NATIONSTAR MORTGAGE, LLC, APPELLANT, *v.* SATICOY BAY LLC SERIES 2227 SHADOW CANYON, RESPONDENT.

No. 70382

November 22, 2017 405 P.3d 641

Appeal from a district court summary judgment in a quiet title action. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

[Rehearing denied December 13, 2017]

[En banc reconsideration denied February 23, 2018]

Akerman LLP and *Ariel E. Stern, Rex D. Garner*, and *Allison R. Schmidt*, Las Vegas, for Appellant.

Law Offices of Michael F. Bohn, Ltd., and *Michael F. Bohn*, Las Vegas, for Respondent.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, HARDESTY, J.:

In *SFR Investments Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 334 P.3d 408 (2014), this court held that under NRS Chapter 116 a homeowners' association (HOA) has a lien on a homeowner's home for unpaid monthly assessments, that the HOA's lien is split into superpriority and subpriority pieces, and that proper foreclosure of the superpriority piece of the lien extinguishes a first deed of trust. In so doing, we noted but did not consider whether such a foreclosure sale could be set aside if it were "commercially unreasonable." *Id.* at 418 n.6. Subsequently in *Shadow Wood Homeowners Ass'n, Inc. v. New York Community Bancorp, Inc.*, 132 Nev. 49, 366 P.3d 1105 (2016), we considered whether such a sale could be set aside based solely on inadequacy of price. Therein, we reiterated the rule from prior Nevada cases that inadequacy of price alone "is not enough to set aside [a] sale; there must also be a showing of fraud, unfairness, or oppression." *Id.* at 60, 366 P.3d at 1112 (citing *Long v. Towne*, 98 Nev. 11, 639 P.2d 528 (1982)). Nonetheless, because *Shadow Wood* also cited the Restatement (Third) of Property: Mortgages § 8.3 (1997), which recognizes that a court is "[g]enerally" justified in setting aside a foreclosure sale when the sales price is less than 20 percent of the property's fair market value, 132 Nev. at 60 & n.3, 366 P.3d at 1112-13 & n.3, appellant Nationstar Mortgage argues that an HOA foreclosure sale can be set aside based on commercial

unreasonableness or based solely on low sales price. We therefore take this opportunity to provide further clarification on these issues.

As to the "commercial reasonableness" standard, which derives from Article 9 of the Uniform Commercial Code (U.C.C.), we hold that it has no applicability in the context of an HOA foreclosure involving the sale of real property. As to the Restatement's 20-percent standard, we clarify that *Shadow Wood* did not overturn this court's longstanding rule that " 'inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale' " absent additional " 'proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price,' " 132 Nev. at 58-59, 366 P.3d at 1111 (quoting *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963)). That does not mean, however, that sales price is wholly irrelevant. In this respect, we adhere to the observation in *Golden* that where the inadequacy of the price is great, a court may grant relief based on slight evidence of fraud, unfairness, or oppression. 79 Nev. at 514-15, 387 P.2d at 994-95 (discussing *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880 (Cal. Ct. App. 1955)). Because Nationstar's identified irregularities do not establish that fraud, unfairness, or oppression affected the sale, we affirm the district court's summary judgment in favor of respondent Saticoy Bay.

FACTS AND PROCEDURAL HISTORY

The subject property is located in a neighborhood governed by an HOA. The previous homeowner had obtained a loan to purchase the property, which was secured by a deed of trust, and which was eventually assigned to Nationstar. When the previous homeowner became delinquent on her monthly assessments, the HOA's agent recorded a notice of delinquent assessment lien, a notice of default, and a notice of sale, and then proceeded to sell the property at a foreclosure sale to Saticoy Bay for $35,000. Thereafter, Saticoy Bay instituted the underlying quiet title action, naming Nationstar as a defendant and seeking a declaration that the sale extinguished Nationstar's deed of trust such that Saticoy Bay held unencumbered title to the property.

Saticoy Bay and Nationstar filed competing motions for summary judgment. As relevant to this appeal, Nationstar argued "the sales price of the property at the HOA auction was commercially unreasonable as a matter of law." In support of this argument, Nationstar provided an appraisal valuing the property at $335,000 as of the date of the HOA's foreclosure sale, and it cited to the Restatement (Third) of Property: Mortgages § 8.3 (1997) for the proposition that a court is generally justified in setting aside a foreclosure sale when the sales price is less than 20 percent of the property's fair market value. In opposition, Saticoy Bay argued that commercial reason-

ableness is not a relevant inquiry in an HOA foreclosure sale of real property and that, instead, such a sale can only be set aside if it is affected by fraud, unfairness, or oppression. According to Saticoy Bay, because Nationstar had not produced any evidence showing fraud, unfairness, or oppression affected the sale, Saticoy Bay was entitled to summary judgment. Ultimately, the district court agreed with Saticoy Bay and granted summary judgment in its favor. This appeal followed.

DISCUSSION

We review de novo a district court's decision to grant summary judgment. *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005). "Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id.* (quotation and alteration omitted). "The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant." *Id.* at 731, 121 P.3d at 1031.

We first consider whether U.C.C. Article 9's commercial reasonableness standard applies when considering an HOA's foreclosure sale of real property. Concluding that the commercial reasonableness standard is inapplicable, we next consider whether a low sales price, in and of itself, may warrant invalidating an HOA foreclosure sale. After reaffirming our longstanding rule that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a [foreclosure] sale," *Golden*, 79 Nev. at 514, 387 P.2d at 995, we next consider whether Nationstar produced evidence showing that the sale was affected by "fraud, unfairness, or oppression" that would justify setting aside the sale, *id*. Because we agree with the district court that Nationstar's proffered evidence does not show fraud, unfairness, or oppression affected the sale, we affirm the district court's summary judgment.[1]

U.C.C. Article 9's commercial reasonableness standard is inapplicable in the context of an HOA foreclosure sale of real property

Before considering Nationstar's argument regarding commercial reasonableness, some context is necessary. Article 9 of the U.C.C. is entitled "Secured Transactions." Generally speaking, and with various exceptions, Article 9 provides the framework by which a

[1]Nationstar also argues that NRS Chapter 116's foreclosure scheme violates its due process rights. That argument fails in light of *Saticoy Bay LLC Series 350 Durango 104 v. Wells Fargo Home Mortgage*, 133 Nev. 28, 388 P.3d 970 (2017), wherein this court held that due process is not implicated when an HOA forecloses on its superpriority lien in compliance with NRS Chapter 116's statutory scheme because there is no state action.

person may obtain money from a creditor in exchange for granting a security interest in personal property (i.e., collateral). *See* NRS 104.9109(1); U.C.C. § 9-109(a) (Am. Law Inst. & Unif. Law Comm'n (2009)); *see generally* William H. Lawrence, William H. Henning & R. Wilson Freyermuth, *Understanding Secured Transactions* §§ 1.01-1.03 (4th ed. 2007) (providing an overview of Article 9's purpose and scope). Article 9 also provides the framework by which the creditor, upon the debtor's default, may repossess and dispose of the personal property to satisfy the outstanding debt. *See* NRS 104.9601-.9628; U.C.C. §§ 9-601 to 9-628. Because a wide array of personal property may be used as collateral, Article 9 does not provide detailed requirements by which a creditor must dispose of the collateral, but instead provides generally that the creditor's disposition of the collateral must be done in a "commercially reasonable" manner. *See* NRS 104.9610(1)-(2); U.C.C. § 9-610(a)-(b); *see also* NRS 104.9627(2) (defining a "commercially reasonable" disposition with reference to the "recognized market" and "in conformity with reasonable commercial practices" for the particular collateral at issue); U.C.C. § 9-627(b) (same); Lawrence, Henning & Freyermuth, *supra* § 18.02 (recognizing that Article 9's procedures governing disposition are "deliberately flexible" because "[t]he drafters hoped that Article 9 dispositions would produce higher prices than those typically obtained in real estate foreclosures").

This court has considered on several occasions whether an Article 9 disposition of collateral was commercially reasonable. In so doing, we have observed that "every aspect of the disposition, including the method, manner, time, place, and terms, must be commercially reasonable," *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98, 560 P.2d 917, 920 (1977) (quoting the former version of NRS 104.9610(1)), and that "[t]he conditions of a commercially reasonable sale should reflect a calculated effort to promote a sales price that is equitable to both the debtor and the secured creditor," *Dennison v. Allen Grp. Leasing Corp.*, 110 Nev. 181, 186, 871 P.2d 288, 291 (1994). We have also observed that because "a secured creditor is generally in the best position to influence the circumstances of sale, it is reasonable that the creditor has an enhanced responsibility to promote fairness." *Savage Constr., Inc. v. Challenge-Cook Bros., Inc.*, 102 Nev. 34, 37, 714 P.2d 573, 575 (1986). In other words, in the context of Article 9 sales, it is arguable that this court has at least implicitly recognized two things: (1) the secured creditor has an affirmative obligation to obtain the highest sales price possible; and (2) if the sale is challenged, the secured creditor has the burden of establishing commercial reasonableness. *See Dennison*, 110 Nev. at 186, 871 P.2d at 291; *Savage Constr.*, 102 Nev. at 37, 714 P.2d at 575; *Levers*, 93 Nev. at 98, 560 P.2d at 920; *accord Chittenden Tr. Co. v. Maryanski*, 415 A.2d 206, 209 (Vt. 1980) ("[T]he majority

rule appears to be that the secured party has the burden of pleading and proving that any given disposition of collateral was commercially reasonable . . . .").

Relying on our aforementioned case law, Nationstar contends that an HOA foreclosure sale of real property should be subject to Article 9's commercial reasonableness standard, such that the HOA (or the purchaser at the HOA sale) has the burden of establishing that the HOA took all steps possible to obtain the highest sales price it could. We disagree.[2] In contrast to Article 9's "deliberately flexible" requirements regarding the method, manner, time, place, and terms of a sale of personal property collateral, *see* Lawrence, Henning & Freyermuth, *supra* § 18.02, NRS Chapter 116 provides "elaborate" requirements that an HOA must follow in order to foreclose on the real property securing its lien, *see SFR Invs.*, 130 Nev. at 753, 334 P.3d at 416. For example, before an HOA can foreclose, it must mail, record, and post various notices at specific times and containing specific information. *See generally* NRS 116.31162-.31164 (2013).[3] In other words, because the relevant statutory scheme curtails an HOA's ability to dictate the method, manner, time, place, and terms of its foreclosure sale, an HOA has little autonomy in taking extra-statutory efforts to increase the winning bid at the sale. Thus, HOA foreclosure sales of real property are ill suited for evaluation under Article 9's commercial reasonableness standard.

The Uniform Common Interest Ownership Act (UCIOA), upon which NRS Chapter 116 is modeled, *see SFR Invs.*, 130 Nev. at 745-46, 334 P.3d at 411, supports our conclusion that HOA real property foreclosure sales are not to be evaluated under Article 9's commercial reasonableness standard. In particular, the UCIOA recognizes that there are technically three different types of common interest communities and that in one of those types, the unit owner's interest in his or her property is characterized as a *personal property* interest. *See* 1982 UCIOA § 3-116(j). Specifically, and although not necessary to examine the distinctions between them for purposes of this appeal, the three different types of common interest communi-

[2]Our ensuing analysis does not directly address the basis for Nationstar's argument, which relies on a comparison of NRS 116.1113's definition of "good faith" and U.C.C. § 2-103(1)'s definition of "good faith." Nonetheless, we have considered Nationstar's argument. In summary, we find it implausible that the drafters of the Uniform Common Interest Ownership Act (and, in turn, Nevada's Legislature when it enacted NRS Chapter 116) intended to equate U.C.C. Article 9's commercial reasonableness standard pertaining to sales of personal property in a secured transaction with an HOA's sale of real property merely by cross-referencing the definition of "good faith" in U.C.C. Article 2.

[3]Because the foreclosure sale in this case took place in January 2014, we refer to the 2013 version of NRS Chapter 116 throughout this opinion. We note, however, that the Legislature's 2015 amendments to NRS Chapter 116 further curtailed an HOA's autonomy regarding the method, manner, time, place, and terms of its foreclosure sale. *See* 2015 Nev. Stat., ch. 266, §§ 2-5, at 1336-42.

ties are: (1) a "condominium or planned community,"[4] (2) "a cooperative whose unit owners' interests in the units are *real estate*," and (3) "a cooperative whose unit owners' interests in the units are *personal property*." *Id.* (emphases added). Tellingly, the UCIOA prompts a state adopting its provisions to choose and insert the following methods of sale for each of the three common interest community types:

> (1) In a condominium or planned community, the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]];
>
> (2) In a cooperative whose unit owners' interests in the units are real estate . . . , the association's lien must be foreclosed in like manner as a mortgage on real estate [or by power of sale under [insert appropriate state statute]] [or by power of sale under subsection (k)]; or
>
> (3) ***In a cooperative whose unit owners interests in the units are personal property*** . . . , the association's lien must be foreclosed in like manner as a security interest under [***insert reference to Article 9, Uniform Commercial Code***.]

1982 UCIOA § 3-116(j)(1)-(3) (emphases added).

Thus, the UCIOA's drafters drew a distinction between real property foreclosures under subsections 3-116(j)(1) and (2) and personal property foreclosures under subsection 3-116(j)(3) and expressly indicated that in the context of a personal property foreclosure, Article 9 should apply.[5] Had the drafters intended for Article 9's commercial reasonableness standard to apply to real property foreclosures in addition to personal property foreclosures, it stands to reason that the drafters would have included such language in subsections (j)(1) and (2). *See* Norman Singer & Shambie Singer, *2A Sutherland Statutory Construction* § 47:23 (7th ed. 2016) ("[W]here a legislature includes particular language in one section of a statute but omits it in another section of the same act, it is generally presumed the legislature acts intentionally and purposely in the disparate inclusion or exclusion . . . ." (quotation and alterations omitted)).[6]

---

[4]The vast majority (perhaps all) of the HOA foreclosure sales that this court has had occasion to review appear to have involved this type of common interest community.

[5]We recognize that UCIOA § 3-116(j)(2) references "subsection k" and that subsection k contains language similar to Article 9's commercial reasonableness standard. *See* 1982 UCIOA § 3-116(k) ("Every aspect of the sale, including the method, advertising, time, place, and terms must be reasonable."). We do not believe that this language changes the propriety of our reasoning.

[6]To be sure, Nevada's Legislature did not adopt § 3-116(j) when it adopted the UCIOA and instead "handcrafted a series of provisions to govern HOA

Because we conclude that HOA real property foreclosure sales are not evaluated under Article 9's commercial reasonableness standard, Nationstar's argument that the HOA did not take extra-statutory efforts to garner the highest possible sales price has no bearing on our review of the district court's summary judgment. *See Wood*, 121 Nev. at 731, 121 P.3d at 1031 ("The substantive law controls which factual disputes are material and will preclude summary judgment; other factual disputes are irrelevant."). And because HOA real property foreclosures are not subject to Article 9's commercial reasonableness standard, it follows that they are governed by this court's longstanding framework for evaluating any other real property foreclosure sale: whether the sale was affected by some element of fraud, unfairness, or oppression.[7] *Shadow Wood*, 132 Nev. at 58-60, 366 P.3d at 1111-12 (reaffirming the applicability of this framework after examining case law from this court and other courts); *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982) (applying same framework); *Turner v. Dewco Servs., Inc.*, 87 Nev. 14, 18, 479 P.2d 462, 465 (1971) (same); *Brunzell v. Woodbury*, 85 Nev. 29, 31-32, 449 P.2d 158, 159 (1969) (same); *Golden*, 79 Nev. at 514-15, 387 P.2d at 994-95 (same). Under this framework, and in contrast to an Article 9 sale, *see Chittenden Tr. Co.*, 415 A.2d at 209, Nationstar has the burden to show that the sale should be set aside in light of Saticoy Bay's status as the record title holder, *see Breliant v. Preferred Equities Corp.*, 112 Nev. 663, 669, 918 P.2d 314, 318 (1996) ("[T]here is a presumption in favor of the record titleholder."), and the statutory presumptions that the HOA's foreclosure sale complied with NRS Chapter 116's provisions, NRS 47.250(16) (providing for a rebuttable presumption "[t]hat the law has been obeyed"); *cf.* NRS 116.31166(1)-(2) (providing for a conclusive presumption that certain steps in the foreclosure process have been followed);[8] *Shadow Wood*, 132 Nev. at

---

lien foreclosures." *SFR Invs.*, 130 Nev. at 746, 334 P.3d at 411. Nonetheless, the Legislature's handcrafted provisions draw the same real property/personal property distinction and apply Article 9 only to personal property foreclosures. *See* NRS 116.3116(10).

[7]While we reject the applicability of Article 9's commercial reasonableness standard to HOA real property foreclosures, we contemporaneously clarify that evidence relevant to a commercial reasonableness inquiry may sometimes be relevant to a fraud/unfairness/oppression inquiry. Nothing in this opinion should be construed as suggesting otherwise, nor does this opinion require us to examine the extent to which the two inquiries overlap.

[8]In *Shadow Wood*, we noted the potential due process implications behind NRS 116.31166's conclusive (as opposed to rebuttable) presumption provision. 132 Nev. at 56-57, 366 P.3d at 1110. This appeal does not implicate the scope of NRS 116.31166's conclusive presumption provision, and we cite the statute only as additional legislative support for the proposition that the party challenging the foreclosure sale bears the burden of showing why the sale should be set aside.

58, 366 P.3d at 1111 (observing that NRS 116.31166's language was taken from NRS 107.030(8), which governs power-of-sale foreclosures). However, before considering whether Nationstar introduced evidence that fraud, unfairness, or oppression affected the sale, we must first consider Nationstar's argument that it was not required to do so in light of the $35,000 sales price for a property with a fair market value of $335,000.

A low sales price, in and of itself, does not warrant invalidating an HOA foreclosure sale

Nationstar's argument is based in part on its interpretation of our opinion in *Shadow Wood*, and as such, a brief summary of *Shadow Wood* is necessary. In *Shadow Wood*, a bank foreclosed on its deed of trust and then obtained the property via credit bid at the foreclosure sale for roughly $46,000. 132 Nev. at 52, 366 P.3d at 1107. Because the bank never paid off the unextinguished 9-month superpriority lien and failed to pay the continually accruing assessments after it obtained title, the HOA foreclosed on its lien. *Id.* at 60, 366 P.3d at 1112. At that sale, the purchaser bought the property for roughly $11,000. *Id.* The bank filed suit to set aside the sale, and the district court granted the bank's requested relief. *Id.* at 54-55, 366 P.3d at 1109.

On appeal, this court considered whether the bank had established equitable grounds to set aside the sale. *Id.* at 60, 366 P.3d at 1112. This court started with the premise that "demonstrating that an association sold a property at its foreclosure sale for an inadequate price is not enough to set aside that sale; there must also be a showing of fraud, unfairness, or oppression." *Id.* (citing *Long v. Towne*, 98 Nev. 11, 13, 639 P.2d 528, 530 (1982)). We then stated that the bank "failed to establish that the foreclosure sale price was grossly inadequate as a matter of law," *id.*, observing that the $11,000 purchase price was 23 percent of the property's fair market value and therefore the sales price was "not obviously inadequate." *Id.* As support, we cited *Golden v. Tomiyasu*, 79 Nev. 503, 514, 387 P.2d 989, 995 (1963), wherein this court upheld a sale with a purchase price that was 29 percent of fair market value. *Shadow Wood*, 132 Nev. at 60, 366 P.3d at 1112. We also cited the Restatement's suggestion that a sale for less than 20 percent of the property's fair market value may " '[g]enerally' " be invalidated by a court. *Id.* at 60 & n.3, 1112-13 & n.3 (quoting Restatement (Third) of Prop.: Mortgages § 8.3 (1997)). Our analysis then focused on whether the sale was affected by fraud, unfairness, or oppression. *Id.* at 61-63, 366 P.3d at 1113-14.

Nationstar suggests that *Shadow Wood* adopted the Restatement's 20-percent standard by necessary implication and that any foreclosure sale for less than 20 percent of the property's fair market value should be invalidated as a matter of law. Alternatively, if *Shadow Wood* did not adopt the Restatement, Nationstar suggests that

this court should do so now.[9] As explained below, we reject both suggestions.

The citation to the Restatement in *Shadow Wood* cannot reasonably be construed as an implicit adoption of a rule that requires invalidating any foreclosure sale with a purchase price less than 20 percent of a property's fair market value. In particular, adopting the Restatement would be inconsistent with this court's holding in *Golden* that "inadequacy of price, however gross, is not in itself a sufficient ground for setting aside a trustee's sale" absent additional "proof of some element of fraud, unfairness, or oppression as accounts for and brings about the inadequacy of price." 79 Nev. at 514, 387 P.2d at 995. If this court had adopted the Restatement, we would have overruled *Golden* rather than cite favorably to it.

Nor do we believe that we should adopt a 20-percent standard and abandon *Golden*. Primarily, we note that the Restatement provides no explanation for why 20 percent (as opposed to 10 percent, 30 percent, etc.) should be the price threshold to invalidate a foreclosure sale as a matter of law. Rather, the Restatement arrived at its conclusion that courts are generally warranted in setting aside sales for less than 20 percent of fair market value by simply surveying cases throughout the country that invalidated sales based on price alone and concluding that 20 percent of fair market value was the rough dividing line between where courts upheld the sales and where courts invalidated the sales. *See* Restatement § 8.3 cmt. b. This is not a compelling justification for adopting the Restatement's standard.

Perhaps the best rationale the Restatement gives to support its 20-percent threshold is that if the price is so low as to be "grossly inadequate" or to "shock the conscience," then there *must* have been fraud, unfairness, or oppression affecting the sale. *Id.* cmt. b; *see In re Krohn*, 52 P.3d 774, 781 (Ariz. 2002) (adopting the Restatement and construing it in a similar manner). However, *Golden* considered and rejected this same rationale, concluding there is no reason to invalidate a " 'legally made' " sale absent *actual* evidence of fraud, unfairness, or oppression. 79 Nev. at 514, 387 P.2d at 995 (quoting *Oller v. Sonoma Cty. Land Title Co.*, 290 P.2d 880, 882 (Cal. Ct. App. 1955), in adopting California's rule).[10] Because we remain convinced that *Golden*'s reasoning is sound, we decline to adopt the Restatement's 20-percent standard or any other hard-and-fast dividing line based solely on price.

---

[9]Although Nationstar's appellate briefs can be construed as making these suggestions, we recognize that during oral argument Nationstar backed away from endorsing such a hard-and-fast rule.

[10]We note that other jurisdictions agree with the reasoning in *Golden* and *Oller*. *See, e.g.*, *Holt v. Citizens Cent. Bank*, 688 S.W.2d 414, 416 (Tenn. 1984); *Sellers v. Johnson*, 63 S.E.2d 904, 906 (Ga. 1951); *Powell v. St. Louis Cty.*, 559 S.W.2d 189, 196 (Mo. 1977).

This is not to say that price is wholly irrelevant. To the contrary, *Golden* recognized that the price/fair-market-value disparity is a relevant consideration because a wide disparity may require less evidence of fraud, unfairness, or oppression to justify setting aside the sale:

> [I]t is universally recognized that inadequacy of price is a circumstance of greater or less weight to be considered in connection with other circumstances impeaching the fairness of the transaction as a cause of vacating it, and that, where the inadequacy is palpable and great, very slight additional evidence of unfairness or irregularity is sufficient to authorize the granting of the relief sought.

79 Nev. at 515-16, 387 P.2d at 995 (quoting *Odell v. Cox*, 90 P. 194, 196 (Cal. 1907)); *id.* (" 'While mere inadequacy of price has rarely been held sufficient in itself to justify setting aside a judicial sale of property, courts are not slow to seize upon other circumstances impeaching the fairness of the transaction as a cause for vacating it, especially if the inadequacy be so gross as to shock the conscience.' " (quoting *Schroeder v. Young*, 161 U.S. 334, 337-38 (1896))). Thus, we continue to endorse *Golden*'s approach to evaluating the validity of foreclosure sales: mere inadequacy of price is not in itself sufficient to set aside the foreclosure sale, but it should be considered together with any alleged irregularities in the sales process to determine whether the sale was affected by fraud, unfairness, or oppression.[11] *See id.*[12] However, it necessarily follows that

[11]While not an exhaustive list, irregularities that may rise to the level of fraud, unfairness, or oppression include an HOA's failure to mail a deed of trust beneficiary the statutorily required notices, *see SFR Invs. Pool 1, LLC v. U.S. Bank, N.A.*, 130 Nev. 742, 756, 334 P.3d 408, 418 (2014) (observing that NRS 116.31168 incorporates NRS 107.090, which requires that notices be sent to a deed of trust beneficiary); *id.* at 422 (GIBBONS, C.J., dissenting) (same); *Bourne Valley Court Tr. v. Wells Fargo Bank, NA*, 832 F.3d 1154, 1163-64 (9th Cir. 2016) (Wallace, J., dissenting) (same), *cert. denied*, 137 S. Ct. 2296 (2017); an HOA's representation that the foreclosure sale will not extinguish the first deed of trust, *see ZYZZX2 v. Dizon*, No. 2:13-CV-1307, 2016 WL 1181666, at *5 (D. Nev. Mar. 25, 2016); collusion between the winning bidder and the entity selling the property, *see Las Vegas Dev. Grp., LLC v. Yfantis*, 173 F. Supp. 3d 1046, 1058 (D. Nev. 2016); *Polish Nat'l Alliance v. White Eagle Hall Co.*, 470 N.Y.S.2d 642, 650-51 (N.Y. App. Div. 1983); a foreclosure trustee's refusal to accept a higher bid, *see Bank of Seoul & Tr. Co. v. Marcione*, 244 Cal. Rptr. 1, 3-5 (Ct. App. 1988); or a foreclosure trustee's misrepresentation of the sale date, *see Kouros v. Sewell*, 169 S.E.2d 816, 818 (Ga. 1969).

