GREGORY FELTON, APPELLANT, *v.* DOUGLAS COUNTY; AND PUBLIC AGENCY COMPENSATION TRUST, RESPONDENTS.

No. 70497

February 15, 2018 410 P.3d 991

Appeal from a district court order denying a petition for judicial review of a workers' compensation award. First Judicial District Court, Carson City; James Todd Russell, Judge.

Reversed and remanded.

[Rehearing denied April 18, 2018]

Evan B. Beavers, Nevada Attorney for Injured Workers, and *Edward L. Oueilhe*, Deputy Nevada Attorney for Injured Workers, Carson City, for Appellant.

Thorndal, Armstrong, Delk, Balkenbush & Eisinger and *Robert F. Balkenbush* and *John D. Hooks*, Reno, for Respondents.

Before the Supreme Court, HARDESTY, PARRAGUIRRE and STIGLICH, JJ.

OPINION

By the Court, STIGLICH, J.:

Workers' compensation benefits are based on a percentage of a worker's average monthly wage; therefore, the proper calculation of a claimant's average monthly wage is of paramount importance. Uncompensated volunteers are provided with a "deemed wage," a fictional salary from which benefits can be calculated if a volunteer, who would not otherwise be an "employee," is injured in the course of volunteer work. This appeal requires us to determine whether a claimant who is injured during the course of volunteer work, who also has concurrent private employment, should have his average monthly wage based solely on his "deemed wage" from volunteer work, or whether he is entitled to have his deemed wage be aggregated with earnings from his concurrent private employment. Because the plain language of our relevant workers' compensation statutes and regulations requires the aggregation of concurrently earned wages, we reverse the district court's denial of appellant's petition for judicial review and remand to the district court with instructions to grant the petition and to remand the matter to the appeals officer for further proceedings consistent with this opinion.

BACKGROUND

Appellant, Gregory Felton, sustained a minor injury to his knee while volunteering on a Douglas County search and rescue team. At

that time, Felton worked for Hewlett-Packard as a quality control specialist.

Following his injury, Felton filed a claim seeking insurance benefits from Douglas County and its workers' compensation insurance carrier, the Public Agency Compensation Trust (PACT). The third-party claims adjustor, Alternative Service Concepts (ASC), notified Felton by letter that it had calculated his average monthly wage (AMW) for the purpose of determining the amount of benefits to which he would be entitled under his claim. ASC based its calculations upon the statutorily deemed wage of a search and rescue volunteer as set forth in NRS 616A.157, which is $2,000 per month. ASC awarded Felton a one-percent permanent partial disability (PPD) or whole person impairment (WPI). Felton disputed the ASC award as to both his AMW and PPD and sought review by a hearing officer. Before the hearing officer, Felton argued that his deemed wage and his earned wage at Hewlett-Packard should be aggregated. The hearing officer affirmed the ASC award in its entirety. Felton appealed only the hearing officer's determination that his AMW should be set at the statutorily deemed wage of a search and rescue volunteer.[1]

The appeals officer affirmed the hearing officer's determination and held that, as a matter of law, Felton was not entitled to an AMW that aggregated his statutorily deemed wage and his earned wage from his private employment.

Felton filed a timely petition for judicial review, arguing that the appeals officer erred as a matter of law by not aggregating his statutorily deemed wage for volunteer work with his actual earned wage. The district court denied Felton's petition in a written order.

DISCUSSION

"The standard for reviewing petitions for judicial review of administrative decisions is the same for this court as it is for the district court." *City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 119, 251 P.3d 718, 721 (2011). "Like the district court, we decide pure legal questions without deference to an agency determination." *Id*. (internal quotation marks omitted). Likewise, "[w]e do not give any deference to the district court decision when reviewing an order regarding a petition for judicial review." *Id*. This court applies a de novo standard of review to questions of law, which includes the administrative construction of statutes. *Elizondo v. Hood Mach., Inc.*, 129 Nev. 780, 784-85, 312 P.3d 479, 482 (2013).

[1]By only appealing the hearing officer's determination as to AMW, Felton conceded the propriety of the award of a one-percent PPD/WPI.

NRS 616A.065 provides a starting point for calculating Felton's AMW

Felton argues his deemed wage and privately earned wage should be aggregated to calculate his AMW. NRS 616A.065 provides in pertinent part:

> 1. Except as otherwise provided in subsection 3, "average monthly wage" means the lesser of:
>
> (a) The monthly wage actually received or deemed to have been received by the employee on the date of the accident or injury to the employee . . . ; or
>
> (b) One hundred fifty percent of the state average weekly wage as most recently computed by the Employment Security Division of the Department of Employment, Training and Rehabilitation during the fiscal year preceding the date of the injury or accident, multiplied by 4.33.

In its written order, the appeals officer quoted the definition of AMW with the following emphasis:

> I. Except as otherwise provided in subsection 3, "average monthly wage" **means the lesser of**:
>
> (a) The monthly wage actually received **or** deemed to have been received by the employee on the date of the accident or injury to the employee, excluding remuneration from employment . . . .

The appeals officer found that the emphasized language barred the aggregation of both earned and deemed wages for the purpose of calculating AMW.

However, in giving effect to the language "the lesser of," the focus should have been on the "or" that separates subsections (1)(a) from (1)(b), not the "or" within subsection (a). "Material within an indented subpart relates only to that subpart; material contained in unindented text relates to all of the following [ ] indented subparts." Antonin Scalia & Bryan A. Garner, *Reading Law: the Interpretation of Legal Texts*, 156 (2012). The phrase "the lesser of" is followed by a colon, and refers to the two indented subsections that follow the colon. As such, the statute refers to "the lesser of" subsection (a) or subsection (b), not "the lesser of" wages actually received or deemed to have been received.

With regard to the "or" contained in subsection (a), NRS 616A.065 clearly states that wages "deemed to have been received" or actually received are properly included in an AMW determination. But it is not clear from the statute that concurrent employment was contemplated and, if so, how it should be considered, which is the issue presented by Felton. "When a statute . . . does not address

the issue at hand," we may go beyond the statutory language to determine the Legislature's intent. *Pub. Employees' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 147, 179 P.3d 542, 548 (2008). While we do not find assistance in the legislative history of NRS 616A.065, we find NRS 616C.420 illuminating in that it requires that regulations be promulgated to provide "a method of determining average monthly wage." And one of those regulations, NAC 616C.447, explicitly addresses concurrent employment.

NAC 616C.447 requires that Felton's AMW be calculated by aggregating his private wage with his deemed wage for volunteer work

By enacting NRS 616C.420, the Legislature delegated authority to the Administrator of the Division of Industrial Relations to "provide by regulation for a method of determining average monthly wage." The resulting regulation is NAC 616C.447, which provides that:

> The average monthly wage of an employee who is employed by two or more employers covered by a private carrier or by a plan of self-insurance on the date of a disabling accident or disease is equal to the sum of the wages earned or deemed to have been earned at each place of employment. The insurer shall advise an injured employee in writing of his or her entitlement to compensation for concurrent employment at the time of the initial payment of the compensation.

The appeals officer stated that "where a statute (or regulation) is unambiguous[,] the plain language will control. The plain language of NRS 616A.065 and NAC 616C.447 do not mandate the aggregation of earned wages *and* those deemed to have been earned, as they are two different categories of wages." This statement, however, ignores the plain language of NAC 616C.447, as there is no language barring aggregation of "different categories of wages"; to the contrary, the language requires aggregation of wages, whether they were "earned" or "deemed to have been earned," at "*each place of employment*" (emphasis added). NAC 616C.447.

In an attempt to distinguish the applicability of NAC 616C.447, the appeals officer relied upon *Meridian Gold Co. v. State ex rel. Department of Taxation*, 119 Nev. 630, 81 P.3d 516 (2003), to state that "[c]ourts, scholarly publications, and recently the Nevada Supreme Court have held that where an administrative regulation conflicts, expands or modifies a governing statute[,] it will be deemed invalid." Applying that principle, the appeals officer concluded:

> to the extent that NAC 616C.447 were construed to mandate aggregation of deemed wages and earned wages from concurrent

> employment, this regulation might be deemed to exceed, modify and conflict with the Nevada statute that specifically defines average monthly wage (NRS 616A.065) and the statute governing the stated average monthly wage of volunteer members of search and rescue organizations (NRS 616A.157), which latter statute does not address, allow for, nor contemplate wages from private/public concurrent employment.

We have previously stated that we "will not hesitate to declare a regulation invalid when the regulation violates the constitution, conflicts with existing statutory provisions or exceeds the statutory authority of the agency or is otherwise arbitrary and capricious." *Meridian Gold Co.*, 119 Nev. at 635, 81 P.3d at 519 (quoting *State, Div. of Ins. v. State Farm Mut. Auto. Ins. Co.*, 116 Nev. 290, 293, 995 P.2d 482, 485 (2000)). However, when faced with related provisions, we construe them in harmony whenever possible so as to give effect to each of the controlling legal provisions. *See State, Div. of Ins.*, 116 Nev. at 295, 995 P.2d at 486.

Reading the relevant provisions in conjunction with one another, they do not conflict, but rather, provide context as separate pieces of a puzzle that fit together in NAC 616C.447. NRS 616A.065 provides the definition (specifically referencing "deemed wages" as a possible starting point for calculating AMW) and a maximum limit of an AMW, but is silent regarding how to deal with concurrent wages. The amount of wages "deemed to have been received" that NRS 616A.065 references is provided (for search and rescue volunteers) in NRS 616A.130 if the injury occurred prior to 2013 or NRS 616A.157 thereafter. With just those statutes, there would be no clear answer as to how to calculate an AMW for a claimant with concurrent wages. However, the Administrator exercised the authority granted by NRS 616C.420 to enact NAC 616C.447, which provides an answer in plain language. If a claimant has concurrent employment, his or her AMW is "equal to the sum of the wages earned or deemed to have been earned at each place of employment." NAC 616C.447.

Contrary to the appeals officer's conclusion, NAC 616C.447 is not a more general provision that conflicts with more specific statutes; rather, it provides specific directions regarding the calculation of AMW using the deemed wages provided by statutes when a claimant has concurrent private employment. If a volunteer search and rescue worker without any other employment is injured in the course of his or her duties, NRS 616A.157 (or NRS 616A.130 if the injury occurred before 2013) stands alone to provide the AMW (subject to the maximum set by NRS 616A.065(1)(b)). However, if the volunteer has concurrent employment, as Felton did at the

time of his injury, the claimant's AMW shall be calculated pursuant to NAC 616C.447, subject to the maximum set forth in NRS 616A.065(1)(b). The appeals officer erred by finding an inconsistency where none exists in the plain language of NAC 616C.447 read in conjunction with the plain language of NRS 616A.130 and NRS 616A.157.[2]

CONCLUSION

Pursuant to NAC 616C.447, Felton's average monthly wage should have been based on the aggregation of his deemed wage for his volunteer work and his concurrent privately earned wage from working at Hewlett-Packard, subject to the maximum amount set forth in NRS 616A.065(1)(b).[3] Accordingly, we reverse the denial of Felton's petition for judicial review and remand this matter to the district court. The district court is instructed to remand this matter to the appeals officer for remand to ASC to recalculate Felton's benefit in a manner that is consistent with this opinion.

Hardesty and Parraguirre, JJ., concur.

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[2]The appeals officer found that "while Nevada law is silent on whether it would allow the aggregation of wages from two dissimilar employments, it may very well adopt the related-employment rule accepted by a majority of jurisdictions throughout the country." Respondents urge this court to adopt the related-employment rule and the parties advance policy reasons for and against adopting such a rule. We decline the invitation to adopt a rule that is absent from statutory language. *See Weaver v. State Indus. Ins. Sys.*, 104 Nev. 305, 306, 756 P.2d 1195, 1196 (1988).

[3]We note that at the time of Felton's injury, NRS 616A.130 provided the deemed wage for volunteer workers within a state or local organization, a category that included volunteers for Douglas County search and rescue like Felton. However, in calculating Felton's deemed wage, ASC relied upon NRS 616A.157, a statute that did not take effect until after Felton's injury. *See* NRS 616C.425(1) (requiring that compensation and benefits "be determined as of the date of the accident or injury to the employee, and their rights thereto become fixed as of that date"). The appeals officer recognized that Felton was injured before NRS 616A.157 went into effect but adopted ASC's use of the statute and found that "[n]either Douglas County nor the PACT appealed this determination and, therefore, effective the date of the determination, the statutory deemed wage under NRS 616[A].157 is Felton's AMW under the claim."

THE LAS VEGAS REVIEW-JOURNAL; AND THE ASSOCIATED PRESS, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE RICHARD SCOTTI, DISTRICT JUDGE, RESPONDENTS, AND VERONICA HARTFIELD, A NEVADA RESIDENT; ESTATE OF CHARLESTON HARTFIELD; AND CLARK COUNTY OFFICE OF THE CORONER/MEDICAL EXAMINER, REAL PARTIES IN INTEREST.

No. 75073

February 27, 2018 412 P.3d 23

Original petition for a writ of mandamus or prohibition challenging a district court order granting a preliminary injunction.

Petition granted.

[Rehearing denied March 6, 2018]

[En banc reconsideration denied March 21, 2018]

McLetchie Shell LLC and *Margaret A. McLetchie* and *Alina M. Shell*, Las Vegas, for Petitioners.

Steven B. Wolfson, District Attorney, and *Laura C. Rehfeldt*, Deputy District Attorney, Clark County, for Real Party in Interest Clark County Office of the Coroner/Medical Examiner.

Sgro & Roger and *Anthony P. Sgro* and *Eunice M. Beattie*, Las Vegas, for Real Parties in Interest Veronica Hartfield and Estate of Charleston Hartfield.

Randazza Legal Group, PLLC, and *Marc J. Randazza*, Las Vegas, for Amici Curiae.

Before the Supreme Court, PICKERING, GIBBONS and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

The district court enjoined the Las Vegas Review-Journal and the Associated Press from reporting on a redacted, anonymized autopsy report that they and other members of the media obtained through a Nevada Public Records Act request. The question presented is whether the district court's preliminary injunction order comports with the First Amendment. We hold that it does not. While we are deeply sympathetic to the decedent's family's privacy concerns, the First Amendment does not permit a court to enjoin the press from

reporting on a redacted autopsy report already in the public domain. We therefore grant the writ and vacate the preliminary injunction as an unconstitutional prior restraint.

I.

A.

On the night of October 1, 2017, a gunman opened fire on a crowd of concertgoers at the Route 91 Harvest music festival in Las Vegas, killing 58 people and injuring hundreds more. Within days, members of the media, including petitioners Las Vegas Review-Journal and the Associated Press (collectively, the Review-Journal), asked the Clark County Coroner for access to the shooter's and his victims' autopsy reports pursuant to the Nevada Public Records Act (NPRA), NRS Ch. 239. The Coroner denied the media requests for the victims' autopsy reports, deeming them confidential. *See* NRS 239.010(1) (providing that confidential government records are not subject to public dissemination). On November 16, 2017, the Review-Journal filed suit against the Coroner under NRS 239.011, which gives a party who has been denied access to a public record the right to sue for an order requiring the government to provide a copy or permit inspection of it.

The district judge assigned to the NPRA case heard argument on January 30, 2018, after full briefing. At the end of the hearing, he orally ruled that the autopsy reports constituted public records subject to inspection and release but directed the Coroner to redact the victims' names and personal identifying information, which the Review-Journal conceded was appropriate. The next day, January 31, 2018, the Coroner released the victims' autopsy reports "with the names, Coroner case number, age and race redacted," emailing them first to the Review-Journal then, eight hours later, to the other news outlets that had requested them. The Review-Journal reported on the redacted autopsy reports immediately, Anita Hassan & Rachel Crosby, *Coroner Releases Autopsy Reports of 58 Victims from Las Vegas Shooting*, Las Vegas Review-Journal (Jan. 31, 2018, 4:50 p.m.), https://www.reviewjournal.com/crime/shootings/coroner-releases-autopsy-reports-of-58-victims-from-las-vegas-shooting, and other members of the press have done so since. *See*, *e.g.*, Stephen Sorace, *Las Vegas Shooting Victims' Info Released; Gunman's Data Excluded*, Fox News (Feb. 1, 2018), http://www.foxnews.com/us/2018/02/01/las-vegas-shooting-victims-autopsy-info-released-gunmans-data-excluded.html; *Fox 5 KVVU-TV* (Live news broadcast Feb. 1, 2018), http://www.fox5vegas.com/clip/14096105/coroner-delays-release-of-1-october-mass-shooter-autopsy (last visited Feb. 26, 2018); Nick Wing & Matt Ferner, *Here Are the Autopsies for the Victims of the Las Vegas Mass Shooting*, Huffington Post (Feb. 15, 2018, 9:13 a.m.), https://www.

huffingtonpost.com/entry/las-vegas-autopsy-documents_us_5a8234efe4b01467fcf08b97.[1]

B.

One of the 58 murder victims was Charleston Hartfield, an off-duty Las Vegas Metropolitan Police Officer who had attended the Route 91 Harvest music festival with his wife, real party in interest Veronica Hartfield. On February 2, 2018, two days after the Coroner publicly released the redacted autopsy reports, Mrs. Hartfield and the Estate of Charleston Hartfield (collectively, the Hartfield Parties), filed a separate lawsuit against the Coroner and the Review-Journal. In their complaint, the Hartfield Parties sought: (1) a declaratory judgment that Mr. Hartfield's redacted autopsy report is confidential and, so, not subject to disclosure under the NPRA; and (2) an injunction barring the Review-Journal from disseminating or reporting on it.

The Hartfield Parties coupled their complaint with a motion for a temporary restraining order and preliminary injunction. The Coroner filed a notice of non-opposition, attaching his brief unsuccessfully urging confidentiality of autopsy records in the NPRA case. The Review-Journal opposed the Hartfield Parties' motion. In its opposition, the Review-Journal argued that the reports were redacted and therefore anonymized; that the report was among those already in the public domain pursuant to the order in the NPRA case; and that granting the motion would abridge its First Amendment freedoms and constitute an invalid prior restraint.

On February 9, 2018, the district judge heard argument on and orally granted the Hartfield Parties' motion for a preliminary injunction. The judge based his ruling on the Hartfield Parties' privacy interests, which he deemed fundamental. Placing the burden on the Review-Journal to demonstrate a "legitimate basis for why the public would need to have access to the redacted Hartfield autopsy report," the district court balanced the Hartfield Parties' privacy interests against what it declared to be the lack of newsworthiness of the redacted autopsy report and found the Hartfield Parties' privacy interests outweighed the Review-Journal's First Amendment interests. In the written order that followed, the district court ordered "that the Las Vegas Review Journal and the Associated Press are hereby restrained and barred from disclosing, disseminating, publishing, or sharing the redacted autopsy report of Mr. Hartfield, or any information of Mr. Hartfield therein." The district court dismissed the Review-Journal's concern that, because the autopsy reports were anonymized and redacted, it could not identify which report was

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[1]We deny the Hartfield Parties' February 16, 2018, motion to strike the Review-Journal's second supplemental appendix, which contains the Huffington Post article.

Mr. Hartfield's. As a solution, it directed the Review-Journal to allow the Coroner and the Hartfield Parties to inspect the reports at the Review-Journal's offices, so that Mr. Hartfield's autopsy report could be identified and all copies of it returned or destroyed.

II.

The Review-Journal filed an emergency petition for mandamus or prohibition with this court on February 12, 2018. In its petition, the Review-Journal challenges the district court's injunction as an invalid prior restraint of its First Amendment freedoms.

"[P]rior restraints on speech and publication are the most serious and the least tolerable infringement on First Amendment rights," *Neb. Press Ass'n v. Stuart*, 427 U.S. 539, 559 (1976), and are presumptively unconstitutional. *Org. for a Better Austin v. Keefe*, 402 U.S. 415, 419 (1971). Although preliminary injunction orders are directly appealable, NRAP 3A(b)(3), and ordinarily, writ relief will not lie when a party can take a direct appeal, NRS 34.170; NRS 34.330; *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008), here the Review-Journal sought writ relief from the district court's *oral* preliminary injunction, which could not be appealed until a written order was entered. *Rust v. Clark Cty. Sch. Dist.*, 103 Nev. 686, 689, 747 P.2d 1380, 1382 (1987) ("only a written judgment may be appealed"). Because the Review-Journal had no right of direct appeal when it filed its writ petition, and because a later appeal would not adequately remediate the harm complained of in this case, *see Capital Cities Media, Inc. v. Toole*, 463 U.S. 1303, 1304 (1983) ("It is clear that even a short-lived 'gag' order in a case of widespread concern to the community constitutes a substantial prior restraint and causes irreparable injury to First Amendment interests as long as it remains in effect."), we accepted the emergency petition for writ relief, ordered entry of a final written order by the district court and expedited briefing by the parties, and now proceed to address the petition on its merits. *See Johanson v. Eighth Judicial Dist. Court*, 124 Nev. 245, 249-50, 182 P.3d 94, 96-97 (2008) (accepting writ review of an order forbidding a party from disseminating information regarding an ongoing district court case, even though an appeal may lie later, in part because the remedy of an eventual appeal was neither speedy nor adequate under the circumstances).

III.

The district court's order enjoining the Review-Journal from reporting on the anonymized, redacted autopsy report it obtained from the Coroner pursuant to the order in the NPRA case constitutes an invalid prior restraint that violates the First Amendment. Although the Supreme Court has not categorically invalidated orders impos-

ing prior restraints on the press, *see Neb. Press*, 427 U.S. at 570, the proponent of such an order "carries a heavy burden of showing justification for the imposition of such a restraint." *N.Y. Times Co. v. United States*, 403 U.S. 713, 714 (1971) (per curiam) (quoting *Keefe*, 402 U.S. at 419). To justify a prior restraint, the interest the prohibition protects must be of the "highest order." *The Fla. Star v. B.J.F.*, 491 U.S. 524, 541 (1989). Also, "[t]he restraint must be the narrowest available to protect that interest; and the restraint must be necessary to protect against an evil that is great and certain, would result from the reportage, and cannot be mitigated by less intrusive measures." *Colorado v. Bryant*, 94 P.3d 624, 628 (Colo. 2004) (citing *CBS Inc. v. Davis*, 510 U.S. 1315, 1317 (1994) (Blackmun, J., in chambers)); *see Johanson*, 124 Nev. at 251, 182 P.3d at 98 (a prior restraint or "gag" order is only justified when "(1) the activity restrained poses either a clear and present danger or a serious and imminent threat to a protected competing interest, (2) the order is narrowly drawn, and (3) less restrictive alternatives are not available") (quoting *Levine v. U.S. Dist. Court for Cent. Dist. of Cal.*, 764 F.2d 590, 595 (9th Cir. 1985)).

The district court based its injunction order on the need to protect the Hartfield Parties' privacy interests. The record does not include the redacted autopsy reports, only the news accounts of them and affidavits from the NPRA case describing the Coroner's redactions. These documents suggest that the redacted reports include information relating to the shooting, such as the location of bullet wounds and the time and date of death, not personal identifying information. And, the case on which the injunction order relies—*Katz v. National Archives & Records Administration*, 862 F. Supp. 476 (D.D.C. 1994)—concerned whether autopsy photographs and x-rays of former President John F. Kennedy were "agency records" subject to disclosure under the federal Freedom of Information Act, or personal presidential papers subject to restrictions on disclosure. It did not concern, as this case does, an order restraining the media from reporting on redacted autopsy reports already obtained from the state pursuant to court order.

For purposes of our analysis we assume, without deciding, that the Hartfield Parties had a protectable privacy interest in preventing disclosure of Mr. Hartfield's redacted autopsy report. Even making this assumption, the fact remains that the Review-Journal obtained the redacted autopsy reports from the Coroner before the Hartfield Parties sued to enjoin their production, and it did so pursuant to the court order entered in the NPRA case. The Hartfield Parties see it as unfair to hold the Review-Journal's possession of the redacted autopsy reports against them because they were not parties to and did not know about the NPRA case until the judge in that case ordered the reports produced. Mandatory Supreme Court precedent

teaches, however, that where the press obtains private information from the state—even where the state should have protected the information—damages or criminal punishment may not be imposed for its subsequent publication, absent extraordinary circumstances. *Cox Broad. Corp. v. Cohn*, 420 U.S. 469, 494-95 (1975) (holding that damages could not be recovered against a news organization for publishing the name of a rape-murder victim, in violation of a state criminal statute, where the reporter obtained the name by inspecting court documents the clerk provided him); *see The Fla. Star*, 491 U.S. at 535-36 (reversing a damage award in favor of rape victim whose name was gleaned from a report released by the police); *Okla. Publ'g Co. v. Dist. Court*, 430 U.S. 308 (1977) (per curiam) (vacating a state court injunction prohibiting the media from publishing the name and photograph of an 11-year-old boy being tried in juvenile court where the juvenile court judge had permitted reporters and other members of the public to attend a hearing in the case, notwithstanding a statute closing such trials to the public). An injunction, if violated, can lead to contempt, so these cases apply here. Indeed, a prior restraint demands more exacting scrutiny than a damage award or criminal sanction, because a prior restraint freezes speech before it is uttered, whereas post-speech civil and criminal sanctions, while they chill speech, do not become fully operative until trial and appellate review have run their course. *See Neb. Press*, 427 U.S. at 559.

The prior publication of the redacted autopsy reports diminished the Hartfield Parties' privacy interests beyond the point of after-the-fact injunctive repair. *See Cox Broad.*, 420 U.S. at 494-95 ("the interests in privacy fade when the information involved already appears on the public record"); *Doe v. City of N.Y.*, 15 F.3d 264, 268 (2d Cir. 1994) ("Certainly, there is no question that an individual cannot expect to have a constitutionally protected privacy interest in matters of public record."); *McNally v. Pulitzer Publ'g Co.*, 532 F.2d 69, 77-78 (8th Cir. 1976) (relying on *Cox Broadcasting* to hold that there was no harm to any constitutional right of privacy when the information claimed to be private was already a matter of public record). Thus, the injunction did not, and could not as a matter of law, promote a state interest of the "highest order." *The Fla. Star*, 491 U.S. at 541. While the district court directed the Coroner to write letters advising other news organizations of its order, its order only restrained the Review-Journal and the Associated Press, requiring them to destroy or return Mr. Hartfield's redacted autopsy report and enjoining them from reporting on it. Leaving other news organizations free to report on Mr. Hartfield's redacted autopsy report while restraining the Review-Journal and the Associated Press from doing so does not accomplish the stated goal of protecting the Hartfield Parties' privacy interests. *Cf. id.* at 540 ("When a State attempts the

extraordinary measure of punishing truthful publication in the name of privacy, it must demonstrate its commitment to advancing this interest by applying its prohibition evenhandedly, to the smalltime disseminator as well as the media giant.”).

The district court placed the burden on the Review-Journal to defend the newsworthiness of the redacted autopsy reports. But it is the proponent of the prior restraint who must bear the heavy burden of justifying it. *N.Y. Times*, 403 U.S. at 714. Because the anonymized and redacted autopsy reports were already in the public domain, “[t]he harm that could have been prevented by the prior restraint has already occurred, and, because this harm has occurred, the heavy presumption against the constitutionality of a prior restraint has not been overcome.” *Bryant*, 94 P.3d at 642 (Bender, J., dissenting). In other words, any damage to the Hartfields’ privacy interests had already been done and the district court’s subsequent order could not remedy that damage. Thus, the real parties in interest failed to demonstrate a serious and imminent threat to a protected competing interest that would warrant the prior restraint imposed in this case. *The Fla. Star*, 491 U.S. at 533-34.

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Accordingly, the district court’s order does not pass constitutional muster, compelling writ relief. We therefore grant the petition and direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its preliminary injunction order.

Gibbons and Hardesty, JJ., concur.

RALPH SIMON JEREMIAS, Appellant, *v.*
THE STATE OF NEVADA, Respondent.

No. 67228

March 1, 2018 412 P.3d 43

Appeal from a judgment of conviction, pursuant to a jury verdict, of one count each of conspiracy to commit robbery and burglary while in possession of a deadly weapon, and two counts each of robbery with the use of a deadly weapon and murder with the use of a deadly weapon. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

[Rehearing denied April 27, 2018]

David M. Schieck, Special Public Defender, and *JoNell Thomas*, Chief Deputy Special Public Defender, Clark County, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, *Jonathan E. VanBoskerck*, Chief Deputy District Attorney, and *David L. Stanton* and *Christopher Burton*, Deputy District Attorneys, Clark County, for Respondent.

Before the Supreme Court, En Banc.

OPINION

By the Court, Stiglich, J.:

This opinion addresses matters which arose during appellant Ralph Jeremias' trial for the murders of Brian Hudson and Paul Stephens. We focus the bulk of our discussion on Jeremias' claim that the district court violated his right to a public trial by closing the courtroom to members of the public during jury selection without making sufficient findings to warrant the closure. Under *Presley v. Georgia*, 558 U.S. 209 (2010), such a violation constitutes structural error, which usually entitles an appellant to automatic reversal of his judgment of conviction without an inquiry into whether the error affected the verdict. But Jeremias did not object to the closure and thus did not preserve the error for appellate review. Under Nevada law, this means he must demonstrate plain error that affected his substantial rights. Following the United States Supreme Court's guidance in *Weaver v. Massachusetts*, 137 S. Ct. 1899 (2017), which discussed the violation of the right to a public trial during jury selection in the context of an ineffective-assistance-of-counsel claim, we hold that Jeremias fails to satisfy plain error review. We also conclude that no relief is warranted on his other claims and that his death sentences are supported by our independent review of the record under NRS 177.055(2).

FACTS AND PROCEDURAL HISTORY

On June 8, 2009, Brian Hudson and Paul Stephens were found murdered in the apartment they shared. They had both been shot in the head, and it appeared they had been robbed. A witness who lived in the same apartment complex told law enforcement that she saw two men, one with light skin and one with darker skin, near the scene around the time of the murders. Another witness said that, after hearing gunshots, he saw a red truck speed from the complex.

Detectives learned that the victims' credit cards had been used at various locations after the murders. They obtained surveillance videos from those locations and identified a potential suspect and a vehicle he was driving. That vehicle model was often used as a rental car, so detectives searched rental car records. This search led

them to Jeremias, who matched the person who had been seen in the surveillance footage using the victims' bank cards. Jeremias was identified by one of the witnesses as the darker-skinned man she had seen in the apartment complex. Jeremias' friend, Carlos Zapata, drove a red truck that was identified by the other witness as that which had left the complex after the shooting.

After further investigation, law enforcement determined that Jeremias committed the murders in the course of a robbery he planned with Zapata and a third individual named Ivan Rios. They were all charged for their roles in the murders; Zapata pleaded guilty and testified on behalf of the prosecution at Jeremias' trial.[1] According to Zapata, Jeremias proposed robbing the victims because he believed there would be drugs and money in their apartment. The plan was for Jeremias, who was friendly with the victims, to gain entry to the apartment. When Jeremias texted the others that everything was ready to go, Zapata would run in and grab the property and Rios would drive them away in Zapata's truck. With the plan set, the group drove to the victims' apartment and Jeremias went inside. While waiting for the signal, Zapata heard gunshots. Jeremias returned empty-handed, and the group fled the scene. Later, Jeremias complained that "it's all for nothing" unless they went back to the apartment and took the property he had left behind. Rios apparently balked, so Jeremias and Zapata took a rental car back to the apartment and stole the property. Afterward, the entire group went out celebrating with the victims' money.

Jeremias testified in his own defense. He admitted that he had been in the victims' apartment and that he stole their property, but he denied there was a plan to rob the victims or that he was involved in their deaths. Instead, he claimed he went to the victims' apartment to buy marijuana. When he knocked on their front door, it "popped open" and he saw them with blood on their faces. He knew they were dead, and in a state of shock and intoxication, he decided to take their property.

The jury found Jeremias guilty of conspiracy to commit robbery, burglary while in possession of a deadly weapon, two counts of robbery with the use of a deadly weapon, and two counts of first-degree murder with the use of a deadly weapon. With respect to the murders, the jury unanimously found they were willful, deliberate, and premeditated and were committed during the perpetration or attempted perpetration of a burglary and robbery. The jury also unanimously found each of the aggravating circumstances alleged (that the murders were committed in the course of a robbery, the murders were committed to prevent a lawful arrest, and Jeremias was convicted of more than one murder), and at least one juror found

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[1]Rios was tried separately and was acquitted.

several mitigating circumstances. The jury unanimously concluded that the mitigating circumstances did not outweigh the aggravating circumstances and imposed a sentence of death for each murder. This appeal followed.

DISCUSSION

Exclusion of Jeremias' family from the courtroom during jury selection

Jeremias contends that the district court violated his right to a public trial by excluding members of his family from the courtroom during voir dire. As explained in more detail below, we conclude that Jeremias forfeited any error by failing to object and fails to demonstrate that this court should grant relief under plain error review.

Jeremias' claim is based on *Presley v. Georgia*, 558 U.S. 209 (2010). In *Presley*, the trial court judge noticed an observer sitting in the audience as jury selection was about to commence. *Id*. at 210. The judge told the observer that he had to leave the courtroom because all of the seats would be needed for prospective jurors. *Id*. The observer was the defendant's uncle, and the defendant objected to "the exclusion of the public from the courtroom." *Id*. (quotation marks omitted). The judge reiterated that there would not be enough seats and noted that it would be inappropriate for the uncle to "intermingle" with the prospective jurors. *Id*. When the matter was raised on appeal, the Supreme Court of Georgia determined that the judge had identified a compelling interest for closing the courtroom. *Id.* at 211. Reversing that decision, the United States Supreme Court explained that limited space in a courtroom and concerns that the defendant's family might interact with potential jurors were inadequate reasons to exclude the public entirely, and the trial court was required to take reasonable measures to accommodate public attendance, such as "reserving one or more rows for the public; dividing the jury venire panel to reduce courtroom congestion; or instructing prospective jurors not to engage or interact with audience members." *Id*. at 215. Because the trial court had relied on inadequate reasons to close the proceedings and did not consider reasonable alternatives, the Court determined that it committed structural error, warranting automatic reversal and remand for a new trial. *Id*. at 216.

The facts of this case are similar. Before potential jurors entered the courtroom, the prosecutor objected to having members of Jeremias' family present during the jury selection process. The prosecutor stated that he had a "number of reasons" for wanting to exclude Jeremias' family and was willing to identify them on the record, but defense counsel had already told Jeremias' family that they would be asked to leave the courtroom. Defense counsel remained silent.

The judge then stated: "Okay. And just so the family knows, we use every single seat for the jurors. So we would need to kick you out, anyway. At least until we get started with the jury selection and get a few people excused, because we don't have enough chairs. We bring the maximum number we can fit with the chairs." Apparently, Jeremias' family then left the courtroom, and it is unclear when they returned.

At first blush, the facts of this case seem to neatly align with those in *Presley*. But there is an important distinction in that the defendant in *Presley* objected to the closure whereas Jeremias did not. The failure to preserve an error, even an error that has been deemed structural, forfeits the right to assert it on appeal. *United States v. Olano*, 507 U.S. 725, 731 (1993) ("No procedural principle is more familiar to this Court than that a constitutional right, or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right . . . ." (internal quotation marks omitted)).[2] Nevada law provides a mechanism for an appellant to seek review of an error he otherwise forfeited. NRS 178.602 (explaining when an unpreserved error "may be noticed"). Before this court will correct a forfeited error, an appellant must demonstrate that: (1) there was an "error"; (2) the error is "plain," meaning that it is clear under current law from a casual inspection of the record; and (3) the error affected the defendant's substantial rights. *Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

For the purposes of this discussion, we will assume that Jeremias satisfies the first two prongs by demonstrating that the district court closed the courtroom to members of the public (his family) for an inadequate reason (courtroom congestion) without balancing other interests or exploring reasonable alternatives. *See Presley*, 558 U.S. at 216. Whether he is entitled to relief therefore turns on whether he can satisfy the third prong: that the error affected his substantial rights.

On that point, Jeremias suggests that the error necessarily affected his substantial rights because it has been deemed structural, which means he would have been entitled to automatic reversal without an inquiry into whether he was harmed had the error been preserved. *See Weaver v. Massachusetts*, 137 S. Ct. 1899, 1908 (2017) (discussing the structural error doctrine). He is mistaken. Under Neva-

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[2]Pointing to *Walton v. Briley*, 361 F.3d 431, 434 (7th Cir. 2004), Jeremias argues that the right to a public trial cannot be forfeited. In addition to disagreeing with *Walton*, we note that it is an outlier and somewhat conflicts with United States Supreme Court precedent. *See generally Levine v. United States*, 362 U.S. 610, 619-20 (1960) (observing, in the due process context, that "[d]ue regard generally for the public nature of the judicial process does not require disregard of the solid demands of the fair administration of justice in favor of a party who, at the appropriate time and acting under advice of counsel, saw no disregard of a right, but raises an abstract claim only as an afterthought on appeal").

da law, a plain error affects a defendant's substantial rights when it causes actual prejudice or a miscarriage of justice (defined as a "grossly unfair" outcome). *Valdez v. State*, 124 Nev. 1172, 1190, 196 P.3d 465, 477 (2008); *Black's Law Dictionary* 1149 (10th ed. 2014) (defining miscarriage of justice). But as the United States Supreme Court recently explained in *Weaver*, a violation of the right to a public trial during jury selection is not inherently prejudicial, nor does it render every trial unfair. Outside of circumstances where a defendant preserves the error at trial and raises it on direct review, a defendant must demonstrate that relief is warranted by pointing to the facts and circumstances of the case presented.[3]

Here, Jeremias fails to establish that the exclusion of his family for a small portion of voir dire prejudiced him or rendered his trial unfair. Like in *Weaver*, the courtroom was open during the evidentiary portion of the trial, there were members of the venire who did not become jurors but were able to observe the selection process, there is no real assertion that any juror lied or that the prosecutor or judge committed misconduct during voir dire, and there was a record made of the questioning that took place during the closure. *See* 137 S. Ct. at 1913. Although permitting Jeremias' family members to remain in the courtroom would have limited his exposure to the harms the public-trial right was intended to combat, "[t]here has been no showing . . . that the potential harms flowing from a courtroom closure came to pass in this case," nor is there any evidence to suggest that "the participants failed to approach their duties with the neutrality and serious purpose that our system demands." *Id*. Thus, while he might have been entitled to relief under different circumstances, *see generally id*. ("If, for instance, defense counsel errs in failing to object when the government's main witness

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[3]Regarding the similar federal plain error test, the Court had previously noted "the possibility" that structural errors "might affect substantial rights regardless of their actual impact on an appellant's trial." *United States v. Marcus*, 560 U.S. 258, 263 (2010) (internal quotation marks omitted). Although we acknowledge that *Weaver* discusses the violation of the right to a public trial in a different context (an ineffective-assistance claim on postconviction review), it makes clear that a violation of the right to a public trial during jury selection only warrants reversal without regard to its effect on the verdict when it has been *preserved* at trial and raised on direct appeal. *See* 137 S. Ct. at 1910 ("Thus, in the case of a structural error where there is an objection at trial and the issue is raised on direct appeal, the defendant generally is entitled to 'automatic reversal' regardless of the error's actual 'effect on the outcome.'" (quoting *Neder v. United States*, 527 U.S. 1, 7 (1999)); *id.* at 1911-12 (listing cases and stating "[t]he errors in those cases necessitated automatic reversal after they were preserved and then raised on direct appeal"); *id.* 1912 ("The reason for placing the burden on the petitioner in this case, however, derives both from the nature of the error and the difference between a public-trial violation preserved and then raised on direct review and a public-trial violation raised as an ineffective-assistance-of-counsel claim." (internal citation omitted)).

testifies in secret, then the defendant might be able to show prejudice with little more detail.”), he has not demonstrated a violation of his substantial rights under the circumstances presented. Accordingly, he fails to satisfy plain error review.

Even assuming otherwise, the decision whether to correct a forfeited error is discretionary, *City of Las Vegas v. Eighth Judicial Dist. Court*, 133 Nev. 658, 660, 405 P.3d 110, 112 (2017), and we decline to exercise that discretion here. Considered in context, Jeremias seeks a new trial because members of his family were not able to observe jury selection for a brief period of time (the record suggests a few hours), despite the strong evidence against him and the fact that there is no serious suggestion that their absence had any effect on the proceeding. We are bound by authority which holds that these facts constitute a violation of Jeremias’ right to a public trial. *But see Weaver*, 137 S. Ct. at 1914 (Thomas, J., concurring) (expressing willingness to reconsider that the right to a public trial extends to jury selection, as held in *Presley*). And the closure should have been avoided, particularly given that members of the public had a right to be present during the jury selection process. *Press-Enter. Co. v. Superior Court of Cal., Riverside Cty.*, 464 U.S. 501, 508-10 (1984). Nevertheless, the violation of Jeremias’ right to a public trial was unquestionably trivial under the circumstances.

Perhaps more importantly, Jeremias’ failure to object could reasonably be construed as intentional. *See Jezdik v. State*, 121 Nev. 129, 140, 110 P.3d 1058, 1065 (2005) (declining to correct a forfeited error where the record did not establish the reason for counsel’s failure to object). The closure did not happen under the radar. *Cf. Gonzalez v. Quinones*, 211 F.3d 735, 736 (2d Cir. 2000) (considering a closure where a court officer locked the doors to the courtroom unbeknownst to the judge and parties). The prosecutor openly stated that he was requesting removal of Jeremias’ family, and indicated that his reasons for doing so involved matters not yet on the record, which he had relayed to Jeremias’ attorney. Jeremias said nothing. While not rising to the level of invited error, *see Pearson v. Pearson*, 110 Nev. 293, 297, 871 P.2d 343, 345 (1994) (recognizing that “[i]n most cases application of the [invited error] doctrine has been based on affirmative conduct inducing the action complained of” (internal quotation marks omitted)), or waiver, *see Ford v. State*, 122 Nev. 796, 805, 138 P.3d 500, 506 (2006) (recognizing that a waiver is an intentional relinquishment of a known right), correcting the error under these circumstances would encourage defendants who are aware their rights are being violated to do nothing to prevent it, knowing that they can obtain a new trial as a matter of law in the event they are convicted. This would erode confidence in the judiciary and undermine the integrity of the criminal justice system,

see United States v. Vonn, 535 U.S. 55, 73 (2002) (emphasizing the value of finality); *Puckett v. United States*, 556 U.S. 129, 140 (2009) (requiring an objection to prevent criminal defendants from "gaming" the justice system), particularly since resolving the entire issue here would have been as easy as setting aside four additional seats and bringing in four fewer prospective jurors, *see Weaver*, 137 S. Ct. at 1912 (observing that "when a defendant objects to a courtroom closure, the trial court can either order the courtroom opened or explain the reasons for keeping it closed," but when a defendant does not object, "the trial court is deprived of the chance to cure the violation"). For all of these reasons, we conclude that no relief is warranted.

Questioning of Zapata

Jeremias next challenges the State's questioning of Zapata, arguing that the prosecutor did not follow correct procedures to refresh Zapata's recollection and used a transcript to guide his testimony.[4] *See* NRS 50.125 (discussing the refreshing recollection doctrine).

"Before refreshing a witness's memory it must appear that the witness has no recollection of the evidence to be refreshed." *Sipsas v. State*, 102 Nev. 119, 123, 716 P.2d 231, 233 (1986). Without first establishing that Zapata's memory needed refreshing, the prosecutor repeatedly referred him to a transcript of his interview with law enforcement during direct examination. The prosecutor also asked Zapata to read aloud from the transcript instead of testifying from his memory. This questioning was inappropriate, and we conclude that the district court abused its discretion in overruling Jeremias' valid objections to it. *See* NRS 50.115 (recognizing that the district court has discretion to control the questioning of witnesses).[5] The prosecutor apparently believed his method of questioning was justified because Zapata admitted that he had not "memorized" the transcript and did not remember what he told police "word for word." But Zapata's inability to remember what he told police verbatim did not authorize the prosecutor to guide his testimony under the guise of refreshing his recollection, and it certainly did not authorize the prosecutor to ask Zapata to read from the transcript rather than testify from his own memory. *See Rush v. Ill. Cent. R.R. Co.*, 399 F.3d

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[4]Jeremias challenges this questioning on other grounds, but he did not contemporaneously object on those grounds and fails to demonstrate plain error regarding them.

[5]In reaching this decision, we decline to consider the prosecutor's explanation, raised for the first time at oral argument on appeal, that there was some sort of arrangement with the defense to question Zapata in this manner to avoid testimony that they had agreed would not become part of trial. We also decline to reconsider Jeremias' request to expand the record to include Zapata's testimony from Rios' trial. We base our decision on the record as it stands.

705, 718-19 (6th Cir. 2005) (explaining that a witness may not read aloud from the writing used to refresh his recollection); 28 Charles Alan Wright & Victor J. Gold, *Federal Practice and Procedure: Evidence* § 6184 (2012) (explaining that courts should not permit a witness to retain a writing "where the circumstances suggest that the writing is merely a script that is being read into evidence under the guise of refreshed recollection").

Nevertheless, we conclude that the error was harmless because Zapata directly inculpated Jeremias in the portions of his testimony that were not inappropriately guided. Moreover, the same testimony could have been elicited had the prosecutor followed proper procedure to refresh Zapata's recollection, or to impeach him if the writing failed to jog his memory or if his testimony differed from his prior statement. Therefore, although the district court abused its discretion, no relief is warranted. *See Valdez v. State*, 124 Nev. 1172, 1189, 196 P.3d 465, 476 (2008) ("If the error is not of constitutional dimension, we will reverse only if the error substantially affects the jury's verdict.").

Testimony of a substitute coroner

Jeremias asserts that the district court violated his right to confrontation by permitting a coroner to testify who did not conduct the victims' autopsies. Reviewing de novo, *Chavez v. State*, 125 Nev. 328, 339, 213 P.3d 476, 484 (2009), we conclude that Jeremias' claim fails because the substitute coroner testified about independent conclusions she made based on photographs from the victims' autopsies. As such, her testimony did not violate the Confrontation Clause. *See Vega v. State*, 126 Nev. 332, 340, 236 P.3d 632, 638 (2010) (holding that admission of an expert's independent opinion based on evidence she reviewed does not violate the Confrontation Clause).

Testimony regarding plastic fragments

Jeremias asserts that the district court abused its discretion by permitting members of law enforcement to testify about fragments of plastic found strewn about the crime scene without first being qualified as experts. Jeremias, however, did not contemporaneously object on this ground; although he objected on this basis before trial, the district court instructed him to lodge objections to the specific portions of the testimony that he believed required an expert, which he did not do. Similarly, on appeal he quotes large portions of testimony regarding the plastic fragments without identifying the specific statements that allegedly required an expert. It is not clear from our review of the record that the testimony in question consti-

tuted expert testimony, and therefore, we discern no error, plain or otherwise. Moreover, it is not clear how the testimony was harmful to Jeremias. He asserts it was "highly prejudicial" because it corroborated Zapata's testimony, but he does not explain how, and it is not clear from our review of the record. For all of these reasons, we conclude that no relief is warranted on this claim.

Video of Jeremias' interrogation

After Jeremias testified and the defense rested, the State moved to admit a video recording of his interrogation. The defense objected on the ground that the State had already cross-examined Jeremias about the interrogation, and the district court overruled the objection. On appeal, Jeremias argues that permitting the jury to take the video into deliberations without first playing it in open court violated his right to confrontation.[6] Because the objection below was on a different basis than the claim asserted on appeal, we review for plain error. And Jeremias fails to demonstrate plain error because the video was, in fact, admitted into evidence. *See Martinorellan v. State*, 131 Nev. 43, 49, 343 P.3d 590, 593 (2015) ("To amount to plain error, the error must be so unmistakable that it is apparent from a casual inspection of the record." (internal quotation marks omitted)). He also fails to demonstrate prejudice affecting his substantial rights because the record does not establish that the jurors viewed the video, and even if they did, his concern that the jury might have been misled by the video's editing is based on mere speculation. We therefore conclude that no relief is warranted on this claim.

Reasonable doubt instruction

Jeremias contends that the district court erred by giving the reasonable doubt instruction because it stated that the State bore the burden of proving every "material element" of the crime without defining what constitutes a material element. He concedes that his claim fails under *Burnside v. State*, 131 Nev. 371, 385-86, 352 P.3d 627, 638 (2015) (holding that the "material element" language is superfluous and should be omitted in future cases, but is not so misleading or confusing to warrant reversal), but he argues that *Burnside* was wrongly decided and should be overruled. We decline to reconsider that decision and hold that no relief is warranted on this claim. *See Miller v. Burk*, 124 Nev. 579, 597, 188 P.3d 1112, 1124 (2008) ("[U]nder the doctrine of *stare decisis*, we will not overturn

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[6]He also contends that permitting the jury to view the video without playing it in open court violated his right to a public trial, but he fails to demonstrate error that is clear from a casual inspection of the record. *See Green v. State*, 119 Nev. 542, 545, 80 P.3d 93, 95 (2003).

[precedent] absent compelling reasons for so doing." (footnotes omitted)).

Challenge to an aggravating circumstance

Jeremias asserts that the aggravating circumstance that he committed the murder to avoid or prevent a lawful arrest pursuant to NRS 200.033(5) is unconstitutional. This court has repeatedly held that the statute does not require an arrest to be imminent and the aggravating circumstance applies when the facts indicate that the defendant killed the victim because the defendant committed a crime and the victim could identify him if left alive. *E.g.*, *Blake v. State*, 121 Nev. 779, 793-94, 121 P.3d 567, 576-77 (2005). Jeremias provides no cause to reconsider these decisions. *See Burk*, 124 Nev. at 597, 188 P.3d at 1124.

Other penalty-phase claims

Jeremias raises other challenges to his penalty phase that he did not preserve below. Specifically, he argues that (1) the district court violated his rights to confrontation and notice by admitting Rios' statements to law enforcement, (2) the district court violated his Second Amendment right to bear arms by admitting evidence that he was found in possession of firearms during several arrests, and (3) the prosecutor committed misconduct during the penalty phase. The first two grounds require little discussion as Jeremias fails to demonstrate plain error affecting his substantial rights. Although we reach the same judgment on his third ground, we feel it is necessary to describe that claim in more detail as it somewhat informs our mandatory review discussed below.

Jeremias' first allegation of misconduct during the penalty phase involves the prosecutor's questioning of a defense witness. As part of his mitigation case, Jeremias presented testimony from Tami Bass, a former member of the Nevada State Board of Parole, who testified about the factors the parole board considers when determining whether to grant parole to a prisoner with a parole-eligible sentence. On cross-examination, the prosecutor asked Bass if she was familiar with the case of Melvin Geary. When Bass said she was not, the prosecutor explained that Geary was a murderer sentenced to life without the possibility of parole who had his sentence commuted to a parole-eligible sentence and was released. The prosecutor then stated, "And do you know what Mr. [Geary] did when he was released from prison? . . . He stabbed another man to death." With Geary's case in mind, the prosecutor asked Bass if the parole board can make mistakes, and she agreed.

The prosecutor was entitled to make the valid point that if Jeremias was given a parole-eligible sentence, the parole board could re-

lease him, despite Bass' suggestion to the contrary. But the prosecutor could have made this point without mentioning Geary's case, or that Geary had his sentence *commuted* to a parole-eligible sentence, or that Geary went on to kill again. Bringing up the facts of Geary's case the way the prosecutor did was inappropriate. *See Collier v. State*, 101 Nev. 473, 478, 705 P.2d 1126, 1129 (1985) (holding that it was inappropriate for a prosecutor to reference facts of another case to promote conclusions about the defendant), *modified on other grounds by Howard v. State*, 106 Nev. 713, 800 P.2d 175 (1990). While these remarks are concerning, the issue presented by Jeremias is whether they were misleading. The prosecutor did not argue or even suggest that Jeremias' sentence could be commuted; therefore, although we disapprove of the remarks, we conclude that Jeremias fails to demonstrate plain error affecting his substantial rights regarding them.

Jeremias also challenges the prosecutor's statement during rebuttal argument that if the jury imposed a life sentence for the murder of Paul, "what's the punishment for [the murder of] Brian? Because whatever you give short of death won't be a day longer in prison. And [Brian's] life is virtually meaningless by a verdict like that." We disapprove of this remark as well. In a case with multiple victims, it is appropriate for a prosecutor to remind the jury that the loss of each victim's life should be reflected in the sentence imposed. It is inappropriate, however, to suggest that justice requires a death sentence because the defendant killed more than one person. The prosecutor's remark in this case tracks closely to the latter, but it is not clearly improper. *See Burnside*, 131 Nev. at 404, 352 P.3d at 649-50 (concluding that the prosecutor's argument that the jury "would give value" to the victim's life by returning a death sentence was not improper in context). There is also no indication that it affected the outcome of the proceeding. Thus, we conclude that Jeremias fails to demonstrate plain error affecting his substantial rights.

Instruction regarding aggravating and mitigating circumstances

Jeremias contends that the instruction regarding the weighing of aggravating and mitigating circumstances is unconstitutional because it did not specify that the aggravating circumstances had to outweigh the mitigating circumstances beyond a reasonable doubt. Although this court rejected a similar challenge in *Nunnery v. State*, 127 Nev. 749, 772, 263 P.3d 235, 250 (2011), Jeremias asserts that a recent United States Supreme Court decision, *Hurst v. Florida*, 136 S. Ct. 616 (2016), calls *Nunnery* into question. He asserts that *Hurst* held for the first time that, where the weighing of facts in aggravation and mitigation is a condition of death eligibility, it constitutes a factual finding which must be proven beyond a reason-

able doubt. And, seizing on language from some of this court's prior cases describing the weighing determination as (in part) a factual finding, he asserts that *Hurst* effectively overruled *Nunnery.* We disagree with his interpretation of *Hurst* and of Nevada's death penalty procedures.

Hurst did nothing more than apply *Ring v. Arizona*, 536 U.S. 584 (2002), and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), to Florida's death penalty procedure; it made no new law relevant to Nevada. *See Ex parte Bohannon*, 222 So. 3d 525, 532 (Ala. 2016) (discussing *Hurst*), *cert. denied sub nom. Bohannon v. Alabama*, 137 S. Ct. 831 (2017). Jeremias' interpretation of *Hurst* is apparently based on the Court's description of Florida's scheme, which it criticized on the grounds that "[t]he trial court *alone* must find 'the facts . . . [t]hat sufficient aggravating circumstances exist' and '[t]hat there are insufficient mitigating circumstances to outweigh the aggravating circumstances.'" *Hurst*, 136 S. Ct. at 622 (second and third alterations in original) (quoting Fla. Stat. Ann. § 921.141(3) (West 2015)). Although that sentence appears to characterize the weighing determination as a "fact," the Court was quoting the Florida statute, not pronouncing a new rule that the weighing of aggravating and mitigating circumstances is a factual determination subject to a beyond-a-reasonable-doubt standard. *Accord People v. Jones*, 398 P.3d 529, 554 (Cal. 2017); *Leonard v. State*, 73 N.E.3d 155, 169 (Ind. 2017); *Evans v. State*, 226 So. 3d 1, 39 (Miss. 2017). Were there any doubt on this point, it was eliminated roughly a week after *Hurst* when the Court announced *Kansas v. Carr*, 136 S. Ct. 633 (2016). There, the Court made the same observations regarding the weighing process as this court had in *Nunnery*—that it was inherently a moral question which could not be reduced to a cold, hard factual determination. *Id*. at 642; *Nunnery*, 127 Nev. at 775, 263 P.3d at 252 ("[T]he weighing process is not a factual determination or an element of an offense; instead, it is a moral or legal judgment that takes into account a theoretically limitless set of facts and that cannot be reduced to a scientific formula or the discovery of a discrete, observable datum." (alteration in original) (quoting *Ex parte Waldrop*, 859 So. 2d 1181, 1189 (Ala. 2002))).

Moreover, while we have previously described the weighing process as a prerequisite of death eligibility, we recently reiterated that it is more accurately described as "part of the individualized consideration that is the hallmark of what the Supreme Court has referred to as the selection phase of the capital sentencing process—the '[c]onsideration of aggravating factors together with mitigating factors' to determine 'what penalty shall be imposed.'" *Lisle v. State*, 131 Nev. 356, 366, 351 P.3d 725, 732 (2015) (alteration in original) (quoting *Sawyer v. Whitley*, 505 U.S. 333, 343 (1992)). We explained that a

defendant is death-eligible, as the term is used for the purposes of the narrowing requirement amenable to the beyond-a-reasonable-doubt standard, so long as the jury finds the elements of first-degree murder and the existence of one or more aggravating circumstances. *Id.* Once the State has proven first-degree murder and one statutorily defined aggravating circumstance beyond a reasonable doubt, each juror is tasked with determining whether to impose a death sentence. *Id*. While Nevada law provides that the jury may *not* impose a death sentence if the mitigating circumstances outweigh the aggravating circumstances, NRS 175.554(3) ("The jury may impose a sentence of death only if it finds at least one aggravating circumstance and further finds that there are no mitigating circumstances sufficient to outweigh the aggravating circumstance or circumstances found."), this does not transform the weighing component into a factual determination. Even if it did, we agree with the Court that it would be pointless to instruct that the jury must, or even that it could, make that determination beyond a reasonable doubt. *Carr*, 136 S. Ct. at 642. We thereby reject the argument that the instruction in this case was unconstitutional.

Nevada's death penalty scheme

Jeremias argues that Nevada's death penalty scheme is unconstitutional on three grounds. First, he argues that it does not adequately narrow the class of persons eligible for the death penalty. Other than making speculative inferences from old statistics, he provides no citation, authority, or analysis of the issue, including no discussion of the aggravating circumstances outlined in NRS 200.033. This court has previously rejected generalized assertions that the death penalty is unconstitutional, *see Rhyne v. State*, 118 Nev. 1, 14, 38 P.3d 163, 172 (2002), and we do so here. Second, he argues that the death penalty constitutes cruel and unusual punishment. His argument is not supported by any cogent argument or authority, and we decline to consider it. *See Maresca v. State*, 103 Nev. 669, 673, 748 P.2d 3, 6 (1987). Third, he argues that executive clemency does not exist. Clemency is not required to make a death penalty scheme constitutional. *Niergarth v. State*, 105 Nev. 26, 28, 768 P.2d 882, 883 (1989). Regardless, clemency is available through the pardons board. *Colwell v. State*, 112 Nev. 807, 812, 919 P.2d 403, 406-07 (1996).

Cumulative error

Jeremias asserts that cumulative error deprived him of due process. *See Valdez v. State*, 124 Nev. 1172, 1195, 196 P.3d 465, 481 (2008) (discussing cumulative error). We conclude that he fails to meet his burden of demonstrating that he is entitled to relief. Al-

though we have identified several arguable errors, they occurred at different portions of the proceedings (jury selection, the guilt phase, and the penalty phase). Jeremias offers no explanation as to whether, or how, this court should cumulate errors across different phases of a criminal trial. Nor does he explain whether, or how, this court should cumulate errors he forfeited with errors he preserved. *See, e.g.*, *United States v. Barrett*, 496 F.3d 1079, 1121 n.20 (10th Cir. 2007) (recognizing a split in authority as to cumulative error analysis when plain errors are implicated and declining to resolve "how to, if at all, incorporate into the cumulative error analysis plain errors that do not, standing alone, necessitate reversal"). Jeremias simply asserts that he incorporates all of the claims and that reversal is warranted. This is insufficient, and we reject the claim.

Mandatory review of Jeremias' death sentences

NRS 177.055(2) requires this court to determine whether the evidence supports the aggravating circumstances, whether the verdict of death was imposed under the influence of passion, prejudice, or any arbitrary factor, and whether the death sentence is excessive considering this defendant and the crime.

The jury found three aggravating circumstances regarding each murder: (1) the murder was committed in the course of a robbery, (2) the murder was committed to prevent a lawful arrest, and (3) the defendant was convicted of more than one murder in the proceeding. The first aggravating circumstance is supported by the evidence in that the victims' property was taken, Zapata testified that there was a plan to commit robbery, and Jeremias admitted that he took the victims' property. The second aggravating circumstance is also supported by the evidence: there was no reason to kill the victims other than to prevent them from reporting the robbery; further, Zapata testified that Jeremias said he did not need to wear a mask because the victims would know who he was, which suggests he killed them to avoid identification and thus arrest. The third aggravating circumstance is supported by the verdict itself. We conclude that the evidence supports the finding of the aggravating circumstances.

We also conclude that the death sentences are not excessive, nor were they imposed under the influence of passion, prejudice, or any arbitrary factor. Although we reiterate our concern with the prosecutor's comments during the penalty phase, we do not believe they improperly influenced the verdict in light of the totality of the circumstances. We recognize that Jeremias was relatively young at the time of the crime. And although the jury found as a mitigating circumstance that he was under the influence of a controlled substance during the murders, there is no evidence that he committed them because of his youth or because he was intoxicated; that he acted

based on uncontrollable, irrational, or delusional impulses; or that the murders occurred during an emotionally charged confrontation. Instead, the evidence reflects advance planning and cold, deliberate calculation. Jeremias killed two people he claimed were his friends for a small amount of money, some marijuana, and laptop computers. He apparently knew going into the apartment that he would kill the victims. Shortly after the murders, Jeremias went out celebrating, apparently unaffected by the acts he had just committed. Putting all of this together, we conclude that the death sentences are supported by our review of the record pursuant to NRS 177.055(2).

We therefore affirm.

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

DAVID DEZZANI; and ROCHELLE DEZZANI, Appellants, *v.* KERN & ASSOCIATES, LTD.; and GAYLE A. KERN, Respondents.

No. 69410

DAVID DEZZANI; and ROCHELLE DEZZANI, Appellants, *v.* KERN & ASSOCIATES, LTD.; and GAYLE A. KERN, Respondents.

No. 69896

March 1, 2018 412 P.3d 56

Consolidated pro se appeals from orders dismissing a complaint in a tort action and awarding attorney fees and costs. Second Judicial District Court, Washoe County; Elliott A. Sattler, Judge.

Affirmed in Docket No. 69410; affirmed in part and reversed in part in Docket No. 69896.

[Rehearing denied April 27, 2018]

Pickering, J., dissented.

David Dezzani and *Rochelle Dezzani*, San Clemente, California, in Pro Se.

Kern & Associates, Ltd., and *Gayle A. Kern* and *Veronica A. Carter*, Reno; *McDonald Carano LLP* and *Debbie A. Leonard*, Reno, for Respondents.

Marquis Aurbach Coffing and *Micah S. Echols* and *Adele V. Karoum*, Las Vegas, for Amicus Curiae State Bar of Nevada.

Before the Supreme Court, En Banc.

OPINION

By the Court, Hardesty, J.:

In these consolidated appeals, we consider whether an attorney can be held liable for a claim under NRS 116.31183 as an agent of a common-interest community homeowners' association. We also consider whether attorneys litigating pro se and/or on behalf of their law firms can recover attorney fees and costs.

We conclude that an attorney is not an "agent" under NRS 116.31183 for claims of retaliatory action where the attorney is providing legal services for a common-interest community homeowners' association. We further conclude that attorneys litigating pro se and/or on behalf of their law firms cannot recover fees because those fees were not actually incurred by the attorney or the law firm. However, we conclude that attorneys litigating pro se and/or on behalf of their law firms can recover taxable costs in the action. Accordingly, we affirm in part and reverse in part.

FACTS AND PROCEDURAL HISTORY

Appellants David and Rochelle Dezzani own a condominium in Incline Village, Nevada. Like all unit owners, the Dezzanis are members of the McCloud Condominium Homeowners' Association (HOA), which is governed by a board of directors and subject to the Revised Declaration of Limitations, Covenants, Conditions, and Restrictions of McCloud Condominium Homeowners' Association (CC&Rs). Respondents Gayle Kern, a Nevada attorney, and her law firm, Kern & Associates (collectively, Kern), represent the HOA and provide legal advice to its governing board.

In 2013, a dispute arose between the Dezzanis and the HOA regarding an extended deck on the Dezzanis' unit. The previous unit owner installed the deck extension with board approval in 2002. The board issued the Dezzanis a notice of violation (NOV) with drafting assistance from Kern informing the Dezzanis that the deck encroached into the common area and thus violated the CC&Rs. The NOV indicated that the Dezzanis had two choices: (1) submit an architectural application to the board to revert the deck back to its original size; or (2) execute a covenant for the deck extension, which would allow it to remain for the Dezzanis' ownership and one subsequent conveyance.

After the Dezzanis responded to the NOV, Kern sent the Dezzanis a letter stating that she represented the HOA and restating the board's position on the deck extension. Kern and the Dezzanis

exchanged several letters wherein Kern communicated the board's position regarding the deck and the Dezzanis challenged the NOV and criticized Kern's legal advice, understanding of Nevada law, and competency. The board held a hearing and ultimately upheld the NOV. Throughout this time, Kern advised the HOA regarding the Dezzanis' and other members' deck extensions.

The Dezzanis filed a complaint against Kern and board member Karen Higgins.[1] The complaint alleged retaliation based on NRS 116.31183. This statute allows a unit owner to "bring a separate action" for compensatory damages, attorney fees, and costs. NRS 116.31183(2)(a), (b). Such an action is permissible when "[a]n executive board, a member of an executive board, a community manager or an officer, employee or agent of an association" takes

> retaliatory action against a unit's owner because the unit's owner has:
>
> (a) Complained in good faith about any alleged violation of [NRS Chapter 116] or the governing documents of the association;
>
> (b) Recommended the selection or replacement of an attorney, community manager or vendor; or
>
> (c) Requested in good faith to review the books, records or other papers of the association.

NRS 116.31183(1). The Dezzanis alleged that Kern retaliated against them because they requested that the HOA retain a new attorney; however, the Dezzanis did not specify how Kern retaliated against them other than furnishing advice to the HOA and communicating with the Dezzanis on behalf of the HOA.

The district court granted Kern's NRCP 12(b)(5) motion to dismiss with prejudice after finding that NRS 116.31183 does not permit attorneys to be held personally liable for action taken on behalf of a client, and that "to permit such causes of action against Kern would result in a chilling effect on individuals' ability to hire and retain counsel."[2] The district court awarded fees and costs to Kern pursuant to NRS 18.010(2)(b) and NRCP 11, finding that the Dezzanis' claims were intended to harass Kern because Kern informed the Dezzanis that their claims were meritless. The Dezzanis appealed both orders.

The Dezzanis' appeals were consolidated and assigned to the court of appeals, where that court affirmed the order dismissing

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[1]Due to service of process issues, the claims against Higgins were dropped.

[2]We note that although the district court cited NRS 116.3118 in its order, the surrounding discussion makes it clear that the court was actually referring to NRS 116.31183.

the complaint and reversed the attorney fees and costs award because the Dezzanis failed to submit their claim to mediation under NRS 38.310(1).[3] *See Dezzani v. Kern & Assocs.*, Docket Nos. 69410 & 69896 (Order Affirming in Part and Reversing in Part, Nev. Ct. App., Nov. 16, 2016). Kern filed a petition for review with this court, which we granted.

DISCUSSION

NRS 116.31183 permits "a separate action" when an "agent" of a homeowners' association takes certain retaliatory action against a unit's owner. The issue here is whether the term "agent" in the statute includes an attorney who is providing legal services to and acting on behalf of a homeowners' association.

The district court did not err in dismissing the Dezzanis' complaint

We review an order granting an NRCP 12(b)(5) motion to dismiss de novo. *Buzz Stew, LLC v. City of N. Las Vegas*, 124 Nev. 224, 227-28, 181 P.3d 670, 672 (2008). Issues of statutory construction are reviewed de novo. *Pub. Emps.' Benefits Program v. Las Vegas Metro. Police Dep't*, 124 Nev. 138, 146, 179 P.3d 542, 548 (2008). "The leading rule of statutory construction is to ascertain the intent of the [L]egislature in enacting the statute." *McKay v. Bd. of Supervisors of Carson City*, 102 Nev. 644, 650, 730 P.2d 438, 443 (1986). To determine legislative intent, we first consider and give effect to the statute's plain meaning because that is the best indicator of the Legislature's intent. *Pub. Emps.' Benefits Program*, 124 Nev. at 147, 179 P.3d at 548. "[I]t is the duty of this court, when possible, to interpret provisions within a common statutory scheme harmoniously with one another in accordance with the general purpose of those statutes and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721 (2008) (internal quotation marks omitted).

The word "agent" is not defined in NRS 116.31183 or otherwise in NRS Chapter 116. *See* NRS 116.31183; NRS 116.003-.095 (definitions). Kern points to NRS 116.31164, which governs foreclosure of liens, and argues that because NRS 116.31164 uses the words "agent" and "attorney" distinctly, it demonstrates that the Legislature purposefully distinguished an attorney from an agent under

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[3]NRS 38.310(1) requires civil actions that relate to "[t]he interpretation, application or enforcement of any covenants, conditions or restrictions [(CC&R's)]" to be submitted to mediation prior to a civil action being filed in court. NRS 38.310(1) is not implicated in this case because the question before this court involves an interpretation of NRS 116.31183, not an interpretation of the HOA's CC&Rs. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 296, 183 P.3d 895, 900 (2008) (concluding that NRS 38.310 applies where interpreting the CC&Rs is necessary to resolve the merits of the case).

NRS Chapter 116. Therefore, Kern contends that the Legislature specifically omitted attorneys from NRS 116.31183, and the term "agent" does not include attorneys.

We agree. NRS 116.31164(4) states that a foreclosure sale can be "conducted by the association, its agent *or* attorney." (Emphasis added.) This distinction demonstrates that the Legislature used the term "attorney" when it intended to address situations applying to attorneys and the term "agent" when it intended to generically address the duties owed by agents. *See Coast Hotels & Casinos, Inc. v. Nev. State Labor Comm'n*, 117 Nev. 835, 841, 34 P.3d 546, 550 (2001) ("Generally, when the [L]egislature has employed a term or phrase in one place and excluded it in another, it should not be implied where excluded."); *Allstate Ins. Co. v. Fackett*, 125 Nev. 132, 138, 206 P.3d 572, 576 (2009) ("We read statutes within a statutory scheme harmoniously with one another to avoid an unreasonable or absurd result."); *McGrath v. State Dep't of Pub. Safety*, 123 Nev. 120, 123, 159 P.3d 239, 241 (2007) (concluding that "we presume that the Legislature intended to use words in their usual and natural meaning"); *see also Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 133 (2000) (concluding that courts must interpret statutes "as a symmetrical and coherent regulatory scheme" (internal quotation marks omitted)); *Davis v. Mich. Dep't of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme."). Accordingly, given the Legislature's distinction between "agent" and "attorney," we conclude that the Legislature did not intend for attorneys to be included in the term "agent" for the purposes of NRS 116.31183.

The dissent is dismissive of the fact that the Legislature distinguished between the terms "agent" and "attorney" in another statute within the same statutory scheme as NRS 116.31183. Notably, the Dezzanis did not raise the statutory interpretation arguments that the dissent puts forth, and therefore, we should not consider them *sua sponte*. *See, e.g.*, *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981). Additionally, because the Dezzanis failed to respond to Kern's arguments regarding the Legislature's distinction between "agent" and "attorney," they have waived the issue. *Bates v. Chronister*, 100 Nev. 675, 682, 691 P.2d 865, 870 (1984) (treating the failure to respond to the opposing party's arguments as a confession of error).

Regardless, the dissent's statutory analysis ignores fundamental rules of statutory construction that begin with analyzing a statute's plain language and its context in the statutory framework, and instead, emphasizes rules of statutory construction involving grammar and punctuation use that are generally resorted to only when they can be employed consistently with the legislative intent. *See*

1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.15 (7th ed. 2009) (stating that grammar and punctuation use are statutory interpretation aids, but "neither is controlling unless the result is in harmony with the *clearly* expressed intent of the Legislature," and acknowledging that "[c]ourts have indicated that punctuation will not be given much consideration in interpretation because it often represents the stylistic preferences of the printer or proofreader instead of the considered judgment of the drafter or legislator" (emphasis added)).

Additionally, the dissent suggests that we read the word "or" too strictly. But "[t]he word 'or' is typically used to connect phrases or clauses representing alternatives." *Coast Hotels & Casinos, Inc.*, 117 Nev. at 841, 34 P.3d at 550. Moreover, "courts presume that 'or' is used in a statute disjunctively unless there is *clear* legislative intent to the contrary." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009) (emphasis added). The dissent concludes that the lack of a comma separating the words "agent" and "attorney" in NRS 116.31164(4) is sufficient to demonstrate that the Legislature intended the phrase "agent or attorney" to mean that "an attorney is merely a subset or an example of an agent, as opposed to not-an-agent." Dissenting opinion *post.* at 74. However, there is no indication that the Legislature intended to use the word "or" in any manner other than disjunctively, and we will not give the absence of a comma decisive weight where doing so would render the word "attorney" in NRS 116.31164(4) redundant and meaningless. *See Bd. of Cty. Comm'rs of Clark Cty. v. CMC of Nev., Inc.*, 99 Nev. 739, 744, 670 P.2d 102, 105 (1983) (concluding that we avoid "[a] reading of legislation which would render any part thereof redundant or meaningless, where that part may be given a separate substantive interpretation"); *see also* 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009) (noting that "when a list exists, the 'or' between two subsections makes it necessary to read 'or' as a disjunctive").

Under the dissent's reasoning, the Legislature's use of the word "agent" in NRS Chapter 116 should always include attorneys. But this interpretation is contrary to the plain language of NRS Chapter 116 and overlooks the Legislature's distinct use of the term "agent" when intending to address matters concerning agents and not attorneys. *See, e.g.*, NRS 116.3107(1) (requiring unit owners to allow "agents" to pass through their units in order for the association to uphold its duty to maintain the common elements); NRS 116.31073(3)(a) (allowing "[t]he association, the members of its executive board and its officers, employees, agents and community manager" to enter a unit to repair a security wall). Thus, such a broad interpretation of the word "agent" does not comport with the

statutory framework as a whole. Accordingly, we conclude that the Legislature did not intend to include attorneys in the term "agent" for purposes of NRS 116.31183. Public policy does not support including attorneys as agents under NRS 116.31183.

Notwithstanding the statutory language and interpretation, the Dezzanis ask us to conclude as a matter of public policy that attorneys are included in the term "agent" in NRS 116.31183. Based on the unique characteristics of an attorney-client relationship that distinguish it from a general agent-principal relationship, we decline to do so.

Black's Law Dictionary defines "agent" as "[s]omeone who is authorized to act for or in place of another; a representative." *Agent*, *Black's Law Dictionary* (10th ed. 2014). Generally, "[a]n agency relationship results when one person possesses the contractual right to control another's manner of performing the duties for which he or she was hired." *Hamm*, 124 Nev. at 299, 183 P.3d at 902. Agency law typically creates liability for a principal for the conduct of his agent that is within the scope of the agent's authority. *Nev. Nat'l Bank v. Gold Star Meat Co.*, 89 Nev. 427, 429, 514 P.2d 651, 653 (1973). Conversely, "[a]n agent's breach of a duty owed to the principal is not an independent basis for the agent's tort liability to a third party." Restatement (Third) of Agency § 7.02 (2006). But this definition of "agent" describes a general agent-principal relationship, which, as discussed below, is distinguishable from an attorney-client relationship. And the legislative history of the statute, which was passed into law in 2003, *see* 2003 Nev. Stat., ch. 385, § 41, at 2218, and its recent amendments, offer no insight into the intended meaning of the word.[4]

This court has recognized that the attorney-client relationship is an agent-principal relationship in the context of whether the client is responsible for the acts of the attorney. For example, in *Estate of Adams v. Fallini*, we considered whether the district court erred in granting an NRCP 60(b) motion to set aside the judgment based on fraud upon the court. 132 Nev. 814, 819-20, 386 P.3d 621, 625 (2016). In resolving the issue, we noted that the respondent's lawyer's "abandonment of his client and his professional obligations to his client . . . alone . . . might not warrant relief, as the lawyer is the client's agent and the acts and omissions of an agent ordinarily return to the principal who hired the faithless agent, not those who

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[4]*See, e.g.*, Hearing on S.B. 182 Before the Senate Judiciary Comm., Exhibit D8, 75th Leg. (Nev., March 18, 2009) (discussing NRS 116.31183's inclusion of community managers and stating that "they are probably already covered under 'agents'" but providing no further definition); Senate Daily Journal, 75th Leg. 449 (Nev., April 16, 2009) (stating that the purpose of the amendments to NRS 116.31183 was to "provide certain additional rights to units' owners by . . . increasing the scope and definition of prohibited retaliatory action," without discussing the intended meaning of the word "agent").

dealt with the agent in his representative capacity." *Id*. at 820, 386 P.3d at 625. Similarly, in a case where the lawyer fraudulently entered into a settlement agreement on behalf of his clients without authority, we concluded that the clients were not bound to the agreement because the lawyer's fraud negated his authority as an agent. *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656-57, 218 P.3d 853, 860 (2009). Other courts that have concluded that the attorney-client relationship is an agent-principal relationship have similarly focused on whether the client could be liable for the attorney's actions under agency law. *See, e.g.*, *Horwitz v. Holabird & Root*, 816 N.E.2d 272, 277 (Ill. 2004) ("In the attorney-client relationship, clients are generally bound by their attorneys' acts or omissions during the course of the legal representation that fall within the apparent scope of their attorneys' authority."); *Koutsogiannis v. BB & T*, 616 S.E.2d 425, 428 (S.C. 2005) (concluding that an attorney is an agent of the client, and, therefore, the client can be liable for the attorney's conduct that falls within the scope of representation); *see also* Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346, 348 (2007).

However, whether the attorney, as opposed to the client, can be personally liable as an agent for actions the attorney took in representing his or her client is distinguishable from cases involving client liability for attorney actions. It does not follow that because an agency relationship has been recognized in the context of client liability for attorney actions that the same notion applies in the context of attorney liability to an adverse or third party from actions taken in representing a client. Rather, an attorney providing legal services to a client generally owes no duty to adverse or third parties. *Fox v. Pollack*, 226 Cal. Rptr. 532, 536 (Ct. App. 1986); *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015). Whether an attorney is liable under an agency theory hinges on whether the attorney is acting solely as an agent for the client, i.e., as a debt collector, or whether the attorney is providing legal services to a client. *Cantey Hanger*, 467 S.W.3d at 481-83.

Moreover, we have previously noted that "the attorney-client relationship involves much more than mere agency, and is subject to established professional standards." *Molezzo Reporters v. Patt*, 94 Nev. 540, 542, 579 P.2d 1243, 1244 (1978). Additionally, we have recognized that courts treat the attorney-client relationship differently from other agent-principal relationships based on the unique characteristics of the attorney-client relationship and the different factual circumstances present in an attorney-client relationship. *See NC-DSH, Inc.*, 125 Nev. at 656, 218 P.3d at 860 (observing that courts "do not treat the attorney-client relationship as they do other agent-principal relationships" in the context of settlement agree-

ments (quoting Grace M. Giesel, *Client Responsibility for Lawyer Conduct: Examining the Agency Nature of the Lawyer-Client Relationship*, 86 Neb. L. Rev. 346, 348 (2007))); *see also Rucker v. Schmidt*, 794 N.W.2d 114, 120 (Minn. 2011) ("[A]lthough attorneys in the discharge of their professional duties are, in a restricted sense, agents of their clients, this agency is distinguishable from other agency relationships . . . ."). The attorney's role is to not only communicate on behalf of his client, but also to counsel, render candid advice, and advocate for his client. RPC 2.1; *Greenberg Traurig, LLP v. Frias Holding Co.*, 130 Nev. 627, 631-32, 331 P.3d 901, 904 (2014). Further, attorneys are limited by ethical obligations that are not typically present in other agent-principal relationships. *See* RPC 1.4(a)(5) (attorney assistance limited by Rules of Professional Conduct); *accord* RPC 1.1 (competence); RPC 1.6 (confidentiality).

Given an attorney's ethical obligations to be candid with a client and zealously represent his or her client, and the general presumption that an attorney providing legal services to a client is generally not subject to third-party liability for that representation, we agree with Kern and the amicus curiae State Bar of Nevada that the two relationships should not be treated the same in NRS 116.31183. Doing so, and imposing liability on an attorney for representing his or her HOA client, would impermissibly intrude on the attorney-client relationship and interfere with an HOA's ability to retain an attorney and the attorney's ability to ethically represent the HOA. Therefore, we conclude that the term "agent" in NRS 116.31183 does not include an attorney who is providing legal services to, and acting on behalf of, a common-interest community homeowners' association.

Although the Dezzanis argue that the attorney-client relationship is different when an attorney and an HOA are involved because the HOA members' fees are used to pay the HOA's attorneys, we disagree. Kern represented the HOA, not its individual members. Thus, similar to counsel for a corporation, Kern owed fiduciary duties only to the HOA, not to the individual members of the HOA. *See Skarbrevik v. Cohen, England & Whitfield*, 282 Cal. Rptr. 627, 635 (Ct. App. 1991) ("[C]orporate counsel's direct duty is to the client corporation, not to the shareholders individually, even though the legal advice rendered to the corporation may affect the shareholders.").

Considering NRS Chapter 116 as a whole and giving harmonious effect to both NRS 116.31183 and NRS 116.31164, we conclude that the Legislature did not intend to use the term "agent" to include attorneys. Additionally, given the unique characteristics of the attorney-client relationship that distinguish the attorney-client relationship from a general agent-principal relationship, we agree with Kern that the two relationships should not be treated the same in NRS 116.31183. Thus, because an attorney who is providing legal services and acting on behalf of a common-interest community

homeowners' association is not an "agent" of the association for purposes of NRS 116.31183, there can be no cause of action against that attorney pursuant to NRS 116.31183 and the district court did not err when it dismissed the Dezzanis' action against Kern.

The district court erred in awarding Kern attorney fees

The Dezzanis also challenge the district court's award of attorney fees to Kern for the services she performed on behalf of herself and her firm. The Dezzanis assert that Kern cannot collect attorney fees because she was representing herself, whereas Kern argues that she is able to collect attorney fees because she was representing her law firm. The district court awarded attorney fees under NRS 18.010(2)(b) and as sanctions under NRCP 11, because it found that the Dezzanis initiated their suit to harass Kern. The district court noted that David Dezzani "has been an attorney for several years and is aware of the obligation to proceed in good faith in all causes of action," and that Kern notified the Dezzanis pursuant to NRCP 11(b) and (c) that their claim was meritless, but they decided to pursue it regardless.

We review a district court's award of attorney fees pursuant to NRS 18.010(2)(b) for an abuse of discretion. *Semenza v. Caughlin Crafted Homes*, 111 Nev. 1089, 1095, 901 P.2d 684, 687 (1995). We have consistently held that attorney litigants who proceed pro se may not be awarded attorney fees because when attorneys represent themselves or their law firms, no fees are actually incurred. *See Frank Settelmeyer & Sons, Inc. v. Smith & Harmer, Ltd.*, 124 Nev. 1206, 1220-21, 197 P.3d 1051, 1060-61 (2008) (concluding that a law firm could not recover fees for itself when an attorney within the firm represented it); *Sellers v. Fourth Judicial Dist. Court*, 119 Nev. 256, 259, 71 P.3d 495, 497-98 (2003) (determining that a pro se attorney litigant is entitled to attorney fees only when he or she is genuinely obligated to pay an attorney for the services that the attorney performed). However, where pro se attorney litigants incur costs associated with the action, they can collect those costs. *See Sellers*, 119 Nev. at 258, 71 P.3d at 497.

The Dezzanis instituted suit against Kern and her law firm, and Kern's district court filings indicated that she proceeded pro se. Because Kern represented herself and her law firm, and thus did not actually incur any attorney fees, we conclude that the district court erred in awarding attorney fees to Kern. However, because Kern actually incurred costs defending this action, we conclude that the district court did not err in awarding Kern costs.[5]

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[5]Regardless of whether Kern actually incurred costs associated with the action, appellate review of this issue has been waived. *See Sheehan & Sheehan v. Nelson Malley & Co.*, 121 Nev. 481, 493, 117 P.3d 219, 227 (2005) (deeming waived the issue of whether costs awarded to a party were reasonably incurred

CONCLUSION

Having concluded that the Legislature did not intend the word "agent" in NRS 116.31183 to encompass an attorney who is providing legal services to and acting on behalf of a common-interest community homeowners' association client, we conclude that the district court did not err in dismissing the Dezzanis' complaint for failure to state a claim upon which relief can be granted. We thus affirm the district court's judgment in Docket No. 69410. We further conclude that attorneys representing themselves or their law firms cannot recover attorney fees because those fees are not actually incurred. Therefore, we conclude that the district court abused its discretion in awarding Kern attorney fees, and we reverse that portion of the district court's order, but affirm the portion of the district court's order awarding costs to Kern, in Docket No. 69896.

Douglas, C.J., and Cherry, Gibbons, Parraguirre, and Stiglich, JJ., concur.

Pickering, J., dissenting:

NRS 116.31183 gives a homeowner who is wrongfully retaliated against for demanding that the HOA fire its attorney the right to sue the HOA *or its agent* for compensatory damages. An attorney is, by definition, the "agent" of the client he or she represents. Since NRS 116.31183 applies to an HOA's agent—and makes no exception for attorney-agents—I cannot agree with the majority's decision to dismiss the homeowners' wrongful retaliation complaint against the HOA board's attorney *with prejudice*. This decision effectively exempts attorneys from NRS 116.31183, granting them an absolute immunity from suit that neither the statute's text nor the common law supports.

To recover compensatory damages for violation of NRS 116.31183, a homeowner must establish a compensable injury, i.e., that the retaliation was wrongful and caused harm. Here, the wrongfulness of the retaliation alleged substantially depends on the covenants, conditions and restrictions (CC&Rs) and whether they justified the measures the HOA's attorney pursued against the homeowners. As the court of appeals correctly held, NRS 38.310's mandatory mediation requirements therefore apply. Under NRS 38.310, this case should have been dismissed *without prejudice*, pending mediation. If mediation failed, the district court would then have to decide whether wrongful retaliation occurred. This is a merits-based determination, not a matter of absolute immunity.

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where the opposing party did not move the district court to retax and settle the costs). Kern served the Dezzanis with a copy of her memorandum of costs, but the Dezzanis did not move the district court to retax and settle those costs. Therefore, the Dezzanis waived appellate review of this issue.

I.

A.

The district court decided this case on an NRCP 12(b)(5) motion to dismiss. The complaint alleges that, as homeowners in a Nevada common-interest community, the Dezzanis complained to their HOA board about its attorney, Kern, demanding that she be fired, and that Kern retaliated by causing the HOA to pursue the Dezzanis for bogus CC&R violations. Nevada has not adopted the federal "plausibility" standard for assessing a complaint's sufficiency, *see Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007), instead following the rule that a "complaint cannot be dismissed for failure to state a claim unless it appears beyond a doubt that the plaintiff could prove no set of facts [that], if accepted by the trier of fact, would entitle him to relief." *Washoe Med. Ctr., Inc. v. Reliance Ins. Co.*, 112 Nev. 494, 496, 915 P.2d 288, 289 (1996) (citation omitted).

Judged by Nevada's motion-to-dismiss standards, the Dezzanis' complaint sufficiently states an NRS 116.31183-based claim. NRS 116.31183 gives a homeowner who complains about her HOA board or its attorney and is retaliated against for doing so the right to sue for compensatory damages:

> 1. An executive board, a member of an executive board, a community manager or an officer, employee or *agent of an association shall not take, or direct or encourage another person to take, any retaliatory action against a unit's owner because the unit's owner has*:
>
> (a) Complained in good faith about any alleged violation of any provision of this chapter or the governing documents of the association; [or]
>
> (b) *Recommended the selection or replacement of an attorney*, community manager or vendor . . . .
>
> . . . .
>
> *2.* In addition to any other remedy provided by law, *upon a violation of this section, a unit's owner may bring a separate action to recover:*
>
> (a) *Compensatory damages*; and
>
> (b) Attorney's fees and costs of bringing the separate action.

NRS 116.31183 (emphases added).

Etymologically and by definition, the word "attorney" means "agent." *Attorney*, *Oxford English Dictionary* (2d ed. 1989) (tracing *attorney* to the Old French *atourné*, past participle of *attourner*, "to attorn, in sense of 'one appointed or constituted'"; defining attorney as "[o]ne appointed or ordained to act for another; *an agent*") (emphasis added); *attorney*, *Black's Law Dictionary* (9th ed. 2009) (defining attorney as, "[s]trictly, one who is designated to transact

business for another; *a legal agent*") (emphasis added); *attorney*, *American Heritage Dictionary of the English Language* (3d ed. 1996) (defining attorney as "[a] person legally appointed by another to act as his or her agent in the transaction of business"). Black-letter law and our cases agree. Restatement (Third) of the Law Governing Lawyers ch. 2, intro. note (Am. Law Inst. 2000) ("A lawyer is an agent."); Restatement (Second) of Agency § 14 cmt. b (Am. Law Inst. 1958) (characterizing attorneys as "recognized agents"); *NC-DSH, Inc. v. Garner*, 125 Nev. 647, 656, 218 P.3d 853, 860 (2009) ("a client who hires a lawyer establishes an agency relationship").

By its plain terms, NRS 116.31183 imposes statutory liability on an "agent" of an HOA who "take[s] retaliatory action" against a homeowner for recommending the "replacement of an [HOA board's] attorney"—precisely what the Dezzanis allege Kern did here. "[T]he meaning of a statute must, in the first instance, be sought in the language in which the act is framed, and if that is plain, . . . the sole function of the courts is to enforce it according to its terms." *Caminetti v. United States*, 242 U.S. 470, 485 (1917). Since attorneys are agents and NRS 116.31183 applies to HOA agents without exception for attorneys, the Dezzanis' complaint sufficiently stated a statute-based claim for relief against Kern and should not have been dismissed with prejudice under NRCP 12(b)(5).

B.

In the teeth of the statute's plain meaning, the majority insists that "the Legislature did not intend for attorneys to be included in the term 'agent' for the purposes of NRS 116.31183." Majority opinion *ante* at 65. As support, the majority relies first on NRS 116.31164(4), then on public policy.

The statute the majority relies on for the proposition attorneys are not agents, NRS 116.31164(4), concerns HOA lien foreclosure sales. It provides that an HOA foreclosure sale "may be conducted by the association, *its agent or attorney*, or a title insurance company or escrow agent licensed to do business in this state." (Emphasis added.) To the majority, NRS 116.31164(4)'s use of the word "or" between "agent" and "attorney" signifies that, for purposes of all of NRS Chapter 116, the Legislature has redefined "agent" to exclude "attorneys." Majority opinion *ante* at 64-65 (accepting Kern's argument that "because NRS 116.31164 uses the words 'agent' and 'attorney' distinctly, it demonstrates that the Legislature purposefully distinguished an attorney from an agent under NRS Chapter 116"). Continuing, the majority credits Kern's position that the Legislature should be seen as having "specifically omitted attorneys from NRS 116.31183"—though it did no such thing—so that, for purposes of NRS Chapter 116, "the term 'agent' does not include attorneys." Majority opinion *ante* at 65.

Respectfully, this reads more into the word "or" than it can support. Doubtless, an "or" preceded by a comma can indicate a disjunctive, such that two words that are separated by an "or" have two alternative definitions. But an "or" is not always disjunctive, and "it is important not to read the word 'or' too strictly where to do so would render the language of the statute dubious." 1A Norman J. Singer & J.D. Shambie Singer, *Sutherland Statutes & Statutory Construction* § 21.14 (7th ed. 2009). As shown above, "attorney" is universally understood to mean "agent." To read the "or" in NRS 116.31164(4) as redefining "attorney" for purposes of NRS Chapter 116 to mean not-an-agent renders the language of the statute "dubious" indeed. *Id*. Also, NRS 116.31164(4) refers to an association or "its agent or attorney" and not "its agent, or attorney." The lack of a comma suggests that, in this context, an attorney is merely a subset or an example of an agent, as opposed to not-an-agent. *See Sutherland Statutes & Statutory Construction*, at § 21.15 ("A comma should always separate each member of a class."). The phrase that follows "agent or attorney" in NRS 116.31164(4)—"a title insurance company or escrow agent"—reinforces this reading, as a "title insurance company" can serve as an "escrow agent," and those terms, too, are joined by "or" in NRS 116.31164(4), with no comma separating them.

The true basis for the majority's decision to exempt attorneys from NRS 116.31183 seems policy-driven, not textual. It is the majority's view that

> . . . imposing liability on an attorney for representing his or her HOA client[ ] would impermissibly intrude on the attorney-client relationship and interfere with an HOA's ability to retain an attorney and the attorney's ability to ethically represent the HOA [so, we] conclude that the term "agent" in NRS 116.31183 does not include an attorney who is providing legal services to, and acting on behalf of, a[n HOA].

Majority opinion *ante* at 69; *see id.* at 8 (citing and quoting from *Greenberg Traurig v. Frias Holding Co.*, 130 Nev. 627, 331 P.3d 901 (2014), *Cantey Hanger, LLP v. Byrd*, 467 S.W.3d 477, 481 (Tex. 2015), and *Fox v. Pollack*, 226 Cal. Rptr. 532 (Ct. App. 1986)).

These cases express some of the same policy concerns the majority has with NRS 116.31183 but they arise in the common-law setting and do not justify judicially exempting attorneys from a statute that, by its plain terms, applies to them. Thus, the majority's cited cases stand for one of two unexceptionable common-law propositions—first, "that communications uttered or published in the course of judicial proceedings are absolutely privileged, rendering those who made the communications[, including attorneys,] immune from civil liabili-

ty," *Greenberg Traurig*, 130 Nev. at 630, 331 P.3d at 903 (quotation omitted); *see Cantey Hanger*, 467 S.W.3d at 481 ("as a general rule, attorneys are immune from civil liability to non-clients *for actions taken in connection with representing a client in litigation*") (quotation omitted; emphasis added); and second, that "an attorney's duty of care in giving legal advice to a client [normally does not extend] to persons with whom the client in acting upon the advice deals," *Fox*, 226 Cal. Rptr. at 536 (quotation omitted). Though both propositions are sound as a matter of common law, neither supports exempting attorneys from statutory obligations and liabilities like those imposed by NRS 116.31183.

In general, "a lawyer is subject to liability to a client or nonclient when a nonlawyer would be in similar circumstances." Restatement (Third) of the Law Governing Lawyers § 56 (Am. Law Inst. 2000). Thus, a lawyer who commits wrongful acts in the name of representing a client outside the litigation setting does *not* enjoy absolute immunity from suit. *See Dutcher v. Matheson*, 733 F.3d 980, 988-89 (10th Cir. 2013) (reversing district court order deeming a lawyer immune from liability in tort merely because the lawyer committed the tort alleged while representing a client; "like all agents, the lawyer would be liable for torts he committed while engaged in work for the benefit of a principal"); *accord Chalpin v. Snyder*, 207 P.3d 666, 677 (Ariz. Ct. App. 2008) (noting that "lawyers have no special privilege against civil suit" and that "[w]hen a lawyer advises or assists a client in acts that subject the client to civil liability to others, those others may seek to hold the lawyer liable along with or instead of the client") (quoting *Safeway Ins. Co. v. Guerrero*, 106 P.3d 1020, 1025 (Ariz. 2005), and Restatement (Third) of the Law Governing Lawyers § 56 cmt. c). While statements attorneys make representing clients in court are privileged, and a third party ordinarily may not sue a lawyer for malpractice committed against a client, these propositions do not immunize lawyers from liability in other settings.

> Lawyers are subject to the general law. If activities of a nonlawyer in the same circumstances would render the nonlawyer civilly liable or afford the nonlawyer a defense to liability, the same activities by a lawyer in the same circumstances generally render the lawyer liable or afford the lawyer a defense.

Restatement (Third) of the Law Governing Lawyers § 56 cmt. b.

Absent express exemption, a lawyer who violates a statute while representing a client faces the same sanctions anyone else would face. Consider the extreme hypothetical posed in *Dutcher*: A lawyer is hired by a client "to commit a murder. Certainly, the lawyer would not be immune from [prosecution] simply because he was executing the principal's wishes in his capacity as a lawyer." 733 F.3d at 989 (quotation and editing marks omitted). And so it is that lawyers and

law firms representing clients have been held liable under the federal securities, RICO, and civil rights statutes, as well as certain federal and state consumer protection statutes. *See* Restatement (Third) of the Law Governing Lawyers § 56 cmts. i & j.

The Legislature rationally could have exempted attorneys from NRS 116.31183, for the policy reasons the majority identifies. But it did not. Instead, it passed a statute prohibiting retaliation against homeowners who complain about, among other things, an HOA's attorney and imposing civil liability on HOAs and agents of HOAs who engage in prohibited conduct.

The legislative history behind NRS 116.31183 is sparse but what there is confirms that NRS 116.31183 and its companion statute, NRS 116.31184, apply to attorneys equally with any other HOA agent. Thus, in 2009, the Legislature amended NRS 116.31183 to add subparagraph (1)(b), prohibiting retaliation against a homeowner who seeks to have the HOA's attorney replaced, S.B. 182, 75th Leg. (Nev. 2009), and the remedial provisions codified in subparagraph (2), A.B. 350, 75th Leg. (Nev. 2009). Among the concerns expressed by S.B. 182's sponsor, Senator Mike Schneider, were the "immensely chilling effect" HOA attorney retaliation against homeowners can have—and an FBI report suggesting that "such conduct may also be another means to perpetuate [the] self-dealing between corrupt managers *and attorneys*" that befell Nevada homeowners in the years preceding the amendment. Hearing on S.B. 182 Before the Senate Judiciary Comm., Exhibit D 8-9, 75th Leg. (Nev., March 18, 2009) (emphasis added). And in 2013, the Legislature added NRS 116.31184, which makes it a misdemeanor to "threaten, harass or otherwise engage in a course of conduct against," inter alia, unit owners or their guests, so as to cause them "harm or serious emotional distress" or to create "a hostile environment for [such] person." 2013 Nev. Stat., ch. 437, § 1. Like NRS 116.31183, NRS 116.31184 applies to, among others, "an officer, employee or agent of an association," without exception for attorneys. The majority's interpretation of NRS 116.31183 would necessarily immunize HOA attorneys from NRS 116.31184 as well as NRS 116.31183, which is, I submit, unreasonable.

II.

The majority also holds that NRS 38.310 does not apply "because the question before this court involves an interpretation of NRS 116.31183, not an interpretation of the HOA's CC&Rs." Majority opinion *ante* at 64, n.3. Again, I disagree. In my view, a homeowner does not have a claim for compensatory damages for violation of NRS 116.31183 unless the retaliation was wrongful and caused improper harm. It is in this context that the policy concerns that

lead the majority to confer absolute immunity on Kern apply, for I interpret NRS 116.31183 to say that if all Kern did was fairly demand that the Dezzanis comply with the CC&Rs, wrongful retaliation did not occur. *Compare McKnight Family, LLP v. Adept Mgmt. Servs., Inc.*, 129 Nev. 610, 615, 310 P.3d 555, 558 (2013) (recognizing contractual nature of CC&Rs), *with* Restatement (Third) of the Law Governing Lawyers § 57 ("[A] lawyer who . . . assists a client to . . . break a contract . . . is not liable to a nonclient for interference with contract . . . if the lawyer acts to advance the client's objectives without using wrongful means."). Determining whether wrongful retaliation occurred requires interpreting portions of the CC&Rs that relate to the dispute between the Dezzanis and the HOA regarding the extended deck on the Dezzanis' unit, including but not limited to the Dezzanis' obligations by virtue of purchasing the unit, the HOA's enforcement rights, and CC&R-based dispute-resolution requirements. Since the Dezzanis' claims call for interpretation of the CC&Rs, by law they must proceed to mediation before going to court. *See Hamm v. Arrowcreek Homeowners' Ass'n*, 124 Nev. 290, 301-02, 183 P.3d 895, 904 (2008) ("parties must submit such an action to mediation or arbitration pursuant to NRS 38.310 before seeking relief in the district court").

III.

Assuming mediation failed and the Dezzanis returned to court, they may or may not have been able to make a case against Kern that could survive summary judgment. Whatever the Dezzanis' prospects for success on the merits, this case has significance beyond the parties because of the principles of statutory interpretation and attorney immunity involved. The Legislature sets policy and writes statutes that the courts in turn must enforce as written, unless the statutes are constitutionally infirm. As NRS 116.31183 applies to HOA agents, without exception for attorneys, and attorneys do not enjoy blanket immunity from suit outside the litigation context, the Dezzanis' complaint should not have been dismissed with prejudice at this stage of the proceedings. I therefore respectfully dissent.

K-KEL, INC., dba SPEARMINT RHINO GENTLEMEN'S CLUB; OLYMPUS GARDEN, INC., dba OLYMPUS GARDEN; SHAC, LLC, dba SAPPHIRE; D. WESTWOOD, INC., dba TREASURES; THE POWER COMPANY, INC., dba CRAZY HORSE TOO GENTLEMEN'S CLUB, Appellants, *v.* THE STATE OF NEVADA DEPARTMENT OF TAXATION; and NEVADA TAX COMMISSION, Respondents.

No. 69886

March 1, 2018 412 P.3d 15

Appeal from a district court order denying consolidated petitions for judicial review in a tax matter. Eighth Judicial District Court, Clark County; Jerry A. Wiese, Judge.

Vacated and remanded.

Greenberg Traurig, LLP, and *Mark E. Ferrario*, Las Vegas, for Appellant SHAC, LLC, dba Sapphire.

Lambrose Brown and *William H. Brown*, Las Vegas, for Appellants D. Westwood, Inc., dba Treasures; K-Kel, Inc., dba Spearmint Rhino Gentlemen's Club; Olympus Garden, Inc., dba Olympus Garden; and The Power Company, Inc., dba Crazy Horse Too Gentlemen's Club.

Adam Paul Laxalt, Attorney General, *Joseph Tartakovsky*, Deputy Solicitor General, *William J. McKean*, Chief Deputy Attorney General, *David J. Pope*, Senior Deputy Attorney General, and *Vivienne Rakowsky*, Deputy Attorney General, Carson City, for Respondents.

Before the Supreme Court, En Banc.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we consider whether the district court erred in denying appellants' petitions for judicial review challenging a decision by the Nevada Tax Commission regarding a tax refund request. This court in *Deja Vu Showgirls of Las Vegas, LLC v. Nevada Department of Taxation* (*Deja Vu I*), held that "the sole remedy for a taxpayer aggrieved by a final decision from the Commission concerning a tax refund request under NRS Chapter 368A is to file a petition for judicial review pursuant to NRS 233B.130." 130 Nev. 711, 716, 334 P.3d 387, 390 (2014). We hold here that the district court lacked

jurisdiction to consider appellants' petitions for judicial review because they were untimely. Therefore, we vacate the district court's order and remand for further proceedings.

FACTUAL AND PROCEDURAL HISTORY

Appellants are exotic dancing establishments challenging the constitutionality of Nevada's Live Entertainment Tax (NLET).[1] In 2006, appellants filed a de novo action (Case 1) with the district court arguing, in part, that the NLET was a facially unconstitutional tax scheme because it burdened protected free speech.[2] While Case 1 was pending, appellants filed individual tax refund requests with the Nevada Department of Taxation. The Department denied these requests, and appellants administratively appealed. The Nevada Tax Commission affirmed the Department's decision by written order on October 12, 2007.

In 2008, appellants filed a second de novo action (Case 2) in the district court, challenging the administrative denials of their refund requests. In 2011, the district court dismissed appellants' Case 2 de novo action for lack of subject matter jurisdiction because appellants failed to file a petition for judicial review, as required by Nevada's Administrative Procedure Act (APA).[3] In that same order, the district court granted appellants 30 days to refile the action as a petition for judicial review.

In compliance with the district court's order, appellants filed a petition for judicial review (Case 3) on September 23, 2011. Thereafter, appellants moved the district court for permission to present additional evidence to the Commission in order to supplement the administrative record. The district court granted the motion and remanded the matter to the Commission to review the additional evidence and determine whether such evidence warranted any change to the Commission's October 12, 2007, decision. The Commission in turn remanded the matter to an administrative law judge (ALJ) to "determine whether the findings of fact, conclusions of law,

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[1]This appeal involves the same parties as the appeals in *Deja Vu I*, 130 Nev. 711, 334 P.3d 387, and *Deja Vu Showgirls of Las Vegas, LLC v. Nevada Department of Taxation*, 130 Nev. 719, 334 P.3d 392 (2014) (*Deja Vu II*). Accordingly, we briefly summarize the events leading to this review and focus on the facts most pertinent to the disposition of the instant appeal.

[2]Appellants' challenge to the resolution of their Case 1 claims is addressed in *Deja Vu II*, 130 Nev. 719, 334 P.3d 392 (holding the NLET does not violate a taxpayer's free speech rights under the United States or Nevada Constitutions).

[3]Appellants' challenge to the district court's dismissal of their Case 2 de novo action is addressed in *Deja Vu I*, 130 Nev. 711, 334 P.3d 387 (holding that a petition for judicial review was the exclusive means of obtaining judicial review of the Commission's order affirming denial of tax refunds).

and final decision issued in 2007 should be amended, reversed, or affirmed." On remand, the ALJ affirmed the Commission's October 12, 2007, final decision. Thereafter, in a decision letter dated February 12, 2014, the Commission affirmed the ALJ's decision affirming the Commission's October 12, 2007, final decision.

On March 11, 2014, appellants filed a second petition for judicial review (Case 4) challenging the Commission's February 12, 2014, decision. Thereafter, the district court consolidated the Case 3 and Case 4 petitions for judicial review. On June 23, 2016, the district court issued an order affirming the Commission's October 12, 2007, and February 12, 2014, decisions and denying the consolidated petitions for judicial review. This appeal follows.

DISCUSSION

In addressing the district court's order denying appellants' consolidated petitions for judicial review, we must first consider the threshold issue of jurisdiction raised by respondents. We conclude that appellants' Case 3 petition for judicial review was not timely filed, and therefore, the district court lacked jurisdiction to consider appellants' Case 3 petition. Consequently, the district court did not have authority to grant appellants an additional 30 days to refile, nor did it have authority to remand the matter to the Commission for consideration of additional evidence. We further conclude the Commission's decision on remand was necessarily void, and therefore the district court lacked authority to consider the merits of appellants' Case 4 petition.

The district court lacked jurisdiction to consider appellants' petitions for judicial review

Respondents argue that the district court did not have jurisdiction to consider appellants' Case 3 petition for judicial review, and thus, this entire case should be disposed of on jurisdictional grounds. In response, appellants contend the district court had jurisdiction to consider their Case 3 and Case 4 petitions for judicial review because (1) their Case 2 de novo action was timely filed, and the district court allowed them to refile the action as the Case 3 petition for judicial review to cure any deficiency; and (2) the Commission entered a subsequent order on February 12, 2014, from which they timely filed their Case 4 petition for judicial review. We agree with respondents.

"Courts have no inherent appellate jurisdiction over official acts of administrative agencies except where the [L]egislature has made some statutory provision for judicial review." *Crane v. Cont'l Tel. Co. of Cal.*, 105 Nev. 399, 401, 775 P.2d 705, 706 (1989). Accordingly, "[w]hen a party seeks judicial review of an administrative decision, strict compliance with the statutory requirements for such review is a precondition to jurisdiction by the court of judicial re-

view, and [n]oncompliance with the requirements is grounds for dismissal." *Washoe Cty. v. Otto*, 128 Nev. 424, 431, 282 P.3d 719, 725 (2012) (second alteration in original) (internal quotation marks omitted). Thus, the filing requirements under the APA, including the time period for filing a petition, are "mandatory and jurisdictional." *Id.* at 434-35, 282 P.3d at 727.

This matter is analogous to *Otto*, *supra.* In *Otto*, Washoe County timely filed a petition for judicial review from a decision of the State Board of Equalization. 128 Nev. at 429, 282 P.3d at 723. The respondents moved to dismiss Washoe County's petition on the ground that it failed to comply with the APA's naming requirement.[4] *Id.* The district court denied the motion but ordered Washoe County to file an amended petition for judicial review that complied with the APA within 30 days. *Id.* at 430, 282 P.3d at 723-24.

On appeal, this court held that a party must strictly comply with the APA's pleading requirements, and because the original petition did not name all of the parties of record to the administrative proceedings, the district court lacked jurisdiction to consider Washoe County's original petition for judicial review. *Id.* at 434, 282 P.3d at 726. Further, this court held that the district court also lacked jurisdiction to consider the amended petition for judicial review because it was ultimately filed outside of the APA's time limit.[5] *Id.* at 434-35, 282 P.3d at 727.

Here, like in *Otto*, this court has held that the district court lacked jurisdiction to consider appellants' original Case 2 action because it did not comply with the APA. Specifically, in *Deja Vu I*, this court affirmed the district court's dismissal of appellants' Case 2 action "because appellants failed to follow proper procedure when they filed a de novo action in the district court . . . rather than filing a petition for judicial review as required by NRS 233B.130," and therefore, the district court lacked jurisdiction to consider the original Case 2 action. 130 Nev. at 714, 334 P.3d at 389-90. Further, like in *Otto*, the district court here purportedly granted appellants the opportunity to cure the jurisdictional defect after the time for filing a petition had passed. Finally, similar to *Otto*, appellants ultimately filed their petition for judicial review well outside the statutory time limits provided in NRS Chapters 233B and 368A.[6] In particular,

[4]A petition for judicial review must "[n]ame as respondents the agency and all parties of record to the administrative proceeding." NRS 233B.130(2)(a).

[5]Pursuant to NRS 233B.130(2)(d), a petition for judicial review must "[b]e filed within 30 days after service of the final decision of the agency."

[6]The parties dispute whether NRS 233B.130(2)'s 30-day time limit or NRS 368A.290's 90-day time limit applies to petitions for judicial review from a decision of the Commission involving a tax refund request under NRS Chapter 368A. Appellants' Case 3 petition for judicial review was not filed within the statutory time limit set forth in either NRS Chapter 233B or NRS Chapter 368A, and therefore, we need not address the issue.

appellants did not file their Case 3 petition for judicial review until almost *four years* after the Commission's October 12, 2007, decision. As the statutory time limit had run, appellants' Case 3 petition for judicial review was not timely filed, and the district court lacked jurisdiction to consider it.

Moreover, because appellants' Case 3 petition failed to invoke the district court's jurisdiction, the district court's subsequent orders in that action are necessarily void. *See State Indus. Ins. Sys. v. Sleeper*, 100 Nev. 267, 269, 679 P.2d 1273, 1274 (1984) ("There can be no dispute that lack of subject matter jurisdiction renders a judgment void."); *see also Cox v. Eighth Judicial Dist. Court*, 124 Nev. 918, 925, 193 P.3d 530, 534 (2008) (stating "[a]ny subsequent orders entered by district courts going to the merits of an action [that] are in excess of their jurisdiction" are void). Thus, the district court's order remanding the matter to the Commission was void, and it follows that the Commission's February 12, 2014, decision, which was made pursuant to a void court order, did not grant the district court jurisdiction that it otherwise lacked, nor did it give the district court authority to consider the merits of appellant's Case 4 petition.

CONCLUSION

We conclude the district court lacked jurisdiction to consider appellants' Case 3 petition for judicial review, and thus lacked the authority to consider the merits of appellants' Case 4 petition, and we therefore vacate the district court's order denying appellants' consolidated petitions for judicial review and remand the matter to the district court with directions to dismiss the petitions for lack of jurisdiction.[7]

Douglas, C.J., and Cherry, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

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[7]Appellants also argue that (1) the NLET violates the Nevada and United States Constitutions; (2) the United States Supreme Court's decision in *Reed v. Town of Gilbert*, 135 S. Ct. 2218 (2015), subjects NLET to strict scrutiny, rather than the rational basis review applied in *Deja Vu II*; and (3) the district court erred in denying appellants' request for additional discovery. Given our disposition, we need not reach these issues.