheduled her preliminary hearing 76 days after her initial appearance, while she remained in custody. The district court denied her petition because it found that good cause existed for this extraordinary delay. Although we conclude that the district court abused its discretion when it found good cause for the extreme delay in this case, we nevertheless affirm the district court's denial of Chittenden's petition for extraordinary writ relief on other grounds.

[1]We use the term preliminary hearing synonymously with "preliminary examination" as referenced in NRS 171.196(2).

PROCEDURAL AND FACTUAL HISTORY

In May 2022, a criminal complaint was filed against Chittenden and four other codefendants, and a warrant for Chittenden's arrest was issued. She was eventually arrested, and on July 28, 2022, Chittenden was brought to appear before the Pahrump Justice Court. The complaint alleged a total of sixteen counts against all codefendants, with five of those counts against Chittenden. Specifically, she was charged with one count of forgery, three counts of using another person's identifying information to harm or impersonate another person, and one count of conspiracy.

Chittenden, who appeared in custody for her initial appearance, requested an own recognizance release or reduction in bail, which was set in the warrant at $70,000. After the justice court denied these requests, Chittenden invoked her right to a preliminary hearing within 15 days. However, the justice of the peace set Chittenden's preliminary hearing for October 12, 2022—76 days later.

Chittenden objected generally to the hearing setting as being outside of the 15-day window but did not request any specific form of relief. The justice court indicated that the October 12 date was "the soonest that we could put on a case of this magnitude, with this many [co]defendants" because otherwise,

> this case is all gonna be bifurcated and you're gonna have to have four separate or different judges, at least, to hear it. Because if I hear her case, then I can't hear any of the other ones, so that would have to go to another judge. And whatever case he hears, then he can't hear any of the other ones, so that would have to go to another judge. Logistically, I don't think that we can do it before then, because of those problems that would arise if we tried to bifurcate this case. And I'm not sure that the [district attorney's] office wants to bifurcate this case and have to pay four or five different times for witnesses to appear.

The State opposed the bifurcation, and without further discussion, the justice court left the preliminary hearing date unchanged.

Approximately one month after her initial appearance, Chittenden petitioned the district court for a writ of mandamus, arguing that the justice court scheduled her preliminary hearing beyond 15 days without good cause in violation of NRS 171.196(2).[2] The writ petition requested that the district court compel the justice court to "follow the law as set forth by NRS 171.196" and to dismiss Chittenden's case. Without requiring a response from the State or hearing any argument from the parties, the district court denied the petition. In its order, the district court cited *Shelton v. Lamb*, 85

[2]NRS 171.196(2) provides that if a defendant does not waive their right to a preliminary hearing, "the magistrate shall hear the evidence within 15 days, unless for good cause shown the magistrate extends such time."

Nev. 618, 460 P.2d 156 (1969), and noted that the court's calendar, pendency of other cases, public expense, health of the judge, and convenience of the court are good causes for a continuance. Then, the court summarily concluded that "[i]n this case, the Justice of the Peace was within the parameters of the law to continue [Chittenden's] preliminary hearing to October 12, 2022."

On the day of her scheduled preliminary hearing, out of the five codefendants charged in the case, only Chittenden appeared in the justice court. She then unconditionally waived her preliminary hearing and agreed to plead guilty to one count of forgery—a category D felony—and to pay $2,950 in restitution. The parties also expressly stipulated on the record that Chittenden had preserved for appellate review the issues raised in her mandamus petition. She was then released on her own recognizance. Chittenden now appeals from the district court's order denying mandamus relief.

ANALYSIS

At the outset, we note that this case presents an unusual procedural history. After the district court denied Chittenden's pretrial petition for a writ of mandamus, she unconditionally waived her preliminary hearing pursuant to negotiations but expressly reserved her right to appeal the issue in her writ regarding the delay in her preliminary hearing. Before her sentencing hearing and before any judgment of conviction was entered, Chittenden filed a timely notice of appeal that challenged only the district court's order denying her writ petition. Neither party challenges appellate jurisdiction in this case, but before we can address the merits of Chittenden's appeal, we must first determine if the matter is properly before us. *See Mazzan v. State*, 109 Nev. 1067, 1075, 863 P.2d 1035, 1040 (1993) ("Where no court rule or statute provides for an appeal, no right to appeal exists.").

This court has jurisdiction over Chittenden's appeal, and the issue is capable of repetition, yet evading review

We first conclude that this court has jurisdiction over Chittenden's appeal from the district court's order denying mandamus. *See Ashokan v. State, Dep't of Ins.*, 109 Nev. 662, 665-66, 856 P.2d 244, 246 (1993) (providing that an appeal from a district court order denying a pretrial petition for a writ of mandamus is the proper remedy). NRS 2.090(2) provides that the Nevada Supreme Court "has jurisdiction to review upon appeal . . . an order granting or refusing to grant an injunction or mandamus in the case provided for by law." NRS 177.015(3) states that "[t]he defendant only may appeal from a final judgment or verdict in a criminal case," and an order of the district court denying a writ of mandamus is a final judgment within the meaning of NRS 177.015(3). *Ashokan*, 109 Nev. at

665, 856 P.2d at 246; *see also Round Hill Gen. Improvement Dist. v. Newman*, 97 Nev. 601, 604, 637 P.2d 534, 536 (1981) ("When disputed factual issues are critical in demonstrating the propriety of a writ of mandamus, the writ should be sought in the district court, with appeal from an adverse judgment to this court." (citing NRS 34.160, NRS 34.220, and NRS 34.310)). Therefore, both NRS 2.090(2) and NRS 177.015(3) confer upon this court appellate jurisdiction over the district court's order denying Chittenden's petition for a writ of mandamus. *Ashokan*, 109 Nev. at 666, 856 P.2d at 246; Nev. Const. art. VI, § 4.

However, Chittenden's appeal challenges the delay of her preliminary hearing without good cause, and a violation of NRS 171.196(2) would have resulted in her unlawful confinement. *See Shelton*, 85 Nev. at 619, 460 P.2d at 157. We note that Chittenden's unconditional waiver of her preliminary hearing and subsequent plea rendered any pretrial detention issue moot. *See generally Valdez-Jimenez v. Eighth Jud. Dist. Ct.*, 136 Nev. 155, 156, 460 P.3d 976, 980 (2020); *see also Sheriff, Washoe Cnty. v. Myles*, 99 Nev. 817, 818, 672 P.2d 639, 639 (1983) (agreeing with the petitioner that "any illegality in the [defendant's] detention was moot upon the finding of probable cause and bind-over at the preliminary hearing"). Further, insofar as Chittenden sought writ relief directing the justice court to "follow the law" and hold her preliminary hearing within 15 days, this relief is no longer available.

Nonetheless, where an appeal is moot, this court may still consider it "if it involves a matter of widespread importance that is capable of repetition, yet evading review." *Personhood Nev. v. Bristol*, 126 Nev. 599, 602, 245 P.3d 572, 574 (2010). The party seeking to overcome mootness must show "that (1) the duration of the challenged action is relatively short, (2) there is a likelihood that a similar issue will arise in the future, and (3) the matter is important." *Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 334-35, 302 P.3d 1108, 1113 (2013); *see also Valdez-Jimenez*, 136 Nev. at 158, 460 P.3d at 982.

The parties did not address mootness in their briefing. However, "[b]ecause mootness is an element of justiciability and raises a question as to our jurisdiction, we consider the matter sua sponte." *Aguirre v. S.S. Sohio Intrepid*, 801 F.2d 1185, 1189 (9th Cir. 1986). In doing so, we conclude that, although Chittenden's appeal is moot, the issue presented here is within the exception to the mootness doctrine.

As to the first factor, the 15-day window provided in NRS 171.196(2) is short in duration, such that a writ petition challenging an allegedly unlawful delay is unlikely to be heard before that window expires. Further, a challenge to an unlawful delay will become moot whenever a case is resolved by dismissal, negotiation, or

bind-over. *See Gerstein v. Pugh*, 420 U.S. 103, 110 n.11 (1975) ("Pretrial detention is by nature temporary, and it is most unlikely that any given individual could have his constitutional claim decided on appeal before he is either released or convicted.").

As to the second factor, we note that there were 32,787 new felony and gross misdemeanor cases filed in Nevada's justice courts during the 2023 fiscal year. 2023 Nev. Sup. Ct. Ann. Rep. app. tbl. B5-1. Given that all criminal defendants charged by criminal complaint with a gross misdemeanor or felony are statutorily entitled to a preliminary hearing, there is a substantial likelihood that a similar issue will arise in the future based on the volume of cases alone. *See* NRS 171.196(1).

Finally, as to the third factor, the issue in this case is of widespread importance. Nevada's appellate courts have not addressed the subject of good cause to delay an initial preliminary hearing setting beyond 15 days since the 1970s. *See Stevenson v. Sheriff, Clark Cnty.*, 92 Nev. 535, 536, 554 P.2d 255, 255 (1976). Our analysis of this issue will "affect many arrestees" and involves the defendant's constitutional right to conditional pretrial liberty. *Valdez-Jimenez*, 136 Nev. at 160, 460 P.3d at 983; *Johnston v. Eighth Jud. Dist. Ct.*, 138 Nev. 700, 706-07, 518 P.3d 94, 102 (2022). Further, deciding this issue "would provide guidance to judges" who are tasked with determining a defendant's custody status and scheduling critical hearings. *Valdez-Jimenez*, 136 Nev. at 161, 460 P.3d at 983. Therefore, because the issue presented in Chittenden's appeal is capable of repetition, yet evading review, we choose to consider her issue on the merits notwithstanding Chittenden's unconditional waiver of her preliminary hearing. We now turn to the merits of Chittenden's claim.

The district court abused its discretion in finding good cause for Chittenden's preliminary hearing delay

Chittenden argues that the district court erroneously denied her petition for a writ of mandamus because the justice court set her preliminary hearing beyond 15 days of her initial appearance without good cause in violation of NRS 171.196(2). The State responds that the district court correctly denied her writ petition because the justice court had good cause to schedule her preliminary hearing 76 days after her initial appearance due to the nature of the case and the court's calendar.

A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, NRS 34.160, or to control a manifest abuse or arbitrary or capricious exercise of discretion, *Round Hill*, 97 Nev. at 603-04, 637 P.2d at 536. Chittenden argued in her writ petition that the justice court manifestly abused its discretion when it "arbitrarily and capriciously" set her preliminary hearing 76 days after her

initial appearance without good cause to do so in violation of NRS 171.196(2). In its order denying the writ, the district court recited several of the potential grounds for good cause listed in *Shelton* and then summarily concluded that good cause existed in this case, without explicitly identifying the good cause that justified the extraordinarily lengthy delay.

We review an order denying a request for mandamus relief for an abuse of discretion. *Koller v. State*, 122 Nev. 223, 226, 130 P.3d 653, 655 (2006). A justice court's assessment of good cause under NRS 171.196(2) is likewise reviewed for an abuse of discretion. *See In re Search Warrants (Little Darlings)*, 139 Nev. 202, 207, 535 P.3d 673, 678 (Ct. App. 2023) (providing that Nevada's appellate courts have typically held that "good cause" determinations are within the court's discretion). However, in this case, even under a deferential standard of review, we conclude that the district court abused its discretion in finding good cause for the delay of Chittenden's preliminary hearing.

In *Shelton*, the Nevada Supreme Court addressed consolidated appeals by two appellants who alleged that the justice court violated their statutory right to a preliminary hearing within 15 days under NRS 171.196(2) by setting their hearings 17 and 18 days after the appellants' respective initial appearances. 85 Nev. at 619-20, 460 P.2d at 157-58. In examining whether good cause existed to delay the preliminary hearings, the supreme court provided several possible grounds that could constitute good cause, including the "condition of [the court's] calendar, the pendency of other cases, public expense, and the convenience or health of judge, court officers, and jurors." *Id.* at 620, 460 P.2d at 157. The court then concluded that good cause existed for the minor delays in the appellants' preliminary hearings. *Id.* Similarly, in *Stevenson*, 92 Nev. at 536, 554 P.2d at 255, the supreme court found there was good cause to set the appellant's preliminary hearing 19 days after his initial appearance and extended the potential grounds for good cause under NRS 171.196(2) to include overcrowded court calendars.

Here, in contrast to the minor delays in *Shelton* and *Stevenson*, the justice court set Chittenden's preliminary hearing 76 days after her initial appearance in justice court, or 61 days beyond the statutory threshold. This delay amounted to more than *four times* the 15-day window provided for in NRS 171.196(2).

To justify the extensive delay in this case, the justice court identified two grounds that it believed constituted good cause: (1) that bifurcating the five codefendants into five separate preliminary hearings would require five different justices of the peace to preside over the hearings and (2) that having five separate preliminary hearings would cause undue financial hardship on the State because it would "have to pay four or five different times for witnesses to

appear." On their face, these reasons initially appear to comport with *Shelton* and *Stevenson*, which permit consideration of the justice court's calendar and public expense. However, these proffered good cause reasons for the delay were premised on mistakes of law and fact and were unsupported by the record. In addition, the justice court failed to consider Chittenden's constitutional interest in conditional pretrial liberty when it scheduled her preliminary hearing 76 days after her initial appearance, during which time Chittenden remained in custody after her request for a release or reduction in bail was denied. Therefore, under the circumstances of this case, the district court abused its discretion when it found that the justice court had good cause to delay Chittenden's preliminary hearing.

The justice court's good cause determination was based on mistakes of law and fact

The justice court's first given reason, that bifurcating Chittenden's preliminary hearing would require separate preliminary hearings for each of the five codefendants, with a different justice of the peace to preside over each hearing, was legally incorrect. As a matter of law, there was no requirement that the justice court bifurcate *all* five codefendants into five separate preliminary hearings. For example, the justice court could have held two or more separate hearings, with one for the defendants who invoked their right to a speedy hearing and one for those who waived that right.

Further, even if the justice court did hold five separate preliminary hearings, presiding over one would not have required the justice of the peace to disqualify himself from presiding over all others. "[A] judge has a general duty to sit, unless a judicial canon, statute, or rule requires the judge's disqualification." *Millen v. Eighth Jud. Dist. Ct.*, 122 Nev. 1245, 1253, 148 P.3d 694, 700 (2006). This court also expects "judges, including every one of our limited jurisdiction judges in the State of Nevada, to disregard improper, inadmissible, or impalpable evidence and base their findings and decisions only on admissible evidence." *Canarelli v. Eighth Jud. Dist. Ct.*, 138 Nev. 104, 109, 506 P.3d 334, 339 (2022); *see also State, Dep't of Highways v. Campbell*, 80 Nev. 23, 33, 388 P.2d 733, 738 (1964) ("[W]here inadmissible evidence has been received by the court, sitting without a jury, and there is other substantial evidence upon which the court based its findings, the court will be presumed to have disregarded the improper evidence."); *Randell v. State*, 109 Nev. 5, 7, 846 P.2d 278, 280 (1993) (stating that judges "spend much of their professional lives separating the wheat from the chaff" (internal quotation marks omitted)).

Generally, "what a judge learns in his official capacity does not result in disqualification." *Kirksey v. State*, 112 Nev. 980, 1007, 923 P.2d 1102, 1119 (1996). To be disqualified, it must be shown that a

bias stems "from an extrajudicial source and result[s] in an opinion on the merits on some basis other than what the judge learned from participation in the case," *Whitehead v. Nev. Comm'n on Jud. Discipline*, 110 Nev. 380, 428 n.45, 873 P.2d 946, 976 n.45 (1994), or that the judge learns something during the course of performing judicial duties and "forms an opinion that displays a deep-seated favoritism or antagonism that would make fair judgment impossible," *Canarelli*, 138 Nev. at 109, 506 P.3d at 339 (internal quotation marks omitted).

Here, anything the justice of the peace would have learned from a preliminary hearing would have been in his official capacity, and he would not have been inherently disqualified from sitting in successive preliminary hearings in the same underlying case. Indeed, we note that the same justice of the peace would presumably hear similar information about the case whether he presided over a single preliminary hearing or over two or more different hearings. Accordingly, the justice court's belief that holding more than one preliminary hearing in this case would require hearings before multiple other justices of the peace is without legal basis.

The justice court's second given reason for delaying Chittenden's preliminary hearing—that having separate preliminary hearings would place an undue financial burden on the State—is also untenable in these circumstances. "The preliminary examination is not intended to be a mini-trial." *Parsons v. State*, 116 Nev. 928, 936, 10 P.3d 836, 841 (2000). The State set forth no factual basis for the justice court to conclude that bifurcating Chittenden's hearing would have caused any hardship, including an undue financial burden, on the State. *Cf. Lee v. Sheriff of Clark Cnty.*, 85 Nev. 379, 380, 455 P.2d 623, 624 (1969) ("The burden is upon the state to demonstrate good cause why appellant did not receive a preliminary hearing within 15 days as required by NRS 171.196(2)."). The State did not address how many witnesses it required, where those witnesses were located, or what additional expense would be incurred in having separate hearings.[3] Chittenden was also named in less than one-third of the charges filed, which suggests that the State would not have been required to present all of the same evidence or witnesses at the codefendants' preliminary hearings.

Therefore, we conclude that the justice court's decision to delay Chittenden's preliminary hearing 76 days from her initial appearance on these grounds was patently unreasonable and a manifest abuse of discretion. Insofar as the district court determined that the justice court's stated reasons constituted good cause under *Shelton*, it also abused its discretion.

[3]We also note that the record indicates the elderly victim in this case had passed away prior to Chittenden's initial appearance.

The justice court also failed to consider Chittenden's constitutional right to conditional pretrial liberty

As noted above, *Shelton* provided a nonexhaustive list of potential reasons that could establish good cause to delay a preliminary hearing beyond 15 days under NRS 171.196(2). However, when *Shelton* was decided in 1969, the preliminary hearing was not yet recognized as a critical stage in the proceedings. *See Victoria v. Young*, 80 Nev. 279, 284, 392 P.2d 509, 512 (1964) (concluding that the preliminary hearing is not a critical stage in the proceedings), *overruled on other grounds by Shelby v. Sixth Jud. Dist. Ct.*, 82 Nev. 204, 211, 414 P.2d 942, 945-46 (1966). Because the preliminary hearing was not considered a critical stage, the hearing had few constitutional implications beyond a limited right to counsel. *Compare Messmore v. Fogliani*, 82 Nev. 153, 154-55, 413 P.2d 306, 306-07 (1966) (holding that an unrepresented defendant's Sixth Amendment rights were violated only because witness testimony taken during the preliminary hearing was introduced at trial), *with Kaczmarek v. State*, 120 Nev. 314, 326, 91 P.3d 16, 25 (2004) (recognizing that Sixth Amendment rights attach at the time that "adversarial proceedings" commence, including preliminary hearings); *see also Patterson v. State*, 129 Nev. 168, 174, 298 P.3d 433, 437 (2013) (recognizing the preliminary hearing as a critical stage in the proceedings). As a result, the potential good cause grounds identified in *Shelton* did not take into account the constitutional rights of the accused, nor did it address how a lengthy delay might impact those constitutional rights.

While *Shelton*'s list of potential grounds to find good cause remains good law, the Nevada Supreme Court recently recognized that "[p]retrial release and detention decisions implicate a liberty interest—conditional pretrial liberty—that is entitled to procedural due process protections." *Johnston*, 138 Nev. at 706, 518 P.3d at 102 (quoting *Holland v. Rosen*, 895 F.3d 272, 297 (3d Cir. 2018)). The court acknowledged this fundamental pretrial liberty interest attaches after arrest. *See Valdez-Jimenez*, 136 Nev. at 162, 460 P.3d at 984 (citing *United States v. Salerno*, 481 U.S. 739, 750 (1987), for the proposition that "the individual's strong interest in liberty" is "fundamental"). The court then recognized that this constitutional interest is not limited to a defendant's initial arrest, but also applies when a defendant is later remanded into custody pending a hearing to determine their custody status. *See Johnston*, 138 Nev. at 706-07, 518 P.3d at 102. In light of *Johnston* and *Valdez-Jimenez*, we necessarily conclude that the right to conditional pretrial liberty applies to defendants awaiting their preliminary hearings, which also may involve "[p]retrial release and detention decisions" based on the justice court's probable cause findings. *Id* at 706, 518 P.3d at 101.

We recognize, however, that there has been no clear guidance on how this constitutional right applies to a defendant's statutory right to a preliminary hearing within 15 days. We therefore take this opportunity to clarify how the defendant's constitutional rights articulated in *Johnston* and *Valdez-Jimenez* impact the justice court's determination of good cause for a delay under NRS 171.196(2), and we conclude that the court must balance the constitutional rights of the defendant against the interests of the State and the needs of the court when evaluating good cause.

Though a preliminary hearing itself is not a constitutional mandate,[4] a defendant's detention pending their preliminary hearing nonetheless implicates their constitutional interest in conditional pretrial liberty and must be considered in the justice court's evaluation of good cause for a delay under NRS 171.196(2). *Johnston*, 138 Nev. at 707, 518 P.3d at 101 ("The timing of a hearing, if one is required, is often of fundamental importance for due process."); *see also Thompson v. State*, 86 Nev. 682, 683, 475 P.2d 96, 97 (1970) ("Statutes prescribing filing times and trial dates serve as protection against oppression of people accused of crimes.").

Therefore, when evaluating good cause to set a preliminary hearing beyond 15 days from the initial appearance, justice courts must consider the defendant's custody status and any applicable conditions of pretrial release. The court must also consider the length of the anticipated delay. *See Chavez v. Dist. Ct.*, 648 P.2d 658, 660 (Colo. 1982) (finding that relief in the form of case-ending sanctions was warranted when the appellant remained in custody for over a month due to the prosecution's lack of preparedness where Colorado law required a preliminary hearing within 30 days); *cf. Shelton*, 85 Nev. at 619, 460 P.2d at 156-57 (affirming preliminary hearing settings 2 and 3 days beyond the 15-day statutory threshold); *Stevenson*, 92 Nev. at 536, 554 P.2d at 256 (affirming a preliminary hearing setting 4 days beyond the 15-day statutory threshold).

An extensive delay beyond the initial 15 days, such as Chittenden's, will more substantially impact a defendant's constitutional rights, particularly when the defendant remains incarcerated. *See McGee v. Sheriff, Clark Cnty.*, 86 Nev. 421, 423, 470 P.2d 132, 133 (1970) (noting that pretrial detention during "the pendency of a criminal charge may subject an accused to public scorn, deprive him of his employment and curtail his speech and associations"). On the other hand, longer delays can more easily be justified when the defendant is neither detained nor subject to onerous conditions of pretrial release, and so the justice court may readdress the

[4]*Azbill v. Fisher*, 84 Nev. 414, 418, 442 P.2d 916, 918 (1968) ("There is no Constitutional right to a preliminary hearing."), *superseded by statute on other grounds as stated in Davis v. Sheriff, Clark Cnty.*, 93 Nev. 511, 512, 569 P.2d 402, 403 (1977).

defendant's custody status contemporaneously with its good cause analysis. *Cf.* NRS 178.499(1) (permitting the justice court, upon its own motion, to increase the amount of bail for good cause); *Salaiscooper v. Eighth Jud. Dist. Ct.*, 117 Nev. 892, 900-01, 34 P.3d 509, 515 (2001) ("The justice courts have express authority to consider constitutional issues[.]").

However, when considering a delay's impact on the defendant's constitutional rights, the justice court must "balanc[e] the interest of the State against fundamental fairness to a defendant with the added ingredient of the orderly functioning of the court system." *State v. Moriwake*, 647 P.2d 705, 712 (Haw. 1982) (quoting *State v. Braunsdorf*, 297 N.W.2d 808, 817 (Wis. 1980) (Day, J., dissenting)); *see also Bullock v. Superior Ct. of Contra Costa Cnty.*, 264 Cal. Rptr. 3d 699, 714 (Ct. App. 2020) (balancing due process interests in a timely preliminary hearing against the specific risks of COVID-19).

The Nevada Supreme Court has already recognized circumstances where the State would be entitled to a continuance of the preliminary hearing. *See, e.g.*, *Hill v. Sheriff, Clark Cnty.*, 85 Nev. 234, 235, 452 P.2d 918, 919 (1969) (recognizing that good cause to continue a preliminary hearing may exist when a subpoenaed witness is unavailable). We see no reason why the anticipated unavailability of a witness, and other grounds that may constitute good cause for a *continuance*, should not also be relevant considerations when *initially* setting a preliminary hearing. Further, as already established by *Shelton*, the justice court may take into account the needs of the court when determining whether good cause exists for a delay, including the court's calendar and the pendency of other cases. 85 Nev. at 620, 460 P.2d at 157; *Stevenson*, 92 Nev. at 536, 554 P.2d at 255.[5]

What constitutes good cause to set a preliminary hearing outside 15 days under NRS 171.196(2) is not subject to a bright-line rule and will vary based on the facts and circumstances of each case. *See Shelton*, 85 Nev. at 620, 460 P.2d at 157. However, the justice court must make findings of fact as to what constitutes good cause so that the reviewing court is not left to speculate as to the justice court's reasoning. *Bullock*, 264 Cal. Rptr. 3d at 714; *see also State v. Ruscetta*, 123 Nev. 299, 304, 163 P.3d 451, 455 (2007) ("Although certain facts may be inferred from the district court's ruling, we decline to speculate about the factual inferences drawn by the district court." (internal quotation marks omitted)).

Thus, "[t]he record must reflect that the [delay] was reasonable in both purpose and length" when the justice court determines that a delay is justified. *State v. Martin*, 384 N.E.2d 239, 242 (Ohio 1978)

[5]We note that a defendant may waive the right to a preliminary hearing within 15 days, *see* NRS 171.196(2), in which case a good cause analysis is not required.

(internal quotation marks omitted). And there should be a "nexus between the [reason for the delay] and the purported need to delay the hearing." *Bullock*, 264 Cal. Rptr. 3d at 714. Therefore, when finding that good cause exists to set a preliminary hearing beyond 15 days, the justice court must make findings, either in writing or on the record, as to why the delay is justified and should also undertake efforts to set the preliminary hearing as soon as possible after the 15-day period.

In this case, the justice court manifestly abused its discretion by failing to consider Chittenden's constitutional interest in conditional pretrial liberty when evaluating good cause for the delay. Prior to setting her preliminary hearing, the court denied Chittenden's request for a release or reduction in bail, and so Chittenden remained in custody for more than two months before the State was required to meet its statutory burden to prove "that there [was] probable cause to believe that an offense has been committed and that [Chittenden] committed it." NRS 171.206. The 61-day delay in this case was extraordinary, particularly when compared with the two-, three-, and four-day delays deemed justified in *Shelton* and *Stevenson*. In fact, by setting her preliminary hearing 76 days from the date of the initial appearance, the justice court delayed Chittenden's preliminary hearing beyond the time that she would have been statutorily entitled to a *trial*. *See* NRS 178.556 (providing that the court may dismiss a case if the accused is not brought to trial within 60 days after the arraignment on an indictment or information). Further, the record does not reflect that the court made any efforts to set Chittenden's hearing within 15 days or as soon as possible thereafter.[6]

Although the justice court's good cause determination addressed its own interest regarding the pendency of other cases and the court's calendar as well as the State's interest in avoiding unnecessary public expense, as detailed above, the court's justifications for the delay were premised on mistakes of law and fact. When balancing Chittenden's strong constitutional interest against the interests of the State and court in this case, the proffered good cause was

[6]The State argues on appeal that, even in the absence of good cause, Chittenden was required to show that the delay prejudiced her. We disagree. Notably, the State relied on authorities addressing a constitutional speedy trial claim, including *Barker v. Wingo*, 407 U.S. 514 (1972), and *Doggett v. United States*, 505 U.S. 647 (1992). However, unlike a constitutional speedy trial violation where the defendant is required to demonstrate prejudice, *see Barker*, 407 U.S. at 530, a defendant is not required to show prejudice when asserting a statutory violation of NRS 171.196(2), which places the burden exclusively on the State to establish good cause for the delay, *Lee*, 85 Nev. at 380, 455 P.2d at 624. Nevada has not previously required a defendant to show prejudice if the State fails to satisfy its burden to establish good cause under NRS 171.196(2), and we decline to impose such a requirement here.

plainly inadequate to justify the 61-day delay, and the district court abused its discretion in finding otherwise. *See Round Hill*, 97 Nev. at 603-04, 637 P.2d at 536.

Other grounds support the denial of the petition for a writ of mandamus

While we agree with Chittenden that there was no good cause to justify the delay in her preliminary hearing, her petition for a writ of mandamus sought remedies that the district court could not provide. As noted above, a writ of mandamus is only available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station, or to control a manifest abuse or arbitrary or capricious exercise of discretion. *Id.* at 604, 637 P.2d at 536; NRS 34.160. In her writ petition, Chittenden requested that the district court compel the justice court both to "follow the law as set forth by NRS 171.196" and to dismiss the case.

Chittenden's first request for relief, that the district court compel the justice court to "follow the law," would have required the justice court to set her preliminary hearing within 15 days under NRS 171.196(2). When initially setting a preliminary hearing, NRS 171.196(2) provides that the magistrate "shall" set the hearing within 15 days unless the time is extended for good cause, and thus, assuming there is no good cause for a delay, the statute reflects a nondiscretionary obligation. *See Markowitz v. Saxon Special Servicing*, 129 Nev. 660, 665, 310 P.3d 569, 572 (2013) ("The word 'shall' is generally regarded as mandatory."). Because the statute is mandatory, mandamus could arguably apply to compel the justice court to set a preliminary hearing within 15 days under NRS 171.196(2). However, in this case, Chittenden's request was moot; her hearing could not have been set within 15 days because Chittenden waited a month after her initial appearance to file the writ petition.[7]

That left Chittenden's request for dismissal as the only viable request for relief that remained. However, Chittenden failed to request dismissal in the justice court in the first instance. "Mandamus lies to correct clear error or an arbitrary abuse of discretion by the [justice] court, a standard that requires adequate presentation of the issue to the [justice] court for decision in the first instance." *PN II, Inc. v. Eighth Jud. Dist. Ct.*, No. 71051, 2016 WL 5400225 (Nev. Sept. 16, 2016) (Order Denying Petition for Writ of Mandamus and Prohibition) (internal citations omitted) (citing *United States v. U.S. Dist. Ct.*, 384 F.3d 1202, 1205 (9th Cir. 2004) (declining to consider as a basis for mandamus an argument not presented to the lower

[7]We note that Chittenden's writ petition did not request to revisit her bail or custody status.

court)); *see also Plata v. Schwarzenegger*, 560 F.3d 976, 984 (9th Cir. 2009) ("It would be most inappropriate for this court to address issues . . . by the extraordinary writ of mandamus before the [lower] court has dealt with them."). The district court in this case could not have properly compelled the justice court to grant Chittenden's request for dismissal because Chittenden neither requested dismissal in the justice court in the first instance, nor was the justice court required to dismiss her case sua sponte. *See Sheriff, Clark Cnty. v. Hatch*, 100 Nev. 664, 666 n.1, 691 P.2d 449, 450 n.1 (1984).[8]

Further, insofar as Chittenden requested that the district court compel the justice court to dismiss her case because the delay in her preliminary hearing resulted in her unlawful detention, Chittenden's request for relief was not properly raised in a mandamus writ petition. Rather, the appropriate vehicle to challenge unlawful detention resulting from an alleged violation of NRS 171.196(2) is a petition for a writ of habeas corpus. *Id.* ("[W]here an accused is detained unlawfully by reason of violation of jurisdictional procedural requirements, denial of a speedy trial, or other proper grounds, a district court may review the legality of the detention on habeas corpus."). Although "[a] pretrial writ of habeas corpus is not the proper avenue to challenge a discretionary ruling," *State v. Nelson*, 118 Nev. 399, 404, 46 P.3d 1232, 1235 (2002), as noted above, NRS 171.196(2) obligates the justice court to set the preliminary hearing within 15 days in the absence of good cause for a delay. Thus, Chittenden's request to dismiss her case due to her unlawful detention should have been raised in a petition for a writ of habeas corpus.

Therefore, the district court properly denied her petition for a writ of mandamus, albeit on other grounds. *See Wyatt v. State*, 86 Nev. 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.").

---

[8]There is no statutorily mandated dismissal remedy for a violation of NRS 171.196(2). *Cf.* NRS 178.556(1) (providing that the district court "may dismiss the complaint" or "indictment or information" for an unnecessary trial delay). As the Nevada Legislature has expressly provided a dismissal remedy for improper delays that violate a defendant's statutory right to a speedy trial, the absence of a similar statutory remedy for an improper delay before a preliminary hearing is presumed intentional. *See State, Dep't of Tax'n v. DaimlerChrysler Servs. N. Am., LLC*, 121 Nev. 541, 548, 119 P.3d 135, 139 (2005) ("Nevada law also provides that the omissions of subject matters from statutory provisions are presumed to have been intentional."). However, dismissal without prejudice has been recognized as a *discretionary* remedy in similar circumstances. *See, e.g.*, *Sheriff, Clark Cnty. v. Blackmore*, 99 Nev. 827, 829, 673 P.2d 137, 138 (1983) (providing that a magistrate's dismissal at the preliminary hearing is without prejudice unless the prosecution acted in a willful or consciously indifferent manner); *McNair v. Sheriff, Clark Cnty.*, 89 Nev. 434, 439, 514 P.2d 1175, 1178 (1973) (noting the prosecution's acknowledgment that the "justice of the peace correctly denied the State's motion for continuance and dismissed its complaint against appellant").

CONCLUSION

In summary, we conclude that good cause did not exist to delay Chittenden's preliminary hearing for an additional 61 days beyond the 15-day threshold as set forth in NRS 171.196(2). Insofar as the district court found that good cause existed for the delay, the district court abused its discretion. Further, the justice court manifestly abused its discretion in failing to consider Chittenden's constitutional right to conditional pretrial liberty when it delayed her preliminary hearing, during which time Chittenden remained in custody.

When evaluating whether there is good cause to delay an initial preliminary hearing setting beyond 15 days, justice courts must balance the defendant's constitutional rights against the interests of the State and the needs of the court. And we hold that justice courts must make findings as to why a delay is justified and must undertake efforts to ensure that the preliminary hearing is held as soon as possible thereafter.

Even though we conclude that good cause did not exist for the delay in this case, the district court properly denied Chittenden's petition for a writ of mandamus because the two forms of relief she requested were unavailable to her. Accordingly, we affirm the district court's decision, albeit on other grounds.

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