[12]This court has endorsed a similar approach in evaluating Article 9 sales. *See Iama Corp. v. Wham*, 99 Nev. 730, 736, 669 P.2d 1076, 1079 (1983); *Levers v. Rio King Land & Inv. Co.*, 93 Nev. 95, 98-99, 560 P.2d 917, 920 (1977); *see also* U.C.C. § 9-627 cmt. 2 (indicating that when an Article 9 sale yields a low price, courts should "scrutinize carefully" all aspects of the collateral's disposition). If

if the district court closely scrutinizes the circumstances of the sale and finds no evidence that the sale was affected by fraud, unfairness, or oppression, then the sale cannot be set aside, regardless of the inadequacy of price. *See id.* at 515-16, 387 P.2d at 995 (overruling the lower court's decision to set aside the sale upon concluding there was no evidence of fraud, unfairness, or oppression).

In sum, we decline to adopt the Restatement's suggestion that a foreclosure sale for less than 20 percent of fair market value necessarily invalidates the sale, meaning Nationstar was not entitled to have the foreclosure sale invalidated based solely on Saticoy Bay purchasing the property for roughly 11 percent of the property's fair market value ($35,000 purchase price for a property valued at $335,000). Consequently, we must next consider whether Nationstar's identified irregularities in the sales process show that the sale was affected by fraud, unfairness, or oppression.

Nationstar's identified irregularities do not show that the HOA foreclosure sale was affected by fraud, unfairness, or oppression

Nationstar points to three purported irregularities in the foreclosure process as evidence that the sale was affected by fraud, unfairness, or oppression: (1) the HOA's lien included fines in addition to monthly assessments even though NRS 116.31162(5) prohibits an HOA from foreclosing on a lien comprised of fines; (2) the notice of sale listed the unpaid lien amount as of the day the notice of sale was generated even though NRS 116.311635(3)(a) requires the notice of sale to list what the unpaid lien amount will be on the date of the to-be-held sale; and (3) the person who signed the notice of default was not the person who the HOA's president designated to sign the notice, which violated NRS 116.31162(2).[13] We consider each identified irregularity in turn.

Foreclosure of a lien that includes fines does not invalidate the sale

Nationstar's first argument relies on NRS 116.31162(5), which provides that an HOA "may not foreclose a lien by sale based on a

---

Nationstar's reliance on Article 9 is meant solely to argue in favor of applying such an approach in the context of real property foreclosures, we have no issue with that argument, as it does not change existing law.

[13]Nationstar also argues that the foreclosure sale was conducted in violation of the statute of limitations. Although the argument is not properly raised on appeal because Nationstar did not raise it in district court, *see Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981), the argument nevertheless fails in light of *Saticoy Bay LLC Series 2021 Gray Eagle Way v. JPMorgan Chase Bank, N.A.*, which determined that "a party has instituted 'proceedings to enforce the lien'" when the homeowner is provided a notice of delinquent assessment. 133 Nev. 21, 26, 388 P.3d 226, 231 (2017) (quoting NRS 116.3116(6)).

fine or penalty." Here, because it is undisputed that the HOA's lien was comprised of fines in addition to monthly assessments, Nationstar argues that the sale violated NRS 116.31162(5) and therefore is void.[14] We believe Nationstar's interpretation of the statute is untenable. In particular, NRS 116.3116(1) is the statute that authorizes an HOA's lien, and that statute provides that an HOA has a lien for fines *and* monthly assessments and that those fines and assessments automatically become part of the HOA's lien as soon as they become due. Thus, under Nationstar's construction of NRS 116.31162(5), an HOA could never foreclose on its lien if it had imposed a fine on the homeowner, regardless of whether the HOA's lien was also comprised of unpaid monthly assessments.

It does not appear that the Legislature intended this result, as NRS 116.31162(5) was enacted in 1997, six years after the Legislature enacted the UCIOA (i.e., NRS Chapter 116), which included NRS 116.3116(1). *See* 1997 Nev. Stat., ch. 631, § 17, at 3122; 1991 Nev. Stat., ch. 245, §§ 1-142, at 535-87. Based on the legislative history, the Legislature enacted NRS 116.31162(5) in conjunction with several other statutes in an apparent attempt to curb an HOA's ability to arbitrarily fine a homeowner and then foreclose on the homeowner's home. *See* Hearing on S.B. 314 Before the Senate Comm. on Commerce & Labor, 69th Leg. (Nev., May 1, 1997) (statement of Gail Burks, President of the Nevada Fair Housing Center, memorialized in exhibit L, explaining that HOAs tend to "abuse their authority" by "foreclos[ing] on a property for unpaid fines"); Hearing on S.B. 314 Before the Senate Comm. on Commerce & Labor, 69th Leg. (Nev., June 24, 1997) (discussing the purpose of what would become NRS 116.31162(5) without reference to its effect on NRS 116.3116(1)); 1997 Nev. Stat., ch. 631, §§ 1-27, at 3110-27 (enacting what would become NRS 116.31162(5) without altering NRS 116.3116(1)).

Because the Legislature did not discuss what impact NRS 116.31162(5) would have on NRS 116.3116(1), it is improbable that the Legislature intended for NRS 116.31162(5) to have the effect that Nationstar proposes. Rather, because the Legislature did not consider NRS 116.3116(1) when it enacted NRS 116.31162(5), it appears that the Legislature intended for NRS 116.31162(5) to prohibit an HOA from foreclosing on a lien that was comprised *solely* of fines. *See Barney v. Mount Rose Heating & Air Conditioning*, 124 Nev. 821, 826, 192 P.3d 730, 734 (2008) ("Statutes are to be read in the context of the act and the subject matter as a whole . . . ."); *Banegas v. State Indus. Ins. Sys.*, 117 Nev. 222, 228, 19 P.3d 245, 249 (2001) ("The intent of the Legislature may be discerned by reviewing the statute or the chapter as a whole."). Thus, the fact

[14]In this respect, it is unclear whether Nationstar is relying on the foreclosed-upon fines as evidence of fraud, unfairness, or oppression or as an independent statutory basis for setting aside the sale. Regardless, we are not persuaded by the argument for the reasons given below.

that the HOA in this case foreclosed on a lien that was comprised of fines in addition to monthly assessments does not violate NRS 116.31162(5) so as to invalidate the sale.

Even if the sale is not void, Nationstar suggests that unfairness exists because all the foreclosure sale proceeds were distributed to the HOA (including fine-related proceeds) instead of just the HOA's superpriority lien amount.[15] However, Saticoy Bay points out that this post-sale impropriety would not warrant invalidating the sale because NRS 116.31166(2) absolves Saticoy Bay from any responsibility to see that the sale proceeds are properly distributed and that Nationstar's recourse, if any, is against the HOA or its agent that conducted the sale and distributed the proceeds. Indeed, NRS 116.31166(2) appears to support Saticoy Bay's argument, as the statute provides that "[t]he receipt for the purchase money contained in such a deed is sufficient to discharge the purchaser from obligation to see to the proper application of the purchase money." Because Nationstar has not addressed Saticoy Bay's reliance on NRS 116.31166(2), we need not definitively determine whether the statute has such an effect in all cases implicating a dispute regarding post-sale distribution of proceeds. *See Ozawa v. Vision Airlines, Inc.*, 125 Nev. 556, 563, 216 P.3d 788, 793 (2009) (treating a party's failure to respond to an argument as a concession that the argument is meritorious). For purposes of this case, however, we are not persuaded that the apparently improper post-sale distribution of proceeds amounts to unfairness so as to justify invalidating an otherwise properly conducted sale.

The notice of sale's failure to list the unpaid lien amount on the date of the sale does not amount to fraud, unfairness, or oppression

Nationstar's next argument is based on NRS 116.311635(3)(a), which provides that the notice of sale "must include [t]he amount necessary to satisfy the lien as of the date of the proposed sale." Here, the notice of sale listed the unpaid lien amount as of the date the notice was generated, not as of the date of the to-be-held sale. Accordingly, Nationstar contends that this irregularity amounts to fraud, unfairness, or oppression sufficient to warrant setting aside the sale when considered in conjunction with the sale price being roughly 11 percent of the property's value. Although the notice of sale technically violated the statute, we are not persuaded that this

[15]As we explained in *Horizons at Seven Hills v. Ikon Holdings*, 132 Nev. 362, 373, 373 P.3d 66, 73 (2016), the superpriority portion of the lien included only the amount equal to nine months of common expense assessments, not any fines, collection fees, and foreclosure costs.

irregularity amounts to fraud, unfairness, or oppression. Significantly, there is no evidence in the record to suggest that Nationstar ever tried to tender payment in any amount to the HOA, much less that Nationstar was confused or otherwise prejudiced by the notice of sale. Thus, we conclude that this technical irregularity does not amount to fraud, unfairness, or oppression.

The person who signed the notice of default was authorized by the HOA to do so

Nationstar's last argument is based on NRS 116.31162(2), which provides that the notice of default "must be signed by the person designated in the declaration or by the association for that purpose or, if no one is designated, by the president of the association." Here, Nationstar appears to be arguing that the HOA violated NRS 116.31162(2) because the notice of default was signed by Yvette Thomas (an employee of the HOA's agent, Red Rock Financial Services) and there is no evidence in the record showing that the HOA's declaration (i.e., its CC&Rs) or the HOA's president specifically designated Ms. Thomas as the person who could sign the notice of default. To the extent that this is Nationstar's argument, we disagree. Although the statute provides that the notice of default "must" be signed by the person designated to sign the notice, the statute provides three ways by which that person may be designated, one of which is "by the association." Thus, "the association" may make a collective decision whom to designate even if its CC&Rs or president made no such designation. Nor did the HOA violate the statute by designating Red Rock Financial Services in general and not Ms. Thomas specifically, as NRS 116.073's definition of "person" supplements NRS 0.039's general definition of "person," which expressly includes "any . . . association." Accordingly, because the HOA did not violate NRS 116.31162(2), this alleged irregularity in the sales process necessarily does not amount to fraud, unfairness, or oppression.

In sum, because a low sales price alone does not warrant invalidating the foreclosure sale, and because Nationstar failed to introduce evidence that the sale was affected by fraud, unfairness, or oppression, the district court correctly determined that Saticoy Bay was entitled to summary judgment on its quiet title and declaratory relief claims. *Wood*, 121 Nev. at 729, 121 P.3d at 1029. We therefore affirm.

PARRAGUIRRE and STIGLICH, JJ., concur.

DR. SHERA D. BRADLEY, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE DOUGLAS W. HERNDON, DISTRICT JUDGE, RESPONDENTS, AND DONTAE HUDSON, AN INDIVIDUAL; AND THE STATE OF NEVADA, BY AND THROUGH STEVEN B. WOLFSON, IN HIS OFFICIAL CAPACITY AS DISTRICT ATTORNEY FOR THE COUNTY OF CLARK, REAL PARTIES IN INTEREST.

No. 70522

November 22, 2017 405 P.3d 668

Original petition for a writ of prohibition or mandamus challenging a district court order requiring petitioner to produce counseling records for *in camera* review.

Petition granted.

Kathleen Bliss Law PLLC and *Kathleen Bliss* and *Jason Hicks*, Las Vegas, for Petitioner.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Steven S. Owens*, Chief Deputy District Attorney, and *Ofelia L. Monje*, Deputy District Attorney, Clark County, for Real Party in Interest State of Nevada.

Karen A. Connolly, Ltd., and *Karen A. Connolly*, Las Vegas, for Real Party in Interest Dontae Hudson.

Law Offices of Franny Forsman and *Franny A. Forsman*, Las Vegas; *Kice Law Group, LLC*, and *Stephanie B. Kice*, Las Vegas, for Amicus Curiae Nevada Attorneys for Criminal Justice.

Before HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

NRS 49.209 provides a general rule of privilege between psychologist and patient, subject to enumerated exceptions outlined in NRS 49.213. In this opinion, we address whether the privilege applies when a criminal defendant seeks records related to a patient who is court-ordered to partake in therapy, and whether, in this matter, an exception to the privilege exists based on state or federal law or the privilege being waived. Because we hold the privilege applies in this case and there was no applicable exception or waiver of the privilege, the district court's order mandating pretrial, *in camera* re-

view of the privileged records is in error, and we grant the requested writ of prohibition.

FACTUAL AND PROCEDURAL HISTORY

J.A., a minor, was arrested while soliciting prostitution and was placed on probation through the juvenile court. As a condition of probation, J.A. was required to attend and complete counseling with petitioner Dr. Shera Bradley. Based on statements made by J.A. to the police, the State charged defendant/real party in interest Dontae Hudson with first-degree kidnapping, sex trafficking of a child under the age of 16, living from the earnings of a prostitute, and child abuse, neglect, or endangerment.

In his criminal case, Hudson filed a motion for discovery, which included requests for J.A.'s counseling, juvenile, and delinquency records. Hudson argued that the records were relevant in determining J.A.'s competence and credibility. The State opposed the motion, arguing that it was prohibited from obtaining and distributing confidential records. The district court ordered J.A.'s complete juvenile and delinquency records be provided for *in camera* review. An amended order required that Dr. Bradley disclose counseling records pertaining to J.A. for *in camera* review.

Dr. Bradley filed a motion to vacate the amended order, and Hudson filed a motion to compel Dr. Bradley to adhere to the amended order. The district court denied Dr. Bradley's motion to vacate and ordered the counseling records be submitted for *in camera* review but stayed the order, allowing Dr. Bradley to file the instant writ petition.

DISCUSSION

Petition for prohibition relief should be entertained

Dr. Bradley seeks alternative relief in the form of a writ of mandamus or prohibition. Although "[t]his court has previously issued a writ of mandamus compelling a district court to vacate a discovery order," *Wardleigh v. Second Judicial Dist. Court*, 111 Nev. 345, 350, 891 P.2d 1180, 1183 (1995), we have held "that prohibition is a more appropriate remedy for the prevention of improper discovery than mandamus," *id.* Accordingly, we consider Dr. Bradley's petition under the prohibition standard.

Generally, extraordinary relief is not available to challenge discovery orders because "[t]he law reserves extraordinary writ relief for situations where there is not a plain, speedy and adequate remedy in the ordinary course of law," and discovery orders can be adequately challenged on appeal from a final judgment. *Mitchell v. Eighth Judicial Dist. Court*, 131 Nev. 163, 167, 359 P.3d 1096, 1099 (2015) (internal quotation marks omitted); *see also* NRS 34.330.

However, "this court has issued writs to prevent improper discovery orders compelling disclosure of privileged information." *Coyote Springs Inv. v. Eighth Judicial Dist. Court*, 131 Nev. 140, 144, 347 P.3d 267, 270 (2015). Here, Dr. Bradley is not a party to the criminal case and therefore will not have standing to seek review on appeal from a final judgment, and she seeks to prevent the disclosure of allegedly privileged material based on the psychologist-patient privilege. Therefore, we elect to exercise our discretion and entertain the petition to determine whether the communications between Dr. Bradley and J.A. are privileged and whether pretrial disclosure of J.A.'s counseling records is required by state or federal law or because the privilege has been waived.

Psychologist-patient privilege

Dr. Bradley argues that the sought-after counseling records are privileged because they concern treatment she provided as J.A.'s psychologist, and that she has asserted the privilege on behalf of J.A. Dr. Bradley also claims that none of the enumerated exceptions to the psychologist-patient privilege are applicable and alleges that disclosure of the counseling records would jeopardize the open but private nature of communication between therapist and patient, a cornerstone to treatment. Hudson argues that the counseling records are not privileged due to the mandatory nature of J.A.'s counseling or due to J.A.'s treatment being an element of a claim or defense, that disclosure is required under state law and federal constitutional law, and that the privilege has been waived by disclosures of confidential information to third parties.

The psychologist-patient privilege applies to Dr. Bradley and J.A.'s confidential communications and records

NRS 49.209 outlines the psychologist-patient privilege as a patient having the ability "to refuse to disclose and to prevent any other person from disclosing confidential communications between the patient and the patient's psychologist or any other person who is participating in the diagnosis or treatment under the direction of the psychologist, including a member of the patient's family." Confidential communication is defined as:

> [C]ommunication . . . not intended to be disclosed to third persons other than: (a) Those present to further the interest of the patient in the consultation, examination or interview; (b) Persons reasonably necessary for the transmission of the communication; or (c) Persons who are participating in the diagnosis and treatment under the direction of the psychologist, including members of the patient's family.

NRS 49.207(1). The privilege may be claimed by the patient or by the psychologist on the patient's behalf. NRS 49.211.

In her motion to vacate the district court's order requiring disclosure of J.A.'s counseling records, Dr. Bradley asserted that she was providing psychological treatment to J.A. and she was claiming the privilege on behalf of her patient. She further averred that her "records [were] solely based upon treatment," that they had not been created for law enforcement purposes, and that her interaction with J.A. had been "solely limited to treatment and [ ] had nothing to do with investigative work." Hudson does not provide evidence that the content of J.A.'s counseling records pertain to anything other than treatment. Accordingly, we hold that Dr. Bradley's confidential records pertaining to J.A. are privileged, unless an exception or waiver applies.

No exception to the privilege applies

NRS 49.213 outlines several exceptions to the psychologist-patient privilege. Notably, the statute does not contain a specific exception for material relevant to the defense in a criminal case. However, two exceptions are implicated in this matter. The statute declares there is no psychologist-patient privilege in the following circumstances:

> 3. For communications relevant to an issue of the treatment of the patient in any proceeding in which the treatment is an element of a claim or defense.
> 4. If disclosure is otherwise required by state or federal law.

NRS 49.213(3), (4). We consider each of these exceptions in turn.

J.A.'s treatment is not an element of a claim or defense under NRS 49.213(3)

Although this court has not directly addressed the exception outlined in NRS 49.213(3), we addressed an almost identical exception to the doctor-patient privilege in *Mitchell v. Eighth Judicial District Court*, 131 Nev. 163, 174, 359 P.3d 1096, 1103 (2015).[1] In that case, we held that "[r]elevance alone does not make a patient's condition an element of a claim or defense," but rather, "the patient's condition must be a fact to which the substantive law assigns significance." *Mitchell*, 131 Nev. at 174, 359 P.3d at 1103 (internal quotation marks omitted). We went on to discuss illustrative examples:

> A defendant who pleads not guilty by reason of insanity, for example, has asserted a defense that has, as one of its elements, his insanity. Similarly, a disinherited child who challenges her

[1]*Compare* NRS 49.213(3), *with* 2002 Nev. Stat. 18th Special Sess., ch. 3, § 17, at 12 ("As to written medical or hospital records relevant to an issue of the condition of the patient in any proceeding in which the condition is an element of a claim or defense."), now codified as NRS 49.245(4).

> father's will on the grounds he was incompetent has asserted a claim about her father's condition to which legal consequences attach: If proved, the condition alleged invalidates the will. In both instances, the patient's condition is an *element* of the claim or defense—not merely *relevant*—because the claim or defense fails unless the condition asserted is established in fact.

Id. (internal citations omitted).

While *Mitchell* addressed the doctor-patient privilege and its exception for records relevant to a *condition* that is an element of a claim or defense, we can discern no logical reason to treat differently the almost identical language of the psychologist-patient exception for communications relevant to an *issue of treatment* that is an element of a claim or defense. Accordingly, we hold that the exception to the psychologist-patient privilege applies where, at a minimum, the treatment or an issue of treatment is a fact to which the substantive law assigns significance and that mere relevance is not sufficient to establish the treatment or an issue of treatment as an element of the claim or defense. *Cf. Potter v. W. Side Transp., Inc.*, 188 F.R.D. 362, 365 (D. Nev. 1999) (discussing a case where plaintiffs "made claims based upon their emotional condition" and holding that the exception in NRS 49.213(3)[2] applies where the patient places his or her mental health at issue).

Here, Hudson's charges include first-degree kidnapping, sex trafficking of a child under the age of 16, living from the earnings of a prostitute, and child abuse, neglect, or endangerment. He alleges that J.A.'s condition, including her behavior, alleged drug use and mental illness, and dishonesty, is part of an element of the claim or defense, without further explanation. While J.A.'s mental condition may arguably be relevant for certain purposes, that on its own is insufficient for purposes of this exception. Rather, Hudson fails to allege or demonstrate that J.A.'s treatment, or an issue of her treatment, is a fact to which the substantive law assigns significance as pertaining to the charges against Hudson or his defense. Therefore, we hold that NRS 49.213(3)'s exception to the psychologist-patient privilege does not apply under the circumstances.

Disclosure is not required under state law

The psychologist-patient privilege does not exist if disclosure of the confidential communication is required by state law. NRS 49.213(4). Hudson argues that state law, specifically NRS 174.235, requires disclosure because the prosecutor is in constructive possession of the counseling records due to the mandatory nature of J.A.'s

[2]The *Potter* court considered NRS 40.213(2), an earlier version of NRS 49.213(3) with identical language. *See* 1995 Nev. Stat., ch. 640, § 19, at 2497.

counseling as a condition of her juvenile probation.[3] He also asserts that Dr. Bradley has a contract with, and is paid by, the government for her services and that it necessarily follows she is an agent of the State. But a defendant is not entitled to the type of information Hudson seeks from the prosecutor when such information is privileged or protected from disclosure pursuant to state law, such as records protected by the psychologist-patient privilege. *See* NRS 49.209; NRS 174.235(2)(b). Therefore, under Nevada law, Hudson is not entitled to Dr. Bradley's counseling records from J.A.'s treatment and NRS 49.213(4)'s exception does not apply on this basis.

Disclosure is not required under federal law

NRS 49.213(4) exempts from the psychologist-patient privilege that which is required to be disclosed pursuant to federal law. Hudson argues that an *in camera* review is mandated because the counseling records are in constructive control of the State and J.A. may have provided Dr. Bradley with exculpatory statements, to which Hudson is entitled pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Accordingly, Hudson argues that due process requires disclosure of the counseling records. He further argues that he is entitled to the counseling records under the Confrontation Clause of the Sixth Amendment.

First addressing the arguments regarding *Brady*, we note that "[t]here is no general constitutional right to discovery in a criminal case, and *Brady* did not create one." *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977). Indeed, "the Due Process Clause has little to say regarding the amount of discovery which the parties must be afforded." *Id*. (quotation marks omitted). Although *Brady* and its

[3]NRS 174.235(1) states:

> Except as otherwise provided . . . at the request of a defendant, the prosecuting attorney shall permit the defendant to inspect and to copy or photograph any:
>
> (a) Written or recorded statements or confessions made by the defendant, or any written or recorded statements made by a witness the prosecuting attorney intends to call during the case in chief of the State, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney;
>
> (b) Results or reports of physical or mental examinations, scientific tests or scientific experiments made in connection with the particular case, or copies thereof, within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney; and
>
> (c) Books, papers, documents, tangible objects, or copies thereof, which the prosecuting attorney intends to introduce during the case in chief of the State and which are within the possession, custody or control of the State, the existence of which is known, or by the exercise of due diligence may become known, to the prosecuting attorney.

progeny stand for the proposition that "the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution," *Brady*, 373 U.S. at 87, this analysis is applied retrospectively. *See United States v. Coppa*, 267 F.3d 132, 140 (2d Cir. 2001) ("[T]he scope of the government's constitutional duty . . . is ultimately defined retrospectively, by reference to the likely effect that the suppression of particular evidence had on the outcome of the trial."); *see also* Irwin H. Schwartz, *Beyond Brady: Using Model Rule 3.8(d) in Federal Court for Discovery of Exculpatory Information*, Champion, Mar. 2010, at 34 ("*Brady* is applied retrospectively. There is never a real *Brady* violation unless nondisclosure was so serious that a post-trial review leads judges to conclude that it undermined their confidence in the verdict." (internal quotation marks omitted)).

Applying these concepts to the instant matter, where this case has yet to go to trial, this court has not been provided with a sufficient record to analyze a *Brady* claim. *See Coppa*, 267 F.3d at 140. Accordingly, we hold that due process does not require disclosure of the counseling records at this time.[4]

Regarding Hudson's argument that the Confrontation Clause requires disclosure of the records, the Confrontation Clause provides criminal defendants with a *trial right*, designed to prevent improper restrictions on the types of questions defense counsel may ask during cross-examination. *See California v. Green*, 399 U.S. 149, 157 (1970) ("[I]t is this literal right to 'confront' the witness at the time of trial that forms the core of the values furthered by the Confrontation Clause."); *Barber v. Page*, 390 U.S. 719, 725 (1968) ("The right to confrontation is basically a trial right."). As a trial right, it does not apply to pretrial discovery. *See Pennsylvania v. Ritchie*, 480 U.S. 39, 52-53 (1987) ("If we were to accept this broad interpretation of *Davis* [*v. Alaska*, 415 U.S. 308 (1974)], the effect would be to transform the Confrontation Clause into a constitutionally compelled rule of pretrial discovery. Nothing in the case law supports such a view.").

This court has yet to address whether the Confrontation Clause entitles a defendant to a witness's counseling records during pretrial discovery. However, courts have held that, at least prior to trial, the Confrontation Clause does not mandate disclosure of privileged or confidential communications. *See, e.g.*, *In re Crisis Connection, Inc.*, 949 N.E.2d 789, 796-97 (Ind. 2011); *People v. Hammon*, 938 P.2d 986, 987 (Cal. 1997) (finding no error in the trial court's order quashing subpoenas for counseling records served on psychother-

[4]Our decision in this matter does not preclude a finding, on appeal, that the counseling records should have been disclosed.

apists who had treated the complaining witness where the defendant argued that access to the information was required based on the Confrontation Clause).[5] We agree with these courts and conclude that Hudson's right to confrontation does not overcome the psychologist-patient privilege during pretrial discovery. Further, at this juncture, we note that Hudson has not articulated any particular exculpatory or relevant information that he believes may be contained in Dr. Bradley's records. Given this deficiency, we express doubt that Hudson's request, in its current form, could form the basis of a Confrontation Clause challenge at trial.

Therefore, we conclude that Hudson has not shown that disclosure of the counseling records is required under federal law, and NRS 49.213(4)'s exception to the psychologist-patient privilege does not apply.

Privilege was not waived

In addition to the exceptions outlined in NRS 49.213, the psychologist-patient privilege may also voluntarily be waived pursuant to NRS 49.385, which states:

> 1. A person upon whom these rules confer a privilege against disclosure of a confidential matter waives the privilege if the person or the person's predecessor while holder of the privilege voluntarily discloses or consents to disclosure of any significant part of the matter.
>
> 2. This section does not apply if the disclosure is:
>
> (a) Itself a privileged communication; or
>
> (b) Made to an interpreter employed merely to facilitate communications.

Hudson argues that J.A.'s mother, as well as the probation officer/case worker and representatives from the Center of Peace and Sal-

[5]As the *Hammon* court noted, there may be times when a witness's right to keep certain information confidential must yield to a criminal defendant's right to confront the witness. 938 P.2d at 992. However, these situations are more appropriately addressed at trial. *See generally Davis*, 415 U.S. 308 (holding that the defendant's right of confrontation took precedence over a statute requiring that the records of juvenile delinquency proceedings be kept confidential); *see also State v. Hufford*, 533 A.2d 866, 875-76 (Conn. 1987) (noting that if the defendant makes a sufficient preliminary showing at trial, the defendant is entitled to have the trial court conduct an *in camera* inspection of the witness's mental health records and that the witness's psychologist-patient privilege can be overridden if the trial court concludes that portions of those records are sufficiently relevant to the defendant's guilt or innocence, or are sufficiently relevant to the witness's credibility). Because this issue is not directly before this court, we need not address it at this time. Nevertheless, we note that a particularized showing by the defendant is likely required before a district court may review a witness's privileged or confidential counseling records *in camera*, even at trial.

vation Army, were present at meetings held in Dr. Bradley's office. Hudson further argues that Dr. Bradley communicated with the Department of Child and Family Services, juvenile probation, Child Protective Services, and the juvenile court about J.A.'s treatment and progress. He contends that the entirety of the preceding establishes a voluntary disclosure of confidential communications and thus a waiver of the psychologist-patient privilege.

No evidence before us demonstrates that J.A. waived the psychologist-patient privilege or authorized Dr. Bradley to do so. Although exhibits provided by Hudson suggest that Dr. Bradley communicated with other individuals regarding J.A.'s *compliance* with therapy, the record fails to demonstrate that Dr. Bradley shared "any significant part" of the confidential communications with anyone other than J.A. NRS 49.385(1). While the record suggests that people other than Dr. Bradley and J.A. were at Dr. Bradley's office, the record does not demonstrate that these individuals were present during Dr. Bradley's treatment sessions with J.A. Furthermore, although the record suggests that J.A. and her mother communicated with her probation officer and Child Protective Services regarding certain issues related to her mental health history, nothing in the record indicates that Dr. Bradley or J.A. relayed any confidential information regarding a significant part of the treatment sessions. Accordingly, we hold that there was no waiver of the privilege protecting J.A.'s counseling records with Dr. Bradley.

CONCLUSION

Because the psychologist-patient privilege applies to J.A. and Dr. Bradley's confidential communications, and because Hudson has not shown that an exception to the privilege applies or that the privilege was waived, we hold that the district court erroneously ordered that Dr. Bradley provide J.A.'s counseling records for *in camera* review. Therefore, we grant the petition and direct the clerk of this court to issue a writ of prohibition ordering the district court to halt the production of the privileged documents.

HARDESTY and PARRAGUIRRE, JJ., concur.

JOHN DOE, ON HIS OWN BEHALF AND ON BEHALF OF A CLASS OF THOSE SIMILARLY SITUATED, APPELLANT, *v.* STATE OF NEVADA EX REL. THE LEGISLATURE OF THE 77TH SESSION OF THE STATE OF NEVADA; THE STATE OF NEVADA DEPARTMENT OF HEALTH AND HUMAN SERVICES; AND THE HONORABLE BRIAN SANDOVAL, IN HIS OFFICIAL CAPACITY AS GOVERNOR OF THE STATE OF NEVADA, RESPONDENTS.

No. 69801

December 7, 2017 406 P.3d 482

Appeal from a district court summary judgment in an action regarding Nevada's medical marijuana laws. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Hafter Law and *Jacob L. Hafter*, Las Vegas, for Appellant.

Legislative Counsel Bureau Legal Division and *Brenda J. Erdoes*, Legislative Counsel, and *Kevin C. Powers*, Chief Litigation Counsel, Carson City, for Respondent State of Nevada ex rel. the Legislature of the State of Nevada.

Adam Paul Laxalt, Attorney General, *Jordan T. Smith*, Assistant Solicitor General, and *Linda C. Anderson* and *Gregory L. Zunino*, Chief Deputy Attorneys General, Carson City, for Respondents State of Nevada Department of Health and Human Services and Governor of the State of Nevada.

Before the Court EN BANC.

OPINION

By the Court, PARRAGUIRRE, J.:

In November 2000, the Nevada Constitution was amended to allow the possession and use of marijuana for the treatment or alleviation of various medical conditions. *See* Nev. Const. art. 4, § 38(1)(a). This amendment also required the Legislature to establish a registry of patients who were authorized to use marijuana for medical purposes. *Id.* § 38(1)(d). As a result, the Legislature enacted Assembly Bill 453, allowing registry identification cardholders to use medical marijuana without fear of state prosecution for certain

marijuana-related offenses.[1] Subsequently, the Legislature established two fees to defray the costs of administering the registration program: an application fee and a processing fee.

In this appeal, we are asked to determine whether Nevada's medical marijuana registry violates the Due Process, Equal Protection, or Self-Incrimination Clauses of the United States or Nevada Constitutions. We hold Nevada's medical marijuana registry does not impinge upon a fundamental right, and the registry is rationally related to a legitimate state interest. Thus, we hold Nevada's medical marijuana registry does not violate the Due Process or Equal Protection Clauses. Finally, we hold Nevada's medical marijuana registry does not violate a registrant's right against self-incrimination. Therefore, we affirm the district court's order.

FACTS AND PROCEDURAL HISTORY

In 2015, appellant John Doe applied for, and received, a registry identification card after his doctor recommended he try medical marijuana to treat his migraine headaches. Doe subsequently filed suit against the Nevada Legislature, the Governor, and the Department of Health and Human Services (the DHHS) (collectively, respondents). In particular, Doe argued that the medical marijuana registry and its associated fees violated his due process and equal protection rights, and his right against self-incrimination. Doe also argued that the DHHS committed fraud and was unjustly enriched by the registration fees.

Doe filed a motion for partial summary judgment on his self-incrimination claim and a countermotion for summary judgment on his due process and equal protection claims. The DHHS and the Governor filed motions to dismiss, and the Legislature filed a motion for summary judgment. Ultimately, the district court granted the respondents' motions, treating each as a motion for summary judgment. Specifically, the district court held that Doe failed to sue the proper state official—the Administrator of the Division of Public and Behavioral Health—for declaratory and injunctive relief. In addition, the district court denied Doe's request to amend his complaint, holding that such an amendment would be futile because Doe's constitutional claims lacked merit. Finally, the district court held that Doe's state-law tort claims were barred as a matter of law due to the State's sovereign immunity. Doe appealed.

---

[1]We acknowledge that the citizens of Nevada have recently approved the Regulation and Taxation of Marijuana Act, permitting the recreational use of one ounce or less of marijuana by individuals 21 years of age and over. Nevada Ballot Questions 2016, Nevada Secretary of State, Question No. 2.

DISCUSSION

On appeal, Doe argues (1) there is a fundamental right to access the health care recommended by licensed physicians under the Due Process Clause, (2) Nevada's medical marijuana registry violates that right under the Equal Protection Clause, and (3) the registry violates a registrant's Fifth Amendment privilege against self-incrimination. "This court reviews constitutional challenges de novo." *Rico v. Rodriguez*, 121 Nev. 695, 702, 120 P.3d 812, 817 (2005).

Nevada's medical marijuana registry does not impinge upon a fundamental right

Doe argues that this court should recognize a new fundamental right to access the health care that a physician recommends to a patient, and that the registry and its associated fees impose an undue burden on a patient's ability to exercise this right. Respondents argue that Doe's asserted right is more accurately understood as a right to use medical marijuana and that no such fundamental right exists.

The Due Process Clauses of the United States and Nevada Constitutions prohibit the State from depriving "any person of life, liberty, or property, without due process of law." U.S. Const. amend. XIV, § 1; Nev. Const. art. 1, § 8(5). The United States Supreme Court has clarified that "[t]he Due Process Clause guarantees more than fair process, and the 'liberty' it protects includes more than the absence of physical restraint." *Washington v. Glucksberg*, 521 U.S. 702, 719 (1997).

The Court, however, has "always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Id.* at 720 (internal quotation marks omitted). Indeed, the Court has cautioned that, "[b]y extending constitutional protection to an asserted right or liberty interest," a court "place[s] the matter outside the arena of public debate and legislative action." *Id.*

Therefore, in deciding whether to expand the concept of substantive due process to encompass a new fundamental right, we must (1) carefully describe the asserted liberty interest; and (2) determine whether the asserted liberty interest is "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right was] sacrificed." *Id.* at 720-21 (internal quotation marks omitted); *see also State v. Eighth Judicial Dist. Court (Logan D.)*, 129 Nev. 492, 503, 306 P.3d 369, 377 (2013).

We construe Doe's proposed liberty interest as the right to use medical marijuana recommended by a physician. The Ninth Circuit has advised that an asserted liberty interest should be narrowly construed so as to avoid unintended consequences. *See Raich v. Gonzales*, 500 F.3d 850, 863-64 (9th Cir. 2007) (interpreting the appellant's proposed right as "the right to use *marijuana* to preserve bodily integrity, avoid pain, and preserve her life"). As in *Raich*, here, Doe's proposed right "does not narrowly and accurately reflect the right that [he] seeks to vindicate." *Id.* at 864. Doe seeks to use medical marijuana to help treat his migraines and argues that Nevada's medical marijuana registry interferes with his proposed right. Indeed, medical marijuana is the only means of health care implicated in this matter.

We hold that the right to use medical marijuana recommended by a physician is not so "deeply rooted in this Nation's history and tradition . . . and implicit in the concept of ordered liberty, such that neither liberty nor justice would exist if [the right was] sacrificed." *Glucksberg*, 521 U.S. at 721 (internal quotation marks omitted).

To date, no court has recognized a fundamental right to use medical marijuana recommended by a physician, and the use of medical marijuana is still prohibited under federal law and the laws of 22 states. *See Raich*, 500 F.3d at 866 (holding that "federal law does not recognize a fundamental right to use medical marijuana prescribed by a licensed physician to alleviate excruciating pain and human suffering"); *see also United States v. Wilde*, 74 F. Supp. 3d 1092, 1095 (N.D. Cal. 2014) (recognizing "no court to date has held that citizens have a constitutionally fundamental right to use medical marijuana"); *Seeley v. State*, 940 P.2d 604, 613 (Wash. 1997) (holding the respondent did not "have a fundamental right to have marijuana prescribed as his preferred treatment over the legitimate objections of the state").

In fact, although several states have legalized medical marijuana since *Raich*, the Ninth Circuit has continued to reject any asserted liberty interest. *See Sacramento Nonprofit Collective v. Holder*, 552 F. App'x 680, 683 n.1 (9th Cir. 2014) (acknowledging that "the use of medical marijuana is more accepted today than it was in 2007," but declining to recognize a fundamental right to use medical marijuana). Given this precedent and the fact that almost half of the states currently prohibit the use of medical marijuana, it would be imprudent to remove the matter from "the arena of public debate and legislative action" at this time. *Glucksberg*, 521 U.S. at 720. Therefore, we decline to expand the concept of substantive due process to encompass a new fundamental right to use medical marijuana recommended by a physician.

Nevada's medical marijuana registry is rationally related to a legitimate state interest

Doe argues that the registry discriminates against people who choose to use marijuana to treat their medical condition and that the registry is not rationally related to a legitimate state interest.[2] Respondents argue that the Legislature could reasonably believe the registry would aid in the enforcement of Nevada's medical marijuana laws by deterring potential violators or assisting in the detection and investigation of specific instances of apparent abuse.

The right to equal protection is "guaranteed by the Fourteenth Amendment of the United States Constitution and . . . Article 4, Section 21 of the Nevada Constitution." *Rico*, 121 Nev. at 702-03, 120 P.3d at 817. In particular, the Fourteenth Amendment prohibits the State from denying "any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. The United States Supreme Court has stated that the "provision creates no substantive rights," rather, it "embodies a general rule that States must treat like cases alike but may treat unlike cases accordingly." *Vacco v. Quill*, 521 U.S. 793, 799 (1997).

Generally, in addressing an equal protection claim, we must determine whether (1) "the statute, either on its face or in the manner of its enforcement, results in members of a certain group being treated differently from other persons based on membership in that group"; and (2) "if it is demonstrated that a cognizable class is treated differently, the court must analyze under the appropriate level of scrutiny whether the distinction made between the groups is justified." *United States v. Lopez-Flores*, 63 F.3d 1468, 1472 (9th Cir. 1995); *see also Rico*, 121 Nev. at 703, 120 P.3d at 817.

Several courts have held that "patients who choose to use a federally prohibited substance" are not "similarly situated to . . . patients who chose to use federally permitted medicines." *Boyd v. Santa Cruz Cty.*, No. 15-CV-00405-BLF, 2016 WL 3092101, at *4 (N.D. Cal. June 2, 2016); *see also Wilson v. Holder*, 7 F. Supp. 3d 1104, 1125 (D. Nev. 2014) (holding the plaintiff was "not similarly situated to individuals that avail themselves of treatment methods *that comply with federal law*"), *aff'd*, 835 F.3d 1083 (2016). However, even assuming Doe has satisfied this threshold inquiry, we conclude that Nevada's medical marijuana registry survives rational basis review.

---

[2]Because we conclude Doe's asserted liberty interest is not a fundamental right under the United States or Nevada Constitutions' Due Process Clauses, we reject Doe's argument that strict scrutiny applies in this matter. *Rico*, 121 Nev. at 703, 120 P.3d at 817 (stating strict scrutiny is warranted when the case involves a "judicially recognized suspect class or [a] fundamental right").

Under rational basis review, legislation is presumed to be valid and will be sustained "if there is a rational relationship between the disparity of treatment and some legitimate governmental purpose." *Heller v. Doe*, 509 U.S. 312, 320 (1993). The State need not "produce evidence to sustain the rationality of a statutory classification," rather, "[t]he burden is on the one attacking the legislative arrangement to negative every conceivable basis which might support it." *Id.* (alteration in original) (internal quotation marks omitted).

In *Whalen v. Roe*, the United States Supreme Court addressed "whether the State of New York [could] record, in a centralized computer file, the names and addresses of all persons who have obtained, pursuant to a doctor's prescription, certain drugs for which there is both a lawful and an unlawful market." 429 U.S. 589, 591 (1976). The Court held "that the patient-identification requirement" under the New York Controlled Substances Act was constitutional, as the legislature could reasonably believe the requirement might "aid in the enforcement of laws designed to minimize the misuse of dangerous drugs." *Id.* at 597-98. The Court also recognized that the State had a "vital interest in controlling the distribution of dangerous drugs," and therefore, it could "experiment with new techniques for control." *Id.* at 598.

We conclude Nevada's medical marijuana registry is rationally related to a legitimate state interest. The Nevada Constitution states that one of the purposes of the registry is to provide enforcement officers a means "to verify a claim of authorization." *See* Nev. Const. art. 4, § 38(1)(d). Thus, like the patient-identification requirement in *Whalen*, here, the registry seeks to aid in the enforcement of laws designed to minimize the misuse of drugs. In addition, the State may experiment with a registry as a method for controlling a drug's use, and it is irrelevant whether the registry is an effective strategy for minimizing the misuse of marijuana. *See Heller*, 509 U.S. at 319 (stating "that rational-basis review . . . is not a license for courts to judge the wisdom, fairness, or logic of legislative choices" (internal quotation marks omitted)). Therefore, Nevada's medical marijuana registry satisfies rational basis review.[3]

Nevada's medical marijuana registry does not violate a registrant's right against self-incrimination

Finally, Doe argues the registry violates his Fifth Amendment right against self-incrimination because he is compelled to disclose that he intends to use medical marijuana in violation of federal law.

[3]In addition, we hold that the Legislature could reasonably believe the imposition of registration fees would assist the State in operating and maintaining the registry.

Respondents argue that Nevada's medical marijuana registration program is entirely voluntary, and thus, the Fifth Amendment is not implicated.

The Fifth Amendment states that no person "shall be compelled in any criminal case to be a witness against himself." U.S. Const. amend. V; Nev. Const. art. 1, § 8(1); *see also Lefkowitz v. Turley*, 414 U.S. 70, 73-74 (1973) (stating the Fifth Amendment's Self-Incrimination Clause applies to the states via the Fourteenth Amendment).

> The Amendment not only protects the individual against being involuntarily called as a witness against himself in a criminal prosecution but also privileges him not to answer official questions put to him in any other proceeding, civil or criminal, formal or informal, where the answers might incriminate him in future criminal proceedings.

Lefkowitz, 414 U.S. at 77.

The United States Supreme Court has held that the Fifth Amendment's Self-Incrimination Clause is not implicated when an individual is required to disclose information as part of a voluntary application for benefits. *See Selective Serv. Sys. v. Minn. Pub. Interest Research Grp.*, 468 U.S. 841, 856-58 (1984). In *Selective Service System*, male applicants for financial aid were required to file "a statement of compliance" with their university that certified that the student had registered for the draft pursuant to the Military Selective Service Act (MSSA). *Id.* at 844. Appellees were students who "need[ed] financial aid to pursue their educations," but who had failed to register for the draft within 30 days of their 18th birthday as required under the MSSA. *Id.* at 845. They argued that, by filing a statement of compliance, the law required them "to confess to a criminal act . . . in violation of their Fifth Amendment rights." *Id.* at 856.

The Court rejected the appellees' argument, stating that "a person who has not registered clearly is under no compulsion to seek financial aid; if he has not registered, he is simply ineligible for aid." *Id.* Following this rationale, a federal district court concluded that the Fifth Amendment's Self-Incrimination Clause was not implicated when an individual applied to participate in the District of Columbia's medical marijuana program as a cultivator or dispensary operator. *See Sibley v. Obama*, 810 F. Supp. 2d 309, 310-11 (D.D.C. 2011).

We hold the rationale expressed in *Selective Service System* and *Sibley* applies in this matter. Nevada law does not compel anyone to seek a registry identification card, and if an individual does apply, Nevada law does not impose criminal or civil penalties on them

if they do not complete the application. Rather, the application may simply be denied. This possibility, in itself, does not implicate the Self-Incrimination Clauses of the United States and Nevada Constitutions.[4]

CONCLUSION

We conclude Nevada's medical marijuana registry does not impinge upon a fundamental right. We further conclude the registry is rationally related to the legitimate state interest of protecting the health, safety, and welfare of the public. Finally, we conclude the Self-Incrimination Clauses are not implicated when an individual applies to participate in Nevada's medical marijuana program. Accordingly, we hold Nevada's medical marijuana registry does not violate the United States or Nevada Constitutions' Due Process, Equal Protection, or Self-Incrimination Clauses. Thus, we affirm the district court's order.

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

LYUDMYLA ABID, APPELLANT, *v.*
SEAN ABID, RESPONDENT.

No. 69995

December 7, 2017 406 P.3d 476

Appeal from a district court order modifying child custody. Eighth Judicial District Court, Family Court Division, Clark County; Linda Marquis, Judge.

Affirmed.

[Rehearing denied April 27, 2018]

Radford J. Smith, Chartered, and *Radford J. Smith, Kimberly A. Medina*, and *Garima Varshney*, Henderson, for Appellant.

Black & LoBello and *John D. Jones*, Las Vegas, for Respondent.

Before the Court EN BANC.

---

[4]Doe also argues that the district court erred in (1) holding the State's sovereign immunity barred his state-law tort claims, (2) denying his motion for a permanent injunction, and (3) denying his request to amend his complaint. Doe concedes that each of these arguments fail if his constitutional claims are rejected. Therefore, having rejected Doe's constitutional arguments, we hold Doe's additional arguments are without merit.

OPINION

By the Court, STIGLICH, J.:

In this child custody proceeding, a father surreptitiously recorded his child and ex-wife's conversations by hiding a recording device in the child's backpack. Because neither the child nor the mother consented to this recording, the father's actions likely violated NRS 200.650, which prohibits the surreptitious recording of nonconsenting individuals' private conversations. The question presented is whether the district court abused its discretion by providing the recordings to a psychologist appointed by the court to evaluate the child's welfare. We hold that the district court properly exercised its discretion in determining that the recordings would assist the expert in forming her opinion. Therefore, we affirm.

FACTS AND PROCEDURAL HISTORY

Sean and Lyudmyla Abid divorced in 2010. Their stipulated divorce decree awarded them joint legal and joint physical custody of their one-year-old child. In 2015, Sean moved to modify those terms to get primary physical custody.

On at least two separate occasions, Sean placed a recording device in the child's backpack as the child traveled to Lyudmyla's home. The child and Lyudmyla were unaware of the device, and neither consented to Sean recording their conversations. Sean then edited the recordings, removed what he claims to be irrelevant material, and destroyed the originals. Claiming that the recordings demonstrated Lyudmyla's attempts to manipulate the child, Sean moved to admit them into evidence in the custody proceeding. Lyudmyla objected on grounds that Sean violated NRS 200.650 in recording her and the child's private conversations.

The district court found that Sean likely violated NRS 200.650 and denied Sean's motion to admit the recordings into evidence. Nonetheless, the court provided the recordings to a psychologist, Dr. Holland, whom the court had appointed to interview and evaluate the child. The court permitted Dr. Holland to consider the recordings as she formulated her opinions.

At the evidentiary hearing, Dr. Holland testified that Lyudmyla's behavior was "creating confusion, distress, and divided loyalty" in the child. She based her opinion in part on the recordings, as well as interviews with the child, Sean, and Lyudmyla, email and text communications between Sean and Lyudmyla, and the parties' pleadings.

After considering Dr. Holland's testimony and other evidence presented, the district court found that, "[a]s a direct result of [Lyudmyla's] direct and overt actions, the child is experiencing:

confusion; distress; a divided loyalty between his parents; and a decreased desire to spend time with [Sean]." Consequently, the court determined it was in the child's best interest that Sean be awarded primary physical custody. Lyudmyla appeals from that order.

DISCUSSION

Lyudmyla argues that the district court abused its discretion by allowing Dr. Holland to consider evidence that Sean obtained in violation of NRS 200.650. We disagree. Even assuming that Sean violated NRS 200.650 in producing the recordings,[1] the court did not abuse its discretion in providing them to Dr. Holland.

An expert witness in a child custody proceeding may consider evidence obtained in violation of NRS 200.650

Lyudmyla argues that Dr. Holland cannot consider evidence obtained in violation of NRS 200.650, because NRS 50.285(2) allows experts to consider inadmissible evidence only if the evidence is "of a type reasonably relied upon by experts," and psychologists do not normally rely upon recordings that are produced illegally.

We review a district court's evidentiary decision for an abuse of discretion, but, to the extent the decision "rests on a legal interpretation of the evidence code," we review that legal interpretation de novo. *Davis v. Beling*, 128 Nev. 301, 311, 278 P.3d 501, 508 (2012) (internal quotation marks omitted). Here, we review for an abuse of discretion the district court's decisions to provide the recordings to Dr. Holland and to deny Sean's motion to admit. But we review the court's legal conclusions concerning admissibility de novo.

NRS 200.650 prohibits "intru[sions] upon the privacy of other persons by surreptitiously . . . recording . . . any private conversation engaged in by the other persons . . . unless authorized to do so by one of the persons engaging in the conversation." Sean does not dispute that he surreptitiously placed a recording device in the child's backpack without the child's or Lyudmyla's consent. Despite finding that Sean violated NRS 200.650 in producing the recordings, the district court provided them to Dr. Holland to consider in forming her opinion.

NRS 50.285(2) allows expert witnesses to consider inadmissible evidence so long as it is "of a type reasonably relied upon by experts in forming opinions or inferences upon the subject." We reject Lyudmyla's argument because it shifts NRS 50.285(2)'s focus on the "type" of evidence at issue to the manner in which the evidence was procured. There is no doubt that Sean's evidence—a contemporaneous recording of a parent's unfiltered interactions with a child—

[1]We express no opinion as to the legality of Sean's actions.

is the type of evidence a psychologist would consider in forming an opinion as to the child's welfare. *See, e.g.*, *In re Marriage of Karonis*, 693 N.E.2d 1282, 1286 (Ill. App. Ct. 1998) ("Reviewing the [allegedly illegally acquired] tapes materially advanced the [expert witness]'s ability to determine and defend the child's best interests here."). Under NRS 50.285(2), then, Dr. Holland was permitted to consider Sean's recordings.

Of course, NRS 50.285(2) cannot permit what another statute prohibits. But we find no such prohibition in our statutory scheme. While NRS 179.505(1) authorizes a criminal defendant to move to suppress illegal recordings, we find no analogous provision in the civil context. Unlike the analogous federal wiretap law,[2] NRS 200.650 is silent regarding evidence and admissibility. *See* NRS 200.690(1) (enforcing NRS 200.650 exclusively with criminal prosecution and civil damages). We will not read a broad suppression rule into NRS 200.650, especially when our Legislature has proven in the criminal context that it knows how to write one. Prohibiting Dr. Holland from considering this evidence would be conflating criminality with inadmissibility, which is left to the sound discretion of the court. *See* NRS 48.025; NRS 48.035.

Furthermore, prohibiting Dr. Holland from considering this evidence would do little to effectuate NRS 200.650's express purpose of protecting an individual's privacy because, in this context, the expert is already inquiring into private details of the relationship between parent and child. NRS 200.650's prohibition against "disclos[ing]" the contents of illegal recordings cannot reasonably be read to prohibit a court-appointed expert from considering such evidence in a child custody case, wherein the "[c]hild's best interest is paramount." *Bluestein v. Bluestein*, 131 Nev. 106, 112, 345 P.3d 1044, 1048 (2015); *see also* NRS 125C.0045(2).

Nor does our caselaw support Lyudmyla's position. This court has only once addressed the proper remedy in a civil action when a litigant attempts to use illegally acquired evidence to gain a litigation advantage. In *Lane v. Allstate Insurance Co.*, Lane illegally recorded phone conversations in violation of NRS 200.620 to obtain evidence to support tort and contract claims against his former employer.[3] 114 Nev. 1176, 1177, 969 P.2d 938, 939 (1998). The district court sanctioned Lane by dismissing his complaint. *Id*. On appeal,

[2]18 U.S.C. § 2515 (2012): "Whenever any wire or oral communication has been intercepted, no part of the contents of such communication and no evidence derived therefrom may be received in evidence *in any trial, hearing, or other proceeding* . . . ." (emphasis added).

[3]We note that, whereas Lane's telephonic recordings implicated NRS 200.*620*, Sean's in-person recordings implicated NRS 200.*650*. For purposes of this opinion, however, this is a distinction without a difference.

this court held that dismissal was too extreme a litigation sanction and instead sanctioned Lane by prohibiting him from using the information contained within the recordings "in any fashion." *Id*. at 1181 n.4, 969 P.2d at 941 n.4. In sanctioning Lane, however, this court did not create a bright line rule that illegally obtained evidence cannot be used in civil proceedings; rather, we held that suppressing Lane's evidence was an appropriate sanction in that particular case. *Id*. at 1181, 969 P.2d at 941.

However, a child custody proceeding is readily distinguishable from *Lane*. Whereas *Lane* was a civil suit for damages, a child custody proceeding is no "mere adversary proceeding between plaintiff and defendant." *Munson v. Munson*, 166 P.2d 268, 271 (Cal. 1946). Here, the interests of a nonlitigant child are at stake. Prohibiting an expert from considering evidence punishes that child by hindering the expert's inquiry into the child's best interests. It is sanctioning the child for the alleged crime of his parent.

In affirming the lower court's decision, we by no means condone Sean's actions. Rather, we have determined that the potential deterrent effect of ignoring Sean's evidence is outweighed by the State's "overwhelming interest in promoting and protecting the best interests of its children." *Rogers v. Williams*, 633 A.2d 747, 749 (Del. Fam. Ct. 1993). We note that there are numerous ways to deter parents in Sean's position without risking harm to an innocent minor. *See id.* at 748 (rejecting the argument "that by admitting evidence that was obtained illegally, the Court is giving its approval to lawlessness"). Sean could be prosecuted for committing what amounts to a category D felony. *See* NRS 200.690(1)(a); *cf. Bartnicki v. Vopper*, 532 U.S. 514, 529 (2001) ("The normal method of deterring unlawful conduct is to impose an appropriate punishment on the person who engages in it."). NRS 200.690(1)(b) creates a private right of action for Sean's ex-wife and child to sue for Sean's intrusion into their privacy. The court can fashion a litigation sanction, such as a fine, that does not affect the child's interests. *See, e.g.*, *Young v. Johnny Ribeiro Bldg., Inc*., 106 Nev. 88, 92, 787 P.2d 777, 779 (1990) (holding that courts have "inherent equitable powers" to sanction parties for "litigation abuses") (internal quotation marks omitted). Finally, and perhaps most importantly, potential spies in Sean's position may be deterred by the simple fact that a parent's lawless invasion into his child's and ex-wife's privacy reflects poorly on his parental judgment and may be factored into the court's decision when determining child custody.[4]

---

[4]This statement does not affect our holding in *Sims v. Sims* "that a court may not use changes of custody as a sword to punish parental misconduct." 109 Nev. 1146, 1149, 865 P.2d 328, 330 (1993). But *Sims* does not prevent a court from considering how a parent's conduct reflects on their judgment.

There is no per se rule that evidence obtained illegally is inadmissible in a child custody proceeding

A premise of Lyudmyla's argument is that illegally obtained evidence is inadmissible in a child custody proceeding. That premise is unfounded—there is no per se rule of inadmissibility in this context, and we decline to adopt one. A district court has discretion in a child custody proceeding to determine whether to admit evidence obtained in violation of NRS 200.650.

Unless a statute prohibits the admission of relevant evidence, it is presumed admissible. NRS 48.025(1). As analyzed above, NRS 200.650 contains no language to rebut that presumption. A per se rule of inadmissibility would sweep broader than the exclusionary rule in the criminal context,[5] and it would be particularly inappropriate here because a district court "needs to consider as much relevant evidence as possible when deciding child custody." *Rogers*, 633 A.2d at 749 (admitting allegedly illegally obtained evidence in a child custody proceeding); *accord Munson*, 166 P.2d at 271 ("[T]he controlling rights are those of the minor child and of the state in the child's welfare."); *Lee v. Lee*, 967 S.W.2d 82, 85 (Mo. Ct. App. 1998) ("Even evidence obtained fraudulently, wrongfully, or illegally is admissible.").

This presumption of admissibility dates back to the common law, wherein admissibility was not affected by the illegal means used to acquire evidence. *See, e.g.*, *Terrano v. State*, 59 Nev. 247, 256, 91 P.2d 67, 70 (1939), *overruled in part by Whitley v. State*, 79 Nev. 406, 412 n.5, 386 P.2d 93, 96 n.5 (1963). While *Mapp v. Ohio* altered this common law rule by excluding evidence illegally acquired by the government in criminal cases, 367 U.S. 643 (1961), *Mapp*'s exclusionary rule does not extend to evidence illegally acquired by a *private individual* in a *civil case*. In *Sackler v. Sackler*, for example, a husband trespassed into his wife's home to obtain evidence relevant to a divorce proceeding. 203 N.E.2d 481, 482 (N.Y. 1964). The New York Court of Appeals rejected the wife's argument that *Mapp* rendered the illegally acquired evidence inadmissible because *Mapp*'s exclusionary rule was meant to deter governmental intrusions; absent a governmental invasion, suppressing evidence would

[5]NRS 179.505 permits an aggrieved party in a criminal proceeding to move to suppress illegally intercepted recordings; it does not render such recordings per se inadmissible. *Cf. Utah v. Strieff*, 136 S. Ct. 2056, 2059 (2016) (creating the attenuation exception to the exclusionary rule); *United States v. Patane*, 542 U.S. 630, 642 (2004) (holding that the exclusionary rule does not apply to physical evidence obtained as a result of questioning that violated *Miranda v. Arizona*, 384 U.S. 436 (1966)); *Harris v. New York*, 401 U.S. 222, 226 (1971) (allowing evidence obtained in violation of *Miranda* to be admitted for impeachment purposes); *Walder v. United States*, 347 U.S. 62, 65 (1954) (same for evidence obtained in violation of the Fourth Amendment).

frustrate courts' search for truth. *Id*. at 483 ("[J]udicial rules of evidence were never meant to be used as an indirect method of punishment of trespassers and other lawless intruders." (internal quotation marks omitted)). Thus, the husband's illegally acquired evidence was admissible. *Id*.

Similarly, in the related child abuse/neglect context, courts routinely hold that evidence obtained in violation of the Fourth Amendment is admissible because "the substantial social cost of ignoring children's safety" exceeds "the minimal additional deterrence achieved by applying the exclusionary rule." *In re W.L.P.*, 202 P.3d 167, 173 (Or. 2009); *accord In re Mary S*., 230 Cal. Rptr. 726, 728 (Ct. App. 1986) ("[T]he potential harm to children in allowing them to remain in an unhealthy environment outweighs any deterrent effect which would result from suppressing evidence unlawfully seized." (internal quotation marks omitted)); *In re Diane P*., 494 N.Y.S.2d 881, 884 (App. Div. 1985) ("[T]he State's overwhelming interest in protecting and promoting the best interests and safety of minors in a child protective proceeding far outweighs the rule's deterrent value."); *State ex rel. A.R. v. C.R.*, 982 P.2d 73, 79 (Utah 1999) ("Whatever deterrent effect there might be is far outweighed by the need to provide for the safety and health of children in peril.").

A per se rule of inadmissibility would force the district court to close its eyes to relevant evidence and possibly place or leave a child in a dangerous living situation. In this instance, the illegally acquired recordings contained no dispositive evidence—they reflected at most one parent's attempt to alienate the child from the other parent. More concerning, however, would be a scenario in which an illegally obtained recording contains evidence of physical or sexual abuse of a child. Categorically excluding such evidence would clearly be against the best interests of the minor and, therefore, in contravention of NRS 125C.0045(2).

Thus, because the recordings' alleged illegality did not render them inadmissible, the court had "broad discretion" in performing its evidentiary gatekeeping function to rule on their admissibility. *Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 492, 117 P.3d 219, 226 (2005) (internal quotation marks omitted). To the extent that the district court excluded Sean's recordings based on its belief that the law *required* exclusion of illegally obtained evidence, that ruling was erroneous. Even so, that error would be harmless because it did not affect the court's decision to award Sean primary custody. *See* NRCP 61.

The district court did not otherwise abuse its discretion in awarding Sean primary custody

Lyudmyla presented two additional arguments on appeal: (1) that the district court abused its discretion by misinterpreting and relying on Dr. Holland's opinion and interviews with the child, and (2) that

the district court ordered the change in custody simply to punish Lyudmyla, in violation of *Sims*, 109 Nev. at 1149, 865 P.2d at 330.

After a careful review of the record, we find these claims to be without merit. The district court properly exercised its discretion in weighing the evidence presented over the course of the two-and-one-half day evidentiary hearing. The district court's factual findings support its determination as to the child's best interest.

CONCLUSION

In a child custody setting, the "[c]hild's best interest is paramount." *Bluestein*, 131 Nev. at 112, 345 P.3d at 1048. The court's duty to determine the best interests of a nonlitigant child must outweigh the policy interest in deterring illegal conduct between parent litigants. Accordingly, the district court did not abuse its discretion in providing the recordings to the expert because reviewing them furthered the expert's evaluation of the child's relationship with his parents and aided the district court's determination as to the child's best interest. Accordingly, we affirm.

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

DOUGLAS, J., concurring:

I concur with the majority in result only.

JOHN W. NEVILLE, JR., ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PETITIONER, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE ADRIANA ESCOBAR, DISTRICT JUDGE, RESPONDENTS, AND TERRIBLE HERBST, INC., REAL PARTY IN INTEREST.

No. 70696

December 7, 2017 406 P.3d 499

Original petition for a writ of mandamus challenging a district court order granting a motion to dismiss claims for unpaid wages.

Petition granted.

Thierman Buck, LLP, and *Joshua D. Buck, Leah L. Jones*, and *Mark R. Thierman*, Reno, for Petitioner.

Littler Mendelson, P.C., and *Rick D. Roskelley, Kathryn B. Blakey, Roger L. Grandgenett II*, and *Montgomery Y. Paek*, Las Vegas, for Real Party in Interest.

Sutton Hague Law Corporation, P.C., and *S. Brett Sutton* and *Jared Hague*, Reno, for Amicus Curiae Nevada Restaurant Association.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of unpaid wages. In this opinion, we clarify that NRS 608.140 explicitly recognizes a private cause of action for unpaid wages. Accordingly, we conclude that NRS Chapter 608 provides a private right of action for unpaid wages. Because petitioner's claims were for unpaid wages under NRS 608.016 (payment for each hour worked), NRS 608.018 (payment for overtime), and NRS 608.020 through NRS 608.050 (payment upon termination), we grant the petition for extraordinary relief.

FACTS AND PROCEDURAL HISTORY

Petitioner John Neville, Jr., was employed as a cashier at a Las Vegas convenience store owned by real party in interest Terrible Herbst, Inc. Terrible Herbst enforces a time-rounding policy whereby it rounds the time recorded and worked by all hourly employees to the nearest 15 minutes for purposes of calculating payment of wages owed to employees. Because of the time-rounding policy, Neville allegedly did not receive wages for work actually performed during the time clocked in before and after his regularly scheduled shift.

In November 2015, Neville filed a class-action complaint against Terrible Herbst alleging (1) failure to pay wages in violation of the Nevada Constitution's Minimum Wage Amendment, Nev. Const. art. 15, § 16; (2) failure to compensate for all hours worked in violation of NRS 608.016; (3) failure to pay overtime in violation of NRS 608.018; (4) failure to timely pay all wages due and owing in violation of NRS 608.020 through NRS 608.050; and (5) breach of contract. All of Neville's NRS Chapter 608 claims also referred to NRS 608.140.

Terrible Herbst moved to dismiss Neville's complaint in its entirety for failure to state a claim, pursuant to NRCP 12(b)(5). According to Terrible Herbst, Neville had not asserted a viable claim under the Nevada Constitution's Minimum Wage Amendment. Further, Terrible Herbst asserted that there is no private right of action to enforce NRS Chapter 608 because the Legislature gave exclusive enforcement authority to the Nevada Labor Commissioner.

Ultimately, the district court granted the motion to dismiss in part, dismissing Neville's NRS Chapter 608 claims on the basis that no private right of action exists. The district court also dismissed Neville's claim pursuant to the Nevada Constitution's Minimum Wage Amendment, concluding that there is no private right of action under the Nevada Constitution for minimum wage claims. The only cause of action that the district court did not dismiss was Neville's breach of contract claim. This writ petition followed.

DISCUSSION

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008). Where there is no plain, speedy, and adequate remedy in the ordinary course of law, extraordinary relief may be available. *Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991). Whether a writ of mandamus will be considered is within this court's sole discretion. *Id.*

In this case, the district court's dismissal of Neville's claim under the Nevada Constitution's Minimum Wage Amendment undisputedly was an arbitrary and capricious exercise of discretion. The constitution expressly provides for a private cause of action to enforce the provisions of the Minimum Wage Amendment. Nev. Const. art. 15, § 16 ("An employee claiming violation of this section may bring an action against his or her employer in the courts of this State to enforce the provisions of this section . . . ."). Moreover, Neville raises a matter of first impression with statewide importance—whether a plaintiff has a private right of action to recoup unpaid wages under NRS Chapter 608. Finally, given that the majority of Neville's class-action claims were dismissed early in the proceedings, we conclude that Neville lacks a plain, speedy, and adequate legal remedy in pursuing his dismissed claims. Accordingly, we elect to exercise our discretion to entertain the merits of this writ petition.

In considering this petition, this court reviews determinations of law de novo. *Helfstein v. Eighth Judicial Dist. Court*, 131 Nev. 909, 913, 362 P.3d 91, 94 (2015). When a court considers a motion to dismiss under NRCP 12(b)(5), all alleged facts in the complaint are presumed true and all inferences are drawn in favor of the complaint. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Thus, dismissing a complaint is appropriate "only if it appears beyond a doubt that [the plaintiff] could prove no set of facts, which, if true, would entitle [the plaintiff] to relief." *Id*. at 228, 181 P.3d at 672.

Neville argues that the district court erred in dismissing his NRS Chapter 608 claims (payment for hours worked, overtime, and pay-

ment upon termination) on the basis that there is no private right of action to enforce those claims under that chapter. In particular, Neville contends that the relevant statutes, as well as precedent from this court, expressly allow employees to seek unpaid wages in court. Terrible Herbst maintains that there is no private right of action under NRS Chapter 608 to support Neville's claims.[1]

NRS 608.016 states, "Except as otherwise provided in NRS 608.0195, an employer shall pay to the employee wages for each hour the employee works. An employer shall not require an employee to work without wages during a trial or break-in period." Further, NRS 608.018 addresses wages for overtime, providing in pertinent part as follows:

> 1. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works:
>
> (a) More than 40 hours in any scheduled week of work; or
>
> (b) More than 8 hours in any workday unless by mutual agreement the employee works a scheduled 10 hours per day for 4 calendar days within any scheduled week of work.
>
> 2. An employer shall pay 1 1/2 times an employee's regular wage rate whenever an employee who receives compensation for employment at a rate not less than 1 1/2 times the minimum rate prescribed pursuant to NRS 608.250 works more than 40 hours in any scheduled week of work.

Pursuant to NRS 608.020, "[w]henever an employer discharges an employee, the wages and compensation earned and unpaid at the time of such discharge shall become due and payable immediately." According to NRS 608.030, "[w]henever an employee resigns or quits his or her employment, the wages and compensation earned and unpaid at the time of the employee's resignation or quitting must be paid no later than" one of two dates, whichever is earlier: "[t]he day on which the employee would have regularly been paid the wages or compensation" or "[s]even days after the employee resigns or quits." If the employer fails to pay, certain penalties apply. *See* NRS 608.040(1); NRS 608.050.

On their face, NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050 are silent as to whether a private right of ac-

---

[1]The Nevada Restaurant Association was allowed to file an amicus brief, and it concurred with Terrible Herbst.

Terrible Herbst also argues that because Neville failed to meet NRS 608.140's requirement for making a written demand prior to filing suit, he has no cause of action. We reject Terrible Herbst's argument according to the plain language of NRS 608.140, which requires a written demand to obtain attorney fees but not to file suit for unpaid wages.

tion exists to enforce their terms. Further, NRS 608.180 expressly states that "[t]he Labor Commissioner or [his representative] shall cause the provisions of NRS 608.005 to 608.195, inclusive, to be enforced." Thus, there is no direct statutory provision for a private right of action under NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050; instead, such enforcement appears to rest with the Labor Commissioner rather than the courts. *See Baldonado v. Wynn Las Vegas, LLC*, 124 Nev. 951, 954, 194 P.3d 96, 98 ("[T]he Nevada Labor Commissioner, who is entrusted with the responsibility of enforcing Nevada's labor laws, generally must administratively hear and decide complaints that arise under those laws.").

However, when no clear statutory language authorizes a private right of action, one may be implied if the Legislature so intended. *Id*. at 958, 194 P.3d at 100-01. In ascertaining the Legislature's intent, this court is guided by the following three factors: "(1) whether the plaintiffs are of the class for whose [ ]special benefit the statute was enacted; (2) whether the legislative history indicates any intention to create or deny a private remedy; and (3) whether implying such a remedy is consistent with the underlying purposes of the legislative scheme." *Id*. at 958-59, 194 P.3d at 101 (internal quotation marks omitted). This court has stated, "[t]he three factors are not necessarily entitled to equal weight; the determinative factor is always whether the Legislature intended to create a private judicial remedy." *Id.* at 959, 194 P.3d at 101. Without legislative intent to create a private judicial remedy, " 'a cause of action does not exist and courts may not create one, no matter how desirable that might be as a policy matter, or how compatible with the statute.' " *Id.* (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286-87 (2001)).

Here, NRS 608.140 demonstrates the Legislature's intent to create a private cause of action for unpaid wages. In particular, NRS 608.140 allows for assessment of attorney fees in a private cause of action for recovery of unpaid wages:

> Whenever a mechanic, artisan, miner, laborer, servant or *employee shall have cause to bring suit for wages earned and due* according to the terms of his or her employment, and shall establish by decision of the court or verdict of the jury that the amount for which he or she has brought suit is justly due, and that a demand has been made, in writing, at least 5 days before suit was brought, for a sum not to exceed the amount so found due, the court before which the case shall be tried shall allow to the plaintiff a reasonable attorney fee, in addition to the amount found due for wages and penalties, to be taxed as costs of suit.

(Emphasis added.)

Indeed, as part of resolving a different issue, this court has previously recognized that the language of NRS 608.140 can be read to

provide for a civil enforcement action to recoup unpaid wages. *See Baldonado*, 124 Nev. at 964 n.33, 194 P.3d at 104 n.33. In *Baldonado*, this court analyzed whether a private cause of action existed under NRS 608.160, which makes it unlawful for an employer to take employee tips or gratuities. *Id*. at 958-61, 194 P.3d at 100-03. In resolving that issue, and although it was not our central holding in that case, this court also addressed NRS 608.140. In a footnote, we contrasted NRS 608.160 with NRS 608.140 and stated that NRS 608.140 "expressly recognize[s] a civil enforcement action to recoup unpaid wages." *Id.* at 964 n.33, 194 P.3d at 104 n.33. In that footnote, this court went on to note that "a private cause of action to recover unpaid wages is entirely consistent with the express authority under NRS 608.140 to bring private actions for wages unpaid and due." *Id*.[2] Additionally, this court stated, "[t]he Labor Commissioner's NRS Chapter 607 authority to pursue wage and commission claims on behalf of those people who cannot afford counsel is also consistent with [the conclusion that there is authority under NRS 608.140 to bring private actions for wages unpaid and due]." *Id.*; *see* NRS 607.160(7) ("If, after due inquiry, the Labor Commissioner believes that a person who is financially unable to employ counsel has a valid and enforceable claim for wages, commissions or other demands, the Labor Commissioner may present the facts to the Attorney General."); NRS 607.170(1) ("The Labor Commissioner may prosecute a claim for wages and commissions or commence any other action to collect wages, commissions and other demands of any person who is financially unable to employ counsel . . . .").

Because NRS 608.016, NRS 608.018, and NRS 608.020 through NRS 608.050 do not expressly state whether an employee could privately enforce their terms, Neville may only pursue his claims

---

[2]While there is a conflict in federal caselaw regarding the proper way to interpret footnote 33 in *Baldonado*, these cases are only illustrative and not controlling authority upon this court. *See Cardoza v. Bloomin' Brands, Inc.*, No. 2:13-cv-01820-JAD-NJK, 2014 WL 3748641, at *1 (D. Nev. July 30, 2014) ("I find that NRS 608.140 does not create a vehicle for privately enforcing the legal rights conferred by NRS 608.016 and 608.018, it merely establishes a fee-shifting mechanism in an employee's suit for wages earned and due according to the terms of his or her employment." (internal quotation marks omitted)); *Descutner v. Newmont USA Ltd.*, No. 3:12-CV-00371-RCJ-VPC, 2012 WL 5387703, at *3 (D. Nev. Nov. 1, 2012) ("Plaintiff relies on footnote 33 . . . . But the *Baldanado* Court did not directly address the question of whether [NRS] 608.140 authorized a private suit or, more importantly, what kinds of suits it implied. Rather, it made the comment in footnote 33 to contrast those sections of the labor code under which there was no language possibly implying any kind of private right of action at all."); *but see Buenaventura v. Champion Drywall, Inc.*, 803 F. Supp. 2d 1215, 1218 (D. Nev. 2011) (ruling that "employees can maintain a private cause of action for unpaid wages pursuant to [NRS] 608.140, [therefore] employees covered by [NRS] 608.018 can bring a private cause of action for the unpaid overtime wages owed pursuant to [NRS] 608.018," and employees may also bring a private cause of action to enforce NRS 608.040).

under the statutes if a private cause of action for unpaid wages is implied. The determinative factor is always whether the Legislature intended to create a private judicial remedy. We conclude that the Legislature intended to create a private cause of action for unpaid wages pursuant to NRS 608.140. It would be absurd to think that the Legislature intended a private cause of action to obtain attorney fees for an unpaid wages suit but no private cause of action to bring the suit itself. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 336, 302 P.3d 1108, 1114 (2013) ("In order to give effect to the Legislature's intent, [this court] ha[s] a duty to consider the statute[s] within the broader statutory scheme harmoniously with one another in accordance with the general purpose of those statutes." (internal quotation marks omitted)). The Legislature enacted NRS 608.140 to protect employees, and the legislative scheme is consistent with private causes of action for unpaid wages under NRS Chapter 608.

Neville's NRS Chapter 608 claims involve allegations that wages were unpaid and due to him at the time he brought his suit before the district court. Moreover, in his complaint, Neville tied his NRS Chapter 608 claims with NRS 608.140. Thus, we conclude that Neville has and properly stated a private cause of action for unpaid wages. As a result, granting Terrible Herbst's motion to dismiss pursuant to NRCP 12(b)(5) was improper. Accordingly, we grant Neville's petition for extraordinary writ relief and direct the clerk of this court to issue a writ of mandamus instructing the district court to vacate its order dismissing Neville's claims.

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