REPORTS OF CASES

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STATE OF NEVADA

Volume 135

KENNETH FRANKS, APPELLANT, *v.*
THE STATE OF NEVADA, RESPONDENT.

No. 72988

January 3, 2019 432 P.3d 752

Appeal from a judgment of conviction, pursuant to a jury verdict, of lewdness with a child under the age of 14 years. Eighth Judicial District Court, Clark County; Carolyn Ellsworth, Judge.

Affirmed.

Law Office of Lisa Rasmussen and *Lisa A. Rasmussen* and *Jim Hoffman*, Las Vegas, for Appellant.

Adam Paul Laxalt, Attorney General, Carson City; *Steven B. Wolfson*, District Attorney, and *Jennifer M. Clemons* and *Jonathan VanBoskerck*, Chief Deputy District Attorneys, Clark County, for Respondent.

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

OPINION

By the Court, Cherry, J.:

In this appeal, we consider a district court's decision to allow the State to introduce evidence of prior, uncharged sexual acts committed by appellant during appellant's current prosecution for a sexual offense for purposes of showing propensity under NRS 48.045(3). We conclude that the plain language of NRS 48.045(3) permits the district court to admit evidence of a separate sexual offense for purposes of proving propensity in a sexual offense prosecution. We further conclude that, although such evidence may be admitted for propensity purposes without the district court holding a *Petrocelli* hearing, evidence of separate acts that constitute sexual offenses still must be evaluated for relevance and its heightened risk of unfair prejudice before being admitted. Therefore, prior to its admission under NRS 48.045(3), the district court must determine that the prior bad sexual act is (1) relevant to the crime charged, (2) proven by a preponderance of the evidence, and (3) weighed to determine that its probative value is not substantially outweighed by the danger of unfair prejudice as articulated by *United States v. LeMay*, 260 F.3d 1018, 1027-28 (9th Cir. 2001). Because we find that the district court did not plainly err by permitting the State to introduce evidence of appellant Kenneth Franks' prior conduct for propensity purposes, we affirm.

FACTS AND PROCEDURAL HISTORY

On September 18, 2015, Franks was charged by criminal complaint with one count of lewdness with a child under the age of 14 related to events occurring in June 2015. A.F., Franks' 12-year-old niece, testified that Franks was wrestling and tickling her when he pulled down her pants and underwear and rubbed her genitals. While Franks initially denied the misconduct, he ultimately admitted to a detective that he had pulled down A.F.'s pants and possibly "grazed her" genitals.

At trial, the State elicited testimony from A.F., A.F.'s father, Franks' mother, and Franks' brother that A.F. was at Franks' house between May and June 2015. However, Franks' brother and mother stated that there was a limited time frame within which Franks could have committed the crime on June 23 and 24. In addition, during the State's questioning of A.F., she made four statements alluding to prior uncharged instances of inappropriate touching, testifying that (1) Franks had previously "touched [her] on top of [her] clothes" with his hand; (2) Franks touched her in this fashion more than once; (3) the charged event was "the last time" Franks touched her; and (4) Franks touched her five times total, though she was unsure

of the exact dates. Franks did not object to the admission of A.F.'s testimony, nor did the district court hold a hearing regarding its admissibility. The jury found Franks guilty of the charged offense, and he was sentenced to 10 years to life.

DISCUSSION

The district court did not plainly err by permitting the State to introduce evidence of Franks' prior acts that constitute separate sexual offenses for purposes of showing propensity under NRS 48.045(3)

Standard of review

We review questions of statutory interpretation de novo, and "when a statute is clear on its face, a court cannot go beyond the statute in determining legislative intent." *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011) (internal quotation marks omitted). "We [typically] review a district court's decision to admit or exclude evidence for an abuse of discretion," but "failure to object precludes appellate review of the matter unless it rises to the level of plain error." *Mclellan v. State*, 124 Nev. 263, 267, 182 P.3d 106, 109 (2008) (internal quotations omitted). Reversal for plain error is only warranted if the appellant demonstrates that the error was prejudicial to his substantial rights. *Pantano v. State*, 122 Nev. 782, 795, 138 P.3d 477, 485-86 (2006).

Statutory interpretation of NRS 48.045(3)

Franks argues that the district court plainly erred by permitting the State to introduce evidence of Franks' prior uncharged sexual acts to demonstrate propensity in his sexual offense prosecution under NRS 48.045(3). We disagree.

Prior to 2015, NRS 48.045(2) barred admission of all "[e]vidence of other crimes, wrongs or acts . . . to prove the character of a person in order to show that the person acted in conformity therewith." However, in a 2015 amendment to Nevada's evidence code, the Legislature added a new rule, codified at NRS 48.045(3), which supersedes NRS 489.045(2)'s restriction on evidence of similar bad conduct for purposes of showing propensity in sexual offense cases. The amendment applies to "court proceeding[s] that [are] commenced on or after October 1, 2015." 2015 Nev. Stat., ch. 399, § 27(4), at 2246. The complaint against Franks was filed on September 18, 2015, but his trial commenced on November 28, 2016. Therefore, NRS 48.045(3) properly applied to Frank's criminal prosecution for lewdness with a child under the age of 14 years. *See Proceeding & Criminal Proceeding*, *Black's Law Dictionary* (10th ed. 2014) (defining "proceeding," in part, as "[a]n act or step that is part of a larger action" or "[t]he business conducted by a court or

other official body; a hearing," and "criminal proceeding" as "[a] judicial hearing, session, or prosecution in which a court adjudicates whether a person has committed a crime or, having already fixed guilt, decides on the offender's punishment; a criminal hearing or trial"); *see also Howland v. State*, 990 S.W.2d 274, 277 (Tex. Crim. App. 1999) (concluding that a criminal proceeding includes any step in a criminal prosecution, not merely the beginning of the prosecution itself, for the purposes of applying a newly enacted statute).

Turning to the language of NRS 48.045(3), the statute plainly provides that "[*n*]*othing* in this section shall be construed to prohibit the admission of evidence in a criminal prosecution for a sexual offense that a person committed another crime, wrong or act that constitutes a separate sexual offense."[1] (Emphasis added.) Therefore, in criminal prosecutions for sexual offenses, NRS 48.045(3) allows for the admission of evidence of a prior bad act constituting a sexual offense "to prove the character of a person in order to show that the person acted in conformity therewith" that would otherwise be barred under NRS 48.045(2). Reading NRS 48.045(3) as restating that prior sexual offenses may be considered for other purposes under NRS 48.045(2) but not for propensity purposes would render NRS 48.045(3) meaningless, as NRS 48.045(3) provides a specific admissibility standard in criminal sexual offense cases, replacing the general criteria set forth in NRS 48.045(2) and superseding subsection 2's restriction on propensity evidence in such cases. Therefore, we conclude that NRS 48.045(3) unambiguously permits the district court to admit prior sexual bad acts for propensity purposes in a criminal prosecution for a sexual offense.

Application of NRS 48.045(3)

Franks argues that the district court erred by failing to hold a *Petrocelli*[2] hearing prior to its admission. We disagree.

Before admitting evidence of a prior bad act pursuant to NRS 48.045(2), this court determined that the district court must hold a *Petrocelli* hearing outside of the presence of the jury to determine that "(1) the prior bad act is relevant to the crime charged and for a purpose other than proving the defendant's propensity, (2) the act is proven by clear and convincing evidence, and (3) the probative value of the evidence is not substantially outweighed by the danger of unfair prejudice." *Bigpond v. State*, 128 Nev. 108, 117, 270 P.3d 1244, 1250 (2012). As discussed, however, NRS 48.045(3) unambiguously removed prior sexual acts from NRS 48.045(2)'s ban on

[1]A "sexual offense" includes "[a]ny . . . offense that has an element involving a sexual act or sexual conduct with another." NRS 179D.097(1)(r).

[2]*See Petrocelli v. State*, 101 Nev. 46, 692 P.2d 503 (1985), *superseded in part by statute as stated in Thomas v. State*, 120 Nev. 37, 44-45, 83 P.3d 818, 823 (2004).

propensity evidence. Therefore, the *Petrocelli* framework established for admitting evidence of a prior act for purposes other than propensity is not applicable in cases where the State seeks to present evidence of separate acts constituting sexual offenses for purposes of showing propensity in a current sexual offense prosecution.

Still, Franks' argument reveals a significant concern: although evidence of prior sexual acts no longer require a *Petrocelli* hearing prior to admission, the Legislature failed to outline any procedural safeguards to mitigate against "the risk that a jury will convict for crimes other than those charged—or that, uncertain of guilt, it will convict anyway because a bad person deserves punishment." *Old Chief v. United States*, 519 U.S. 172, 181 (1997) (internal quotation marks omitted). Therefore, as in *Petrocelli*, 101 Nev. at 51-52, 692 P.2d at 507-08, we now address and rectify the absence of procedural safeguards with regard to evidence potentially admissible under NRS 48.045(3).

First, similar to the *Petrocelli* framework, we conclude that the State must request the district court's permission to introduce the evidence of the prior sexual offense for propensity purposes outside the presence of the jury. *See Bigpond*, 128 Nev. at 117, 270 P.3d at 1250. The State must then proffer its explanation of how the prior sexual offense is relevant to the charged offense, i.e., tends to make it more probable that the defendant engaged in the charged conduct. *See* NRS 48.015.

Second, we note that the relevancy of a prior sexual offense also "depends upon the fulfillment of a condition of fact, [wherein] the judge shall admit it upon the introduction of evidence sufficient to support a finding of the fulfillment of the condition." NRS 47.070(1). In light of the nature of prior sexual act evidence, federal courts require "district court[s] [to] make a preliminary finding that a jury could reasonably find by a preponderance of the evidence that the other act occurred." *See, e.g.*, *United States v. Enjady*, 134 F.3d 1427, 1433 (10th Cir. 1998) (internal quotation marks omitted); *see also United States v. Oldrock*, 867 F.3d 934, 939 (8th Cir. 2017); *United States v. Dillon*, 532 F.3d 379, 387 (5th Cir. 2008). Therefore, prior to the admission of prior sexual offense evidence for propensity purposes under NRS 48.045(3), the district court must make a preliminary finding that the prior sexual offense is relevant for propensity purposes, and that a jury could reasonably find by a preponderance of the evidence that the bad act constituting a sexual offense occurred.

Finally, while all "relevant evidence is inadmissible if its probative value is substantially outweighed by the danger of unfair prejudice," *State v. Eighth Judicial Dist. Court (Armstrong)*, 127 Nev. 927, 933, 267 P.3d 777, 781 (2011) (internal quotation marks omitted), other courts have cautioned to "pay careful attention to both

the significant probative value and the strong prejudicial qualities of that evidence" due to "the inherent strength of [prior sexual act] evidence," *LeMay*, 260 F.3d at 1027 (internal quotation marks omitted). In order to address the highly probative yet prejudicial nature of this evidence, the Ninth Circuit Court of Appeals set forth a modified balancing analysis, stating that the district court must consider several nonexhaustive factors prior to allowing its admission:

> (1) the similarity of the prior acts to the acts charged, (2) the closeness in time of the prior acts to the acts charged, (3) the frequency of the prior acts, (4) the presence or lack of intervening circumstances, and (5) the necessity of the evidence beyond the testimonies already offered at trial.

Id. at 1028 (internal quotation marks omitted). We conclude that the factors articulated by the Ninth Circuit are useful and account for the legislative intent to permit propensity evidence in sexual offense prosecutions—the purpose of NRS 48.045(3)—while also taking into account the risk of unfair prejudice that accompanies this strong evidence. Therefore, after a defendant challenges the State's intent to introduce prior sexual offense evidence for propensity purposes, the district court should evaluate whether that evidence is unfairly prejudicial under the *LeMay* factors prior to admitting such evidence.

Here, although the district court applied no similar safeguards before permitting the State to introduce evidence of Franks' prior acts under NRS 48.045(3), it is apparent that Franks was not unfairly prejudiced by the admission of the prior bad acts. Franks' prior conduct demonstrated that he had a propensity to engage in such conduct. Further, a jury could reasonably find by a preponderance of the evidence that the prior conduct occurred from A.F.'s testimony. *See Keeney v. State*, 109 Nev. 220, 229, 850 P.2d 311, 317 (1993) (holding that a higher burden, clear and convincing evidence, can be provided by a victim's testimony alone), *overruled on other grounds by Koerschner v. State*, 116 Nev. 1111, 13 P.3d 451 (2000), *modified on other grounds by State v. Eighth Judicial Dist. Court (Romano)*, 120 Nev. 613, 623, 97 P.3d 594, 600 (2004).

Finally, the probative value of the evidence of Franks' prior conduct was not substantially outweighed by the danger of unfair prejudice under *LeMay*. First, Franks' prior acts and the act for which he was charged in the underlying case were identical, as each act involved sexual misconduct targeting the same child and involved inappropriate touching. Further, although A.F. could not testify as to the exact dates when the prior sexual offense acts occurred, they were sufficiently frequent and close in time that A.F., who was 12 years old when the last offense occurred and 13 years old at the time of trial, could testify as to the number and details of the uncharged offenses, *see LeMay*, 260 F.3d at 1029 (reasoning that the lapse of

12 years between trial and the prior sexual offenses did not render admission of relevant evidence of the similar prior acts an abuse of discretion), and the record does not demonstrate any intervening circumstances that would alter the balance of the acts' probative value and risk of prejudice. Lastly, while evidence regarding the prior bad acts may not have been necessary to establish the State's case, the "evidence need not be *absolutely necessary* to the prosecution's case in order to be introduced; it must simply be helpful or *practically necessary*." *Id.* A.F.'s testimony was helpful to the State's case by establishing Franks' propensity to commit the charged crime. Therefore, we conclude that the district court did not plainly err by admitting the evidence of Franks' prior sexual offenses.[3]

Sufficient evidence supporting Franks' conviction

Franks argues that there was insufficient evidence presented by the State to support his conviction because there was no evidence that the touching (1) was intentional beyond A.F.'s inadmissible testimony that he previously touched her, and (2) occurred during June 2015 as alleged in the charging documents. We disagree.

"[T]he test for sufficiency upon appellate review is not whether this court is convinced of the defendant's guilt beyond a reasonable doubt, but whether the jury, acting reasonably, could be convinced to that certitude by evidence it had a right to accept." *Edwards v. State*, 90 Nev. 255, 258-59, 524 P.2d 328, 331 (1974). Therefore, "the relevant inquiry is whether, after viewing the evidence in the light most favorable to the prosecution, *any* rational trier of fact could have found the essential elements of the crime beyond a reasonable doubt." *Milton v. State*, 111 Nev. 1487, 1491, 908 P.2d 684, 686-87 (1995) (internal quotation marks omitted). "[I]t is the jury's function, not that of the court, to assess the weight of the evidence and determine the credibility of witnesses." *Rose v. State*, 123 Nev. 194, 202-03, 163 P.3d 408, 414 (2007) (alteration in original) (internal quotation marks omitted). Moreover, a lewdness victim's testimony need not be corroborated. *See Gaxiola v. State*, 121 Nev. 638, 649-50, 119 P.3d 1225, 1233 (2005).

The previous version of NRS 201.230(1) (2005) provided as follows:

> A person who willfully and lewdly commits any lewd or lascivious act, other than acts constituting the crime of sexual assault, upon or with the body, or any part or member thereof, of a child under the age of 14 years, with the intent of arousing,

[3]Franks also disputes the district court's jury instruction that it may consider evidence of his prior sexual acts for propensity purposes. Because NRS 48.045(3) allows the State to introduce prior crimes, wrongs, or acts that constitute a separate sexual offense for propensity purposes in a sexual offense prosecution, we conclude that Franks' argument lacks merit.

> appealing to, or gratifying the lust or passions or sexual desires of that person or of that child, is guilty of lewdness with a child.

Here, as to Franks' intent, and contrary to Franks' argument, evidence of repeated touching of A.F.'s genitals was admissible under NRS 48.045(3) to show propensity to commit the charged crime and was indicative of the fact that the charged act was not accidental. Moreover, A.F. testified that Franks pulled down her pants and underwear separately and his fingers "rubb[ed]" her genitals, which supports that the touching was intentional. Despite Franks' statement to police that he might have accidentally "grazed" A.F.'s genitals, a rational juror could find that the evidence established that Franks intentionally touched A.F. Second, as to the timing of the incident, a total of five witnesses—A.F., A.F.'s father, a detective, Franks' mother, and Franks' brother—provided testimony showing that A.F. was at Franks' house between May and June, 2015. Although Franks' brother and mother stated that there was a limited time frame within which Franks could have committed the crime on June 23 and 24, the jury maintained the right to either (1) disbelieve the testimony of Franks' family members as to those dates generally, or (2) find that there was nonetheless an opportunity for Franks to commit the crime on those occasions. Therefore, we conclude that there was sufficient evidence to support Franks' conviction.

CONCLUSION

We conclude that the district court did not commit plain error by allowing the State to introduce evidence of Franks' prior sexual acts for propensity purposes. We further conclude that sufficient evidence supported Franks' conviction. Therefore, we affirm the judgment of conviction.

Parraguirre and Stiglich, JJ., concur.

DARRELL T. COKER, an Individual, Appellant, *v.* MARCO SASSONE, Respondent.

No. 73863

January 3, 2019 432 P.3d 746

Appeal from a district court order denying a special motion to dismiss. Eighth Judicial District Court, Clark County; Rob Bare, Judge.

Affirmed.

Randazza Legal Group, PLLC, and *Marc J. Randazza* and *Alex J. Shepard*, Las Vegas, for Appellant.

Gentile, Cristalli, Miller, Armeni & Savarese, PLLC, and *Dominic P. Gentile, Clyde F. DeWitt*, and *Lauren E. Paglini*, Las Vegas, for Respondent.

Before the Supreme Court, Cherry, Parraguirre and Stiglich, JJ.

OPINION

By the Court, Parraguirre, J.:

In this appeal, we are asked to review a district court order denying appellant's special motion to dismiss. Central to its resolution are Nevada's anti-SLAPP statutes—specifically NRS 41.660, which authorizes a litigant to file a special motion to dismiss when an action filed in court is "based upon a good faith communication in furtherance of the right to petition or the right to free speech in direct connection with an issue of public concern." We first clarify that in light of recent legislative changes, the appropriate standard of review for a district court's denial or grant of an anti-SLAPP motion to dismiss is de novo. We next conclude that the district court properly denied appellant's special motion to dismiss for the reasons set forth herein.

FACTUAL AND PROCEDURAL BACKGROUND

Respondent Marco Sassone is an artist and painter who has created numerous works of art using media such as watercolor, oil paint, and serigraph throughout his career. After being informed that copies of his artwork were being advertised on various websites as original, signed lithographs—a medium on which Sassone contends he never produced nor sold his artwork—Sassone investigated the activity. It is Sassone's contention that the copies being sold were counterfeit, his signature was forged, and that this activity was part of an ongoing fraudulent scheme. He traced the sales back to appellant Darrell Coker and sued under Nevada's Deceptive Trade Practice and RICO statutes.

Coker then filed a special motion to dismiss under NRS 41.660, arguing that dissemination of artwork to the public is expressive conduct. It is Coker's contention that as such, his activity is protected by Nevada's anti-SLAPP statute. Additionally, Coker contends that dissemination of artwork is in the public interest, further warranting anti-SLAPP protection. In opposing this motion, Sassone argues that he filed the present action to enjoin Coker from injuring Sassone's reputation and reducing the value of his artwork—*not* to silence his speech.

The district court denied Coker's motion, finding that Coker failed to demonstrate that his conduct was "a good faith commu-

nication that was either truthful or made without knowledge of its falsehood," one of the statutory requirements for anti-SLAPP protection. Coker timely appealed.

DISCUSSION

Standard of review

Nevada's anti-SLAPP statutes aim to protect First Amendment rights by providing defendants with a procedural mechanism to dismiss "meritless lawsuit[s] that a party initiates primarily to chill a defendant's exercise of his or her First Amendment free speech rights" before incurring the costs of litigation. *Stubbs v. Strickland*, 129 Nev. 146, 150, 297 P.3d 326, 329 (2013). Since enactment in 1993, these statutes have undergone a series of legislative changes to ensure full protection and meaningful appellate review.

Relevant here is the evolution of NRS 41.660, which authorizes defendants to file a special motion to dismiss when an action is filed to restrict or inhibit free speech. Before October 1, 2013, NRS 41.660 simply instructed courts to treat the special motion to dismiss as a motion for summary judgment, and thus, this court reviewed such motions de novo. *John v. Douglas Cty. Sch. Dist.*, 125 Nev. 746, 753, 219 P.3d 1276, 1281 (2009), *superseded by statute as stated in Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017). In 2013, the Legislature removed the language likening an anti-SLAPP motion to dismiss to a motion for summary judgment and set forth a specific burden-shifting framework.[1] 2013 Nev. Stat., ch. 176, § 3, at 623-24. "The 2013 amendment completely changed the standard of review for a special motion to dismiss by placing a significantly different burden of proof on the parties." *Delucchi v. Songer*, 133 Nev. 290, 296, 396 P.3d 826, 831 (2017). Plaintiffs bore the heightened "clear and convincing evidence" burden of proof, and we accordingly adopted the more deferential abuse of discretion standard of review. *Shapiro v. Welt*, 133 Nev. 35, 37, 389 P.3d 262, 266 (2017).

However, NRS 41.660's burden-shifting framework evolved in 2015 when the Legislature *decreased* the plaintiff's burden of proof from "clear and convincing" to "prima facie" evidence. 2015 Nev. Stat., ch. 428, § 13, at 2455. As amended, the special motion to dismiss again functions like a summary judgment motion procedurally, thus, we conclude de novo review is appropriate.[2]

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[1]As amended in 2013, NRS 41.660 required a moving party to establish "by a preponderance of the evidence" that the communication in question fell within the anti-SLAPP statute. 2013 Nev. Stat., ch. 176, § 3, at 623-24. If established, the burden then shifted to the plaintiff to prove by "clear and convincing evidence" the probability of prevailing on the claim. *Id.*

[2]However, we note that the standard of review set forth in *Shapiro v. Welt* applies to actions where the proceedings were initiated before the 2015 legislative change.

We find support for this reversion not only in general principles of appellate review, but also in California's anti-SLAPP jurisprudence. This court has repeatedly recognized the similarities between California's and Nevada's anti-SLAPP statutes, routinely looking to California courts for guidance in this area.[3] *See, e.g.*, *Patin v. Lee*, 134 Nev. 722, 724-25, 429 P.3d 1248, 1250-51 (2018); *Shapiro*, 133 Nev. at 40, 389 P.3d at 268 (adopting California's "guiding principles" to define "an issue of public interest" pursuant to NRS 41.637(4)); *John*, 125 Nev. at 752, 219 P.3d at 1281 (describing both states' anti-SLAPP statutes as "similar in purpose and language"). As such, we turn to *Park v. Board of Trustees of California State University*, wherein the California Supreme Court explained:

> We review de novo the grant or denial of an anti-SLAPP motion. We exercise independent judgment in determining whether, based on our own review of the record, the challenged claims arise from protected activity. In addition to the pleadings, we may consider affidavits concerning the facts upon which liability is based. We do not, however, weigh the evidence, but accept plaintiff's submissions as true and consider only whether any contrary evidence from the defendant establishes its entitlement to prevail as a matter of law.

393 P.3d 905, 911 (Cal. 2017) (citations omitted). In light of the 2015 legislative change to NRS 41.660, we find it appropriate to adopt California's recitation of the standard of review for a district court's denial or grant of an anti-SLAPP motion to dismiss as de novo.

Having clarified the applicable standard of review, we now turn to the merits of Coker's anti-SLAPP motion.

Coker's conduct is not protected communication under Nevada's anti-SLAPP statute

Under Nevada's anti-SLAPP statutes, a moving party may file a special motion to dismiss if an action is filed in retaliation to the

[3]California's and Nevada's statutes share a near-identical structure for anti-SLAPP review. Both statutes posit a two-step process for determining how to rule on an anti-SLAPP motion. *Compare* Cal. Civ. Proc. Code §§ 425.16(b)(1), 425.16(e) (West 2016), *with* NRS 41.660(3)(a)-(b). Both statutes allow courts to consult affidavits when making a determination. *Compare* Cal. Civ. Proc. Code § 425.16(b)(2) (West 2016) (which permits courts to "consider the pleadings, and supporting and opposing affidavits"), *with* NRS 41.660(3)(d) (which permits courts to "[c]onsider such evidence, written or oral, by witnesses or affidavits, as may be material in making a determination"). Moreover, in NRS 41.665, the Nevada Legislature specifically stated that the standard for determining whether a plaintiff has satisfied its burden of proof under NRS 41.660 is the same standard required by California's anti-SLAPP statute. Given the similarity in structure, language, and the legislative mandate to adopt California's standard for the requisite burden of proof, reliance on California caselaw is warranted.

exercise of free speech. A district court considering a special motion to dismiss must undertake a two-prong analysis. First, it must "[d]etermine whether the moving party has established, by a preponderance of the evidence, that the claim is based upon a good faith communication in furtherance of . . . the right to free speech in direct connection with an issue of public concern." NRS 41.660(3)(a). If successful, the district court advances to the second prong, whereby "the burden shifts to the plaintiff to show 'with prima facie evidence a probability of prevailing on the claim.'" *Shapiro*, 133 Nev. at 38, 389 P.3d at 267 (quoting NRS 41.660(3)(b)). Otherwise, the inquiry ends at the first prong, and the case advances to discovery.

We recently affirmed that a moving party seeking protection under NRS 41.660 need only demonstrate that his or her conduct falls within one of four statutorily defined categories of speech, rather than address difficult questions of First Amendment law. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017). NRS 41.637(4) defines one such category as: "[c]ommunication made in direct connection with an issue of public interest in a place open to the public or in a public forum . . . which is truthful or is made without knowledge of its falsehood." Here, the district court dismissed Coker's anti-SLAPP motion without reaching the second prong, finding that Coker failed to demonstrate that his conduct was "truthful or made without knowledge of its falsehood." We agree, and further conclude that Coker failed to sufficiently prove that his communication was made in direct connection with an issue of public interest.[4]

Coker failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood

We clarified in *Shapiro v. Welt* that "no communication falls within the purview of NRS 41.660 unless it is 'truthful or is made without knowledge of its falsehood.'" 133 Nev. at 40, 389 P.3d at 268 (quoting NRS 41.637). To satisfy this requirement, Coker relied on his declaration, wherein he swears that he bought the lithographs from a bulk art supplier and never personally created any copies of the artwork.[5] The issue here, however, is neither creation nor distribution. Rather, Sassone's complaint is based on Coker's representation of the lithographs as originals. Thus, Coker would need to

[4]We find no reason to address the other elements required for activity to fall within NRS 41.660's scope of protection, as Sassone does not dispute that his claim was based upon the challenged activity or that the communication was made in a public forum.

[5]Coker additionally argues that Sassone failed to produce evidence that Coker's conduct was untruthful or dishonest. We reject Coker's attempt to shift the burden, as NRS 41.660 clearly mandates that at this stage of the inquiry, it is Coker's burden—not Sassone's—to prove that his conduct was either truthful or made without knowledge of its falsehood.

provide evidence persuading this court that at the time he advertised and sold the lithographs online, he believed that they were originals and, thus, advertised them as such.

Tellingly, Coker has made no such statement. Nor has he provided this court with any evidence suggesting that he believed that the lithographs were, in fact, originals.[6] Absent such evidence, we conclude that Coker has failed to demonstrate that his conduct was truthful or made without knowledge of its falsehood.

Coker failed to demonstrate that his conduct was made in direct connection with an issue of public interest

Coker argues that "[t]he public has a right to and significant interest in the widespread access to creative works," thereby making his activity protected under NRS 41.660. Sassone again distinguishes that the challenged activity is not the mere dissemination of his artwork, but Coker's description of the counterfeit works as originals. In this respect, Sassone acknowledges that had Coker copied Sassone's works and sold the copies while disclosing them as such, Sassone would have no basis for his suit. We find this distinction imperative in concluding that Coker's conduct was not made in direct connection with an issue of public interest.

To determine whether an issue is in the public interest, we have adopted California's guiding principles:

> (1) "public interest" does not equate with mere curiosity;
>
> (2) a matter of public interest should be something of concern to a substantial number of people; a matter of concern to a speaker and a relatively small specific audience is not a matter of public interest;
>
> (3) there should be some degree of closeness between the challenged statements and the asserted public interest—the assertion of a broad and amorphous public interest is not sufficient;
>
> (4) the focus of the speaker's conduct should be the public interest rather than a mere effort to gather ammunition for another round of private controversy; and
>
> (5) a person cannot turn otherwise private information into a matter of public interest simply by communicating it to a large number of people.

Shapiro, 133 Nev. at 39, 389 P.3d at 268 (quoting *Piping Rock Partners, Inc. v. David Lerner Assocs., Inc.*, 946 F. Supp. 2d 957, 968

[6]We acknowledge that Coker additionally provided photocopies of canceled checks he used to pay the bulk art supplier and a sworn declaration by Thomas R. Burke, a prominent anti-SLAPP litigator. However, upon review of this evidence, we find neither persuasive.

(N.D. Cal. 2013)). Applying these factors, we find that the sufficient degree of closeness between the challenged statements and the asserted public interest is lacking, as Coker fails to demonstrate how false advertising and the sale of counterfeit artwork, the challenged activity, is sufficiently related to the dissemination of creative works.[7] Additionally, Coker does not argue, nor do we find support in the record, that the focus of Coker's conduct was to increase access to creative works or advance the free flow of information. Without evidence suggesting otherwise, we conclude that his focus was to profit from the sale of artwork, and that increased access to creative work was merely incidental. Thus, we cannot conclude that selling counterfeit artwork online, while advertising it as original, is related to the asserted public interest of dissemination of creative works.

The case cited by Coker does not compel a different result. In *Maloney v. T3Media, Inc.*, the United States Court of Appeals for the Ninth Circuit granted a media company's anti-SLAPP motion after the company was sued for distributing unlicensed photographs of NCAA student-athletes. 853 F.3d 1004 (9th Cir. 2017). The Ninth Circuit discussed the "public interest" element briefly in a footnote and summarily held that the activity was in the public interest "because the photographs memorialize cherished moments in NCAA sports history, and California defines 'an issue of public interest' broadly." *Id.* at 1009-10 n.3.

Following California's lead, we too define an issue of public interest broadly. However, Coker fails to explain how a holding specific to sports memorabilia is instructive here. We furthermore find nothing in the record or caselaw that justifies extending the definition of "an issue of public interest" to include the advertisement and sale of counterfeit artwork as original. Accordingly, we decline to do so. To hold otherwise in this case would risk opening the floodgates to an influx of motions disguising unlawful activity as protected speech. Finally, we reject Coker's general contention that the sole question under the first prong is whether the conduct is "expressive activity" and reiterate that courts determining whether conduct is protected under NRS 41.660 must look to statutory definitions, as opposed to general principles of First Amendment law. *See Delucchi v. Songer*, 133 Nev. 290, 299, 396 P.3d 826, 833 (2017) (adopting the Supreme Court of California's rationale that "courts determining whether conduct is protected under the anti-SLAPP statute look not to First Amendment law, but to the statutory definitions" (internal quotation marks omitted)). Codified in NRS 41.637, the Nevada Legislature

[7]Regarding this factor, we further note that Coker defines his asserted public interest generally as the "free flow of information" and "[a] robust public domain," which can readily be categorized as broad and amorphous.

has provided courts with four specific categories of speech activity that fall within NRS 41.660's purview. NRS 41.637 functions *solely* to clarify the meaning of NRS 41.660 and limit the scope of its protection. Thus, to hold that NRS 41.660 applies broadly to all expressive conduct, as Coker compels this court to do, would render the specific limits set forth in NRS 41.637 meaningless.

Having identified two grounds for dismissal at the first prong of the analysis, we find no reason to address the second prong concerning whether Sassone demonstrated the requisite probability of prevailing on his claims.

CONCLUSION

We therefore take this opportunity to clarify that the applicable standard of review under the 2015 version of NRS 41.660 is de novo. Upon an independent review of the record, we conclude that Coker has failed to demonstrate that the challenged claims arise from activity protected by NRS 41.660. Specifically, we find no evidence in his declaration, or otherwise, that confirms that he believed that the lithographs were originals. We further hold that advertising and selling counterfeit artwork as original work is not in direct connection with an issue of public interest.

Accordingly, we affirm the district court's denial of Coker's special motion to dismiss.

CHERRY and STIGLICH, JJ., concur.

BOMBARDIER TRANSPORTATION (HOLDINGS) USA, INC., APPELLANT, *v.* NEVADA LABOR COMMISSIONER; THE INTERNATIONAL UNION OF ELEVATOR CONSTRUCTORS; AND CLARK COUNTY, RESPONDENTS.

No. 71101

January 17, 2019 433 P.3d 248

Appeal from a district court order denying a petition for judicial review of a decision of the Nevada Labor Commissioner. Eighth Judicial District Court, Clark County; Joseph Hardy, Jr., Judge.

Affirmed.

Jackson Lewis P.C. and *Paul T. Trimmer* and *Gary C. Moss*, Las Vegas, for Appellant.

Aaron Ford, Attorney General, *Lawrence J.C. VanDyke*, Solicitor General, and *Robert E. Werbicky*, Deputy Attorney General, Carson City, for Respondent Nevada Labor Commissioner.

Fisher & Phillips LLP and *Holly E. Walker* and *Mark J. Ricciardi*, Las Vegas, for Respondent Clark County.

McCracken, Stemerman & Holsberry, LLP, and *Richard G. McCracken* and *Kimberley C. Weber*, Las Vegas, for Respondent The International Union of Elevator Constructors.

Before the Supreme Court, EN BANC.[1]

OPINION

By the Court, HARDESTY, J.:

In this appeal we must determine whether Nevada's prevailing wage law requirements apply to none or part of a maintenance contract for an airport shuttle system. Generally, work performed under a maintenance contract is not subject to prevailing wage requirements, as it does not qualify as "public work" under NRS 338.010(15). However, the Labor Commissioner determined that because a portion of the work under the contract at issue in this case is repair work, that work is a "public work" project under NRS 338.010(15) and is not exempt from prevailing wage requirements. We conclude that the Labor Commissioner properly determined that the "repair" portion of a maintenance contract is a public work project under NRS 338.010(15), even if the contract is predominantly for maintenance, and that no exemptions applied that would allow appellant Bombardier Transportation (Holdings) USA, Inc. (Bombardier) to forego paying prevailing wages on that portion of the contract. We further conclude that the Labor Commissioner's decision was supported by substantial evidence and that the Labor Commissioner properly determined that 20 percent of the work involved repair rather than maintenance and was thus subject to the prevailing wage.

FACTS AND PROCEDURAL HISTORY

In 1985, Bombardier installed an automated transportation system (ATS) at the McCarran International Airport (the airport). The ATS is the shuttle system that delivers passengers to the C and D concourses at the airport. In June 2008, Bombardier and respondent Clark County entered into a five-year contract for maintenance work on the ATS. The contract includes minor and major maintenance tasks.

[1]THE HONORABLE ELISSA F. CADISH and THE HONORABLE ABBI SILVER did not participate in the decision of this matter. THE HONORABLE MICHAEL L. DOUGLAS, Senior Justice, was appointed by the court to participate in the decision of this matter.

In October 2009, respondent International Union of Elevator Constructors (the Union), the labor union that represented technicians working on the ATS, filed a complaint with the Labor Commissioner, claiming that Bombardier was not paying the ATS technicians prevailing wage rates. Following a six-day administrative hearing, the Labor Commissioner determined that the contract is a public work project and therefore subject to NRS Chapter 338's prevailing wage requirements. The Labor Commissioner further determined that no statutory exemption applied to exempt Bombardier from paying the ATS technicians prevailing wages for repair work performed under the contract because the contract itself was not directly related to the normal operation or normal maintenance of the airport, nor was Bombardier an exempted railroad company. Distinguishing between tasks requiring skilled or unskilled technicians, the Labor Commissioner concluded that 20 percent of the work under the contract was for major repairs and required payment of prevailing wages. He directed Clark County to "calculate the 20% due to the ATS Technicians who performed work on [the contract]" and to provide that calculation within 30 days.

Bombardier filed a petition for judicial review, challenging the Labor Commissioner's decision. The district court summarily affirmed the Labor Commissioner's decision, but also remanded the decision "solely for supervision and jurisdiction by the Labor Commissioner over the payment by Bombardier pursuant to calculation to be performed by the Clark County Department of Aviation." Bombardier now appeals the district court order denying its petition for judicial review.

DISCUSSION

Bombardier challenges the Labor Commissioner's determinations that (1) the contract is a public work project as defined under NRS 338.010(15) (2009),[2] and (2) the contract is not exempt from Nevada's prevailing wage requirements under either NRS 338.011(1) or NRS 338.080, because it is not directly related to the normal operation or normal maintenance of the airport and Bombardier is not a railroad company. Bombardier also argues that substantial evidence does not support the Labor Commissioner's determination that 20 percent of the work under the contract was for repair work and therefore subject to prevailing wages. Finally, Bombardier challenges the Labor Commissioner's classification of the ATS Technicians as Elevator Constructors and the determination that they were entitled to recover prevailing wages on that basis.

[2]All references to NRS Chapter 338 are to the statutes as they existed in 2009, when Bombardier filed its complaint. The Legislature has since reorganized certain provisions of Chapter 338, but the statutes at issue here have remained substantively the same.

I.

We review an agency's decision under the same standard as the district court, without deference to the district court's decision, and "determine, based on the administrative record, whether substantial evidence supports the administrative decision." *Kay v. Nunez*, 122 Nev. 1100, 1105, 146 P.3d 801, 805 (2006). We defer to the agency's findings of fact, but review its legal conclusions de novo. *State, Dep't of Taxation v. Masco Builder Cabinet Grp.*, 127 Nev. 730, 735, 265 P.3d 666, 669 (2011). We also review de novo statutory interpretation questions in the administrative context and will look to the legislative history to ascertain the Legislature's intent when it is not clear from the statute's plain language. *See State, Dep't of Motor Vehicles v. Taylor-Caldwell*, 126 Nev. 132, 134, 229 P.3d 471, 472 (2010); *see also Valenti v. State, Dep't of Motor Vehicles*, 131 Nev. 875, 878-79, 362 P.3d 83, 85 (2015) (stating that this court will look to the legislative history when it cannot discern the legislative intent from the statute's plain language).

II.

NRS Chapter 338, Nevada's public works chapter, requires employers to pay workers prevailing wages when the workers perform public work and no exemption otherwise applies. We are asked to determine whether a portion of work done under this maintenance contract qualified as "public work" under NRS 338.010(15), such that it was subject to the prevailing wage requirements. "Public work" is "any project for the new construction, repair or reconstruction of . . . [a] project financed in whole or in part from public money for [a variety of public purposes]." NRS 338.010(15). Bombardier argues that the contract did not qualify as a "public work" for two reasons: (1) it was not a "project," and (2) it was not "for the new construction, repair or reconstruction of . . . [a] project." We address each of these arguments in turn.

A.

NRS Chapter 338 does not define "project." The Labor Commissioner consulted two dictionaries to determine the ordinary meaning of the term: the *Merriam-Webster's Dictionary* defines "project" as "a planned piece of work that ha[s] a specific purpose . . . and that usually requires a lot of time"; and the *Cambridge University Academic Content Dictionary* defines "project" as "a piece of planned work or activity that is completed over a period of time and intended to achieve a particular aim."

On appeal, Bombardier argues that a "project" has "a singular, defined end point" and "a schedule with substantial completion dates or other defined objectives." Bombardier agrees with the *Cambridge Dictionary* definition, but also relies on a 2010 version of

Merriam-Webster's Dictionary, which defines "projects" as "plans or schemes to complete a particular objective in accordance with a defined schedule." Bombardier contends that the contract does not meet this definition because it involved ongoing maintenance work and therefore lacked an endpoint or substantial completion dates. Though Bombardier takes issue with the Labor Commissioner's definition of "project," Bombardier's proffered definitions are not much different: both require a planned undertaking with a specific purpose to be completed over time.

The Labor Commissioner's determination that the contract was a project under NRS 338.010(15) is a question of fact, which we review for substantial evidence. *See Bisch v. Las Vegas Metro. Police Dep't*, 129 Nev. 328, 342, 302 P.3d 1108, 1118 (2013). The Labor Commissioner determined that the contract was a project because the work was performed based on a defined and comprehensive schedule, which was outlined in the contract. Further, the Labor Commissioner explained that the contract lasted for a period of five years and required scheduled routine, preventative, and corrective maintenance. The Labor Commissioner explained that although the contract appeared to be primarily for maintenance work (a Bombardier official testified that 80 percent of it was for maintenance), some of the work (the other 20 percent) met the definition of "project." For example, one category of maintenance, "Major Maintenance," included tasks such as replacing major repairable units, performing major repairs, rebuilding and overhauling major components, and repairing spare equipment. Unlike routine maintenance tasks, these tasks contemplated preventive and corrective projects as required at various times over the five-year contract period.

Such tasks were consistent with the definition of "project" because they constitute a planned piece of work for a specific purpose completed over a limited period, and within a contract intended to achieve a particular aim. Thus, while substantial evidence supports a finding that these tasks were a "project," we conclude that the Labor Commissioner's determination that the entire contract was a project and therefore subject to NRS Chapter 338 was overbroad. Based on the contract's schedule and objectives, only the contract provisions providing for "repairs" that exceeded normal maintenance were a "project" within the plain meaning of NRS 338.010(15).

B.

Bombardier argues that regardless of whether the contract is a "project," it was not "*for* . . . new construction, repair or reconstruction," as required to be a public work under NRS 338.010(15).[3]

[3]Bombardier also contends that, regardless of the ordinary meaning of "project," the contract did not qualify as a "project" under NRS 338.010(15) because that term should be construed only as "construction project." Bombardier

(Emphasis added.) Bombardier contends that the prevailing wage requirements apply only when a contract's primary purpose is for repairs, arguing that this contract's primary purpose was *for* maintenance. Thus, it adds, to the extent the contract included repair work, that work was only incidental to the contract's primary purpose. Bombardier points out that the Labor Commissioner's finding that 80 percent of the contract pertained to maintenance proves that the contract's primary purpose was maintenance and not repair.

We agree with Bombardier that the word "for" can indicate purpose. *See, e.g.*, *For*, *Merriam Webster's Collegiate Dictionary* (11th ed. 2007) (explaining that "for" can be "used as a function word to indicate purpose" or "to indicate an intended goal"). But NRS 338.010(15) does not require such an all-or-nothing approach when evaluating the contract's purpose, nor does it exempt hybrid contracts. NRS 338.010(15) defines "public work" as "any project," not an entire contract; it does not state that individual contract provisions cannot be severed and assessed on their own. Such a limitation would run afoul of NRS Chapter 338's purpose and would allow parties to insulate themselves from the statutes' applicability by simply including repair work in a maintenance contract.

While the Legislature exempted normal maintenance contracts, it specifically maintained that public work projects for repair were subject to prevailing wage requirements. *See* NRS 338.010(15). It sought to avoid burdening public bodies with the prevailing wage requirement for small contracts that involved simple, day-to-day tasks. *See* Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981).

Contrary to Bombardier's argument, there is no indication that the Legislature intended to exempt repair work where a project involves both repair and maintenance work. We agree with the Labor

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advances several arguments to support this position: that the list of examples in the statutory provision are all construction or development projects, that this court's decisions on prevailing wages have involved construction contracts and real property rather than contracts for maintenance, that maintenance contracts in Clark County have generally not been subject to prevailing wages, and that the "financ[ing]" language in NRS 338.010(15) excludes maintenance contracts from the definition of "project" because such contracts are paid for with normal operating funds rather than bonds or long-term debt measures.

We conclude that Bombardier's arguments are belied by the plain language of NRS 338.010(15), which specifically states "any project for the new construction, repair or reconstruction," and notably does not limit the term "project" to "construction project," despite such limitation in other provisions of the statute. *See* NRS 338.010(18)-(20) (2009) (specifically using the term "construction project"); *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."). In addition, the financing language in the statute does not require a particular type of funding, only that the project be financed by public money, which the contract was.

Commissioner and the Union that such an approach would allow employers to circumvent prevailing wage laws by including some maintenance work in contracts, which would be inconsistent with the Legislature's intent in enacting NRS Chapter 338. *See City of Reno v. Bldg. & Constr. Trades Council of N. Nev.*, 127 Nev. 114, 118 n.3, 251 P.3d 718, 720 n.3 (2011) ("The prevailing wage laws are meant to ensure that a public body pays a laborer working on a public project no less than the prevailing wage they would receive for the same type of work done for a private employer in that county.").

Next, we turn to whether the contract in this case included repairs as used in NRS 338.010(15). The Labor Commissioner determined that certain tasks under the contract were repairs, despite Bombardier labeling them "maintenance," because they necessarily required technical training or skills that other tasks did not. For example, the contract listed routine maintenance tasks under "Scheduled Vehicle Maintenance," but also included "[r]eplacing major repairable units," "[p]erforming major repairs," "[r]ebuilding and overhauling major components," and "[r]epairing spare equipment" under the same section. Some of the tasks also involved repairs of station doors, graphics, and occupancy detectors, and the repair and replacement of contactors and isolation switches. Other tasks included repair or replacement of failed equipment or components and major maintenance of the ATS equipment.

The Legislature did not define the term "repair." The verb form of "repair" is defined as "1. [t]o restore to a sound or good condition after decay, waste, injury, partial destruction, dilapidation, etc.; to fix . . . 2. [t]o renew, revive, or rebuild after loss, expenditure, exhaustion, etc." *Repair*, *Black's Law Dictionary* (10th ed. 2014). These definitions recognize an activity beyond normal maintenance. And the Legislature distinguished tasks that are not repairs by characterizing them as normal maintenance, including such activities like window washing, janitorial and housekeeping services, and fixing broken windows, *see* Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981). Accordingly, we agree with the Labor Commissioner that the contract provisions that are *for* major repair tasks constitute the type of repairs the Legislature intended to subject to NRS 338.010(15).

III.

Bombardier next argues that the contract was exempt from the prevailing wage laws under NRS 338.011(1) because it was "directly related to the normal operation of the public body or the normal maintenance of its property." Bombardier advances a second basis for its exemption, arguing that the contract was exempt under NRS 338.080(1) because it is a railroad company. We conclude that nei-

ther of these exemptions apply and that the Labor Commissioner was correct in concluding the same.

A.

NRS 338.011(1) exempts from the requirements of NRS Chapter 338 any contract "[a]warded in compliance [with government purchasing laws] which is directly related to the *normal operation* of the public body or the *normal maintenance* of its property." (Emphases added.) The Labor Commissioner concluded that these exemptions do not apply because (1) the ATS is not part of the airport's "normal operation," and (2) certain repair work under the contract exceeded "normal maintenance."

i.

First, we note that NRS 338.011(1) does not define the phrase "directly related to the normal operation of the public body." The Labor Commissioner adopted a narrow reading of this provision. He explained that while the ATS is the primary method of transporting passengers around the airport property, it is not the only method; its importance to the airport does not mean that it directly relates to the airport's normal operation. The Labor Commissioner determined that the normal operation of the airport is to fly and land airplanes and to transport passengers via airplanes, explaining that "[p]lanes would take off and land; passengers would make it to their destinations," even without the ATS.

Conversely, Bombardier argues that the ATS has been essential to the airport since 1982, and that the airport has relied on the ATS to transport passengers to new areas of the airport in its development and expansion projects. Thus, according to Bombardier, the exemption applies because the ATS has been and will continue to be essential to the airport.

The Union argues, and we agree, that Bombardier reads this exception too broadly. The exception for projects related to "the normal operation of the public body" cannot swallow Nevada's prevailing wage requirement rule. Such an interpretation would result in every project at the airport being exempt from public work projects. And, while we agree with both the Union and Labor Commissioner that NRS 338.011(1) should be read narrowly, we cannot wholly defer to the Labor Commissioner's interpretation of the statute because he failed to support his interpretation with any authority. *See Nev. Pub. Emps.' Ret. Bd. v. Smith*, 129 Nev. 618, 625, 310 P.3d 560, 565 (2013) (providing that while we defer to an agency's interpretation of its statute, this interpretation is only persuasive). Such an interpretation, while consistent with the statutory text, loses its persuasive value.

We take this opportunity to define "directly related to the normal operation of the public body" as stated in NRS 338.011(1). The plain meaning of "directly related" is an immediate or straightforward connection or relationship between two things. *See Directly*, *Black's Law Dictionary* (10th ed. 2014) (defining "directly" as "[i]n a straightforward manner," and "immediately"); *id*. at *Related* (defining "related" as "[c]onnected in some way; having relationship to or with something else"). Further, "normal" is defined as "[a]ccording to a regular pattern; . . . forces that operate periodically or with some degree of frequency." *See id.* at *Normal*. Finally, "operational," the adjective form of "operation" means "able to function." *See id.* at *Operational*. Accordingly, a contract is "directly related to the normal operation of a public body" when it has an immediate relationship to the regular way in which the public body functions. We also agree with the Labor Commissioner that "directly" modifies "related," and we read this as a narrow exception to Nevada's prevailing wage law.

Satisfied with this definition, we answer whether the Labor Commissioner's conclusion is supported by substantial evidence. "Substantial evidence is evidence which a reasonable mind might accept as adequate to support a conclusion." *Schepcoff v. State Indus. Ins. Sys.*, 109 Nev. 322, 325, 849 P.2d 271, 273 (1993). We do not "reweigh evidence or witness credibility." *Bisch*, 129 Nev. at 342, 302 P.3d at 1118.

Bombardier contends that substantial evidence does not support the Labor Commissioner's conclusion that this contract was not directly related to the airport's normal operation. Bombardier rests its argument on the testimony of the former Director of Aviation for the airport, Randall Walker, who testified that it would be impossible to manage the C and D gates without the ATS. Walker explained that the ATS is the only method of transportation to the D gates, but that there are other ways to get to the C gates. Walker further testified that on one occasion, all of the ATS equipment shut down, resulting in delayed and missed flights.

We agree that transporting passengers between gates is an important airport operation. Nevertheless, we agree with the Labor Commissioner that the contract was not directly related to the normal operation of the airport, but for a different reason. The issue here is not whether the ATS is part of the normal airport operation, but rather whether the *repair portion of this contract* was directly related to the *normal* operation of the airport or its property. We conclude that it was not.

Contract provisions not subject to the prevailing wage laws are only those that the Legislature intended to exempt. *See supra*, Section II(B). Here, the contract provisions containing major repairs were not exempt because they were not directly related to the normal op-

eration of the airport. Walker's testimony that on a single occasion, the ATS broke down and caused havoc cuts against Bombardier's argument because it illustrated that such *abnormal* events—those that require major repair of the ATS—were not *normal* operations. Walker's testimony and the contract demonstrate that such major repairs were not immediately related to the regular way in which the airport functions. Further, the Labor Commissioner determined that Bombardier submitted no other evidence to support its argument. Accordingly, we agree, but for different reasons, with the Labor Commissioner that this exemption does not apply. *Saavedra-Sandoval v. Wal-Mart Stores, Inc.*, 126 Nev. 592, 599, 245 P.3d 1198, 1202 (2010) (providing that this court will affirm a judgment that reached the correct result, even if arrived at for the wrong reason).

ii.

Second, we turn to the Labor Commissioner's conclusion that the contract was not exempt from the prevailing wage requirement under NRS 338.011(1) because it was not "directly related to . . . the normal maintenance" of the airport. The essence of Bombardier's argument is that the exemption should apply because all maintenance contracts involve some element of repair; thus, it asks us to look at the contract's overarching maintenance purpose. We are asked to determine whether the major repairs listed in the contract, identified above, were "directly related to . . . the normal maintenance" of the airport.

NRS Chapter 338 does not define "normal maintenance." The Labor Commissioner defined "normal maintenance" as "work that does not require a lot of skill or training (i.e., janitorial services), not work that requires training and technical skills." Relying on this definition, the Labor Commissioner found that tasks under the contract that did not require technical skills were exempted from the prevailing wage requirement. The tasks that involved repair work, on the other hand, exceeded "normal maintenance."

"Normal" means "conforming to a . . . regular pattern." *Normal*, *Merriam-Webster's Collegiate Dictionary* (11th ed. 2014). "Maintenance" means "[t]he care and work put into property to keep it operating and productive; general repair and upkeep." *Maintenance*, *Black's Law Dictionary* (10th ed. 2014). Thus, normal maintenance is a patterned upkeep of property to keep it operating.

Repairs, on the other hand, cannot be part of this normal upkeep because they necessarily require decay or waste, and the restoration thereof. *See Repair*, *Black's Law Dictionary* (10th ed. 2014). The contract's language is consistent with this distinction because it plainly segregates tasks based on the amount of effort and skill required to complete them. It is clear the Legislature did not consider

the terms as synonymous; it intended to exempt maintenance work, which could include minor, day-to-day repairs, while requiring payment of prevailing wages on public work projects involving major repairs. *See* Hearing on A.B. 94 Before the Assembly Government Affairs Comm., 61st Leg. (Nev., Feb. 12, 1981). It would produce an absurd result to read "repair" into what NRS 338.011 has qualified as "normal" operations and maintenance, because the statute plainly aims to exempt tasks not included in "repair." *See* NRS 338.010(15) (applying prevailing wage requirements to "repair" projects).

These major repairs were not directly related to the normal maintenance of the airport because they exceeded day-to-day upkeep. This interpretation is consistent with the statute's plain language and reflects the Legislature's intent. *See Valenti*, 131 Nev. at 878-79, 362 P.3d at 85. Accordingly, we agree with the Labor Commissioner's interpretation that major repair tasks in the contract, while listed as maintenance, were actually "repairs" and therefore outside the scope of the phrase ". . . directly related . . . to the normal maintenance" of the airport.

B.

Bombardier next argues that it was exempt from paying prevailing wages because it is a railroad company, which is exempt under NRS 338.080(1). NRS 338.080(1) exempts from the prevailing wage requirements:

> [a]ny work, construction, alteration, repair or other employment performed, undertaken or carried out, by or for any railroad company or any person operating the same, whether such work, construction, alteration or repair is incident to or in conjunction with a contract to which a public body is a party, or otherwise.

The Labor Commissioner determined that Bombardier was not exempt under this statute because (1) the ATS is not a railroad and (2) Bombardier does not hold itself out as a railroad company.

First, neither NRS Chapter 338 nor the legislative history define what type of "work" is considered "for [a] railroad." The Labor Commissioner determined that the ATS is not a traditional railroad because it does not run on steel rails nor is it drawn by a locomotive. *See Westinghouse Elec. Corp. v. Williams*, 325 S.E.2d 460, 463 (Ga. Ct. App. 1984) (holding that an airport transit system operating on a guideway was not a railroad). This interpretation is consistent with the common meaning of railroads and other statutes wherein the Legislature has defined railroads as operating on railways. *See, e.g.*, NRS 484A.200 (defining "railroad" as one that operates on "stationary rails"); NRS 484B.050 (same); NRS 710.300 (requiring a "railway" or "railway lines" for railroad utilities). Further, this interpretation is consistent with the testimony of Bombardier's director

of services, who testified that the shuttle operates on a guideway between two stations. It lacks rails and operates unmanned cars with rubber tires on an elevated, concrete, single-track guideway within the facility. It also does not switch lanes or require an operator, nor does it include other features common to railroads and trains. Therefore, we conclude that the ATS is not a railroad under NRS 338.080(1).

Second, even though the ATS is not a railroad, Bombardier argues that it could be exempt as a railroad company. Neither NRS Chapter 338 nor the legislative history define the term "railroad company." The Labor Commissioner did not define the term "railroad company," but the term is defined by *Black's Law Dictionary* as "[a] corporation organized to construct, maintain, and operate railroads." *Railroad Corporation*, *Black's Law Dictionary* (10th ed. 2014). Bombardier cannot be a railroad company because it is not maintaining or operating a railroad—the ATS is not a railroad. Moreover, if Bombardier were a railroad company, the Public Utilities Commission would regulate it.[4] *See* NRS 704.020 (defining railroads as public utilities subject to the Commission's regulation).

We recognize the Legislature's intent to specifically regulate railroads as public utilities, and seeing no evidence that Bombardier is a railroad company, we hold that it cannot claim this exemption.

IV.

The Labor Commissioner determined that 20 percent of the maintenance work under the contract deemed "corrective maintenance" was public work because it "involved repair, replacement, rebuilding or modifying [the] ATS components." He concluded that calling such work "maintenance" was a "misnomer."

Bombardier challenges the Labor Commissioner's determination, arguing that the employee work summaries relied on to reach this determination were inadmissible hearsay evidence.[5] Having relied on inadmissible evidence, Bombardier argues, the Labor Commissioner's conclusion is not supported by substantial evidence. We

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[4]We decline to consider whether Bombardier's other maintenance projects on light rails, monorails, and its out-of-state railroad holdings make it a railroad company because such projects are not exempted under NRS 338.080(1). We also reject the Labor Commissioner's conclusion that NRS 338.080(1) applies only to Nevada railroad companies.

[5]On appeal, Bombardier argues that the primary work summary exhibit was inadmissible under NRS 52.275, which concerns the admissibility of voluminous writings. However, Bombardier did not argue that as a basis for excluding the summaries to either the Labor Commissioner or to the district court in its petition for judicial review, so we need not consider it here. *See State ex rel. State, Bd. of Equalization v. Barta*, 124 Nev. 612, 621, 188 P.3d 1092, 1098 (2008) ("[T]his court generally will not consider arguments that a party raises for the first time on appeal.").

conclude that the Labor Commissioner properly considered the employee work summaries because the information allowed him to have a more complete record from which to ascertain the facts and resolve the case. Procedural and evidentiary rules are relaxed in administrative proceedings. *Dutchess Bus. Servs., Inc. v. Nev. State Bd. of Pharmacy*, 124 Nev. 701, 711, 191 P.3d 1159, 1166 (2008) (acknowledging that "proceedings before administrative agencies may be subject to more relaxed procedural and evidentiary rules"). Moreover, the Labor Commissioner is not bound by the technical rules of evidence in such proceedings, NAC 607.410(1), and may exercise his discretion in deviating from the technical rules of evidence if doing so "will aid in ascertaining the facts," NAC 607.410(2). Admitting and relying on these work summaries was plainly within the Labor Commissioner's discretion.

Additionally, these summaries were not the sole basis for the Labor Commissioner's determination regarding the work; he also considered the employees' testimony about their experience working on different tasks for the ATS. In addition, he considered the contract itself, which distinguished between "preventive maintenance" work and "corrective maintenance" work. Based on the tasks listed under each, the Labor Commissioner concluded that 80 percent of the work under the contract was "preventive maintenance" work and 20 percent was "corrective maintenance" work. The Labor Commissioner concluded that the "corrective maintenance" tasks were better categorized as repair work, requiring Bombardier to pay prevailing wages for that 20 percent. The Labor Commissioner's approach in allocating prevailing wages based on the type of work performed under the contract is consistent with the language and intent of the statute. *See Taylor v. State, Dep't of Health & Human Servs.*, 129 Nev. 928, 930, 314 P.3d 949, 951 (2013). Accordingly, we conclude that there was substantial evidence supporting the Labor Commissioner's conclusion that the contract was comprised of 20 percent repair work. *See Bisch*, 129 Nev. at 334, 302 P.3d at 1112.

V.

Next, Bombardier argues that the Labor Commissioner improperly shifted the burden of proof in requiring Bombardier to prove damages because, under *Mort Wallin of Lake Tahoe, Inc. v. Commercial Cabinet Co.*, the employees, as the party seeking damages, have the burden to demonstrate which tasks constituted covered repairs and how much of that work they performed. 105 Nev. 855, 857, 784 P.2d 954, 955 (1989). Bombardier also argues that the Labor Commissioner incorrectly excused the Union from having to prove damages after determining that Bombardier did not maintain adequate records, which it disputes. Rather, Bombardier contends that its records were reliable because they were completed by the

employees and, regardless, it was not on notice that it had to maintain prevailing wage records. Bombardier's reliance on *Mort Wallin of Lake Tahoe* is misplaced. That case involved a tort-based action, which was not subject to NRS Chapter 338.

Pertinent here, NRS 338.090(2)(a) requires that the Labor Commissioner "assess a person who, after an opportunity for a hearing, is found to have failed to pay the prevailing wage required pursuant to [NRS Chapter 338]." There is no reference to which party has the burden to prove this amount. The Labor Commissioner is to award "an amount equal to the difference between the prevailing wages required to be paid and the wages that the contractor or subcontractor actually paid." NRS 338.090(2)(a). This provision authorizes the Labor Commissioner to deduce the amount of damages from the evidence presented at the hearing.

The Labor Commissioner considered evidence that Bombardier and the Union provided. The Labor Commissioner faulted Bombardier with any inaccuracies in the employment records because Bombardier did not encourage ATS technicians to track their hours accurately or on a task-specific basis. Moreover, the Labor Commissioner noted that after the ATS technicians entered their hours, "someone other than the worker"—referring to an administrative employee—entered or adjusted the hours and tasks originally reported, without personal knowledge of what work the ATS technicians actually performed. The Labor Commissioner is correct that "employees, who have performed work for which they have not been properly compensated, should not be penalized for the employer's failure to keep accurate records as required by law." This is precisely what the United States Supreme Court held in interpreting the burden of proof an employee seeking benefits had to prove under the Fair Labor Standards Act. *See Anderson v. Mt. Clemens Pottery Co.*, 328 U.S. 680, 687-88 (1946), *superseded by statute on other grounds as recognized in Integrity Staffing Sols., Inc. v. Busk*, 574 U.S. 27, 36 (2014). Therefore, we agree with the Labor Commissioner that there was "a just and reasonable inference" that prevailing wages were required for 20 percent of the work completed under the contract as that work constituted repair work. Further, the Labor Commissioner did not err in assessing damages as he analyzed evidence from both parties to determine the amount of damages. *See* NRS 338.090(2)(a).

VI.

Finally, Bombardier argues that the Labor Commissioner engaged in unauthorized rulemaking and exceeded his authority by concluding that the ATS technicians were properly classified as "Elevator Constructors." "[T]he Labor Commissioner has the authority to de-

termine and distinguish classifications of workers" and is obliged to "define a classification or type of work and then to determine the prevailing wage for that classification." *City Plan Dev., Inc. v. Office of Labor Comm'r*, 121 Nev. 419, 432, 117 P.3d 182, 190-91 (2005).

The Labor Commissioner determined that the contract did not properly classify the ATS technicians. Relying on the Office of the Labor Commissioner's posted 2008 job descriptions for public work projects, the Labor Commissioner found that the ATS technicians' proper job classification was "Elevator Constructor." The Labor Commissioner determined that this job description applied to the ATS technicians because, like elevators, the ATS functions as an automated people mover. Further, the Labor Commissioner determined that the ATS technicians performed several of the same tasks and used the same tools as employees classified under the "Elevator Constructor" job description. We conclude that Bombardier's argument lacks merit because the Labor Commissioner was not engaging in ad hoc rulemaking. Rather, he "simply applied the evidence to his predefined classifications to determine each claimant's appropriate wage," which he has authority to do under NRS Chapter 338. *City Plan Dev.*, 121 Nev. at 432, 117 P.3d at 191.

CONCLUSION

We conclude that the "repair" portion of the contract in this case was a public work project under NRS 338.010(15), and no exemptions apply that allow Bombardier to forego paying prevailing wages to the ATS technicians who performed repair work under the contract. The Labor Commissioner's factual findings were supported by substantial evidence. Accordingly, we affirm the district court's denial of the petition for judicial review.

Gibbons, C.J., Pickering, Parraguirre, and Stiglich, JJ., and Douglas, Sr. J., concur.

RICARDO P. PASCUA, Appellant, *v.* BAYVIEW LOAN SERVICING, LLC; SEASIDE TRUSTEE, INC.; and BANK OF NEW YORK MELLON, Respondents.

No. 71770

February 7, 2019 434 P.3d 287

Appeal from a district court order denying a petition for judicial review in a Foreclosure Mediation Program matter. Eighth Judicial District Court, Clark County; Kathleen E. Delaney, Judge.

Reversed and remanded.

Robison, Sharp, Sullivan & Brust and *Therese M. Shanks*, Reno, for Appellant.

Weinstein & Riley, P.S., and *Aaron Waite*, Las Vegas, for Respondents.

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

OPINION

By the Court, GIBBONS, C.J.:

This case presents us with the question of whether a decedent's spouse, who has been appointed as special administrator over the decedent's estate, may elect to participate in the Foreclosure Mediation Program (FMP) regarding the decedent's residential real property, despite the fact that the property was purchased in the decedent's name only. We conclude that where an individual has been appointed special administrator of an estate that includes residential real property, the special administrator resides in the property as his or her primary residence, and the special administrator retains an ownership interest via intestate succession laws, he or she is entitled to participate in the FMP.

I.

During her marriage to appellant Ricardo P. Pascua, Myrna Pascua purchased a home in her name only, which was encumbered by a deed of trust. In 2010, Myrna passed away, survived by Ricardo and their two children. After Myrna's death, Ricardo filed a petition for special letters of administration with the probate court wherein he requested appointment as special administrator of Myrna's estate. Ricardo later filed an amended petition, listing the purpose of the appointment as "marshall[ing] all assets," and listing himself and his two children as relatives and heirs. In 2011, Ricardo was ultimately appointed special administrator of Myrna's estate "for the purpose of administrating the estate in accordance with [NRS] 140.040."

In 2016, respondent Bayview Loan Servicing, LLC, which serviced Myrna's mortgage for respondent Bank of New York Mellon, the assignee of the deed of trust, commenced foreclosure proceedings on the property. Ricardo, as special administrator of Myrna's estate, requested foreclosure mediation through Nevada's FMP. At the mediation, the mediator found that the homeowner failed to attend the mediation because she was deceased and concluded that the property was not eligible for the FMP because, among other things, Ricardo was not an owner or grantor of the property, and the

order appointing him as special administrator did not specifically authorize him to participate in the FMP. Ricardo filed a petition for judicial review in the district court, which was denied. Ricardo now appeals and raises a single issue: whether a special administrator of an estate that includes residential real property subject to foreclosure proceedings may elect to participate in the FMP.[1]

II.

Ricardo argues that a special administrator's general powers and duties under NRS 140.040 to preserve and take charge of real property of the estate, and specific powers under NRS 140.040(2)(a) to "commence, maintain or defend actions and other legal proceedings . . ." as a special representative are sufficient to vest authority in the special administrator to participate in the FMP.[2] He further argues that a special administrator may participate in the FMP under the foreclosure mediation rules (FMRs) and NRS 107.086.

A.

"In reviewing a district court order granting or denying judicial review in an FMP matter, this court gives deference to a district court's factual determinations and examines its legal determinations," such as the construction of a statute or FMP rule, de novo. *Jacinto v. PennyMac Corp.*, 129 Nev. 300, 304, 300 P.3d 724, 727 (2013); *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 467, 255 P.3d 1281, 1285 (2011). "If the plain meaning of a statute is clear on its face, then [this court] will not go beyond the language of the statute to determine its meaning." *Beazer Homes Nev., Inc. v. Eighth Judicial Dist. Court*, 120 Nev. 575, 579-80, 97 P.3d 1132, 1135 (2004) (alteration in original) (internal quotation marks omitted). Moreover, "[w]here the statutory language . . . does not speak to the issue before us, we will construe it according to that which 'reason and public policy would indicate the legislature intended.'" *Salas v. Allstate Rent-A-Car, Inc.*, 116 Nev. 1165, 1168, 14 P.3d 511, 514 (2000) (quoting *State, Dep't of Motor Vehicles & Pub. Safety v. Lovett*, 110 Nev. 473, 477, 874 P.2d 1247, 1249-50 (1994) (internal quotation marks omitted)).

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[1]Ricardo initially filed a pro se informal brief, but the case was thereafter referred to the pro bono program for appointment of counsel.

[2]Alternatively, Ricardo argues that he substantially complied with NRS 140.040(2)(c) because his initial petition specifically stated that he was seeking special administrator status for the purpose of negotiating a short sale of the property. We are not persuaded by his argument, as the issue is not whether the scope of the order appointing him special administrator included authorization to negotiate a short sale, but whether a special administrator is eligible to participate in the FMP.

B.

The FMP applies to "owner-occupied residence[s],"[3] FMR 1(1), defined as "housing that is occupied by an owner as the owner's primary residence," NRS 107.086(1), (19)(d).[4] The stated purpose of the FMP "is to provide for the orderly, timely, and cost-effective mediation of owner-occupied residential foreclosures," and to "encourage[ ] deed of trust beneficiaries (lenders) and homeowners (borrowers) to exchange information and proposals that may avoid foreclosure." FMR 1(2). The question before us is whether the FMP rules and statutory scheme contemplate Ricardo's participation in the FMP as special administrator of Myrna's estate.

A special administrator is a person appointed "to collect and take charge of the estate of the decedent . . . and to exercise such other *powers as may be necessary to preserve the estate*." NRS 140.010 (emphasis added). NRS 140.040, the statute upon which Ricardo's special administration powers are based, provides that "[a] special administrator shall . . . [t]ake charge and management of the real property and enter upon and preserve it from damage, waste and injury." NRS 140.040(1)(b). Property acquired during the marriage is presumed to be community property. *Pryor v. Pryor*, 103 Nev. 148, 150, 734 P.2d 718, 719 (1987). "Rebuttal of the presumption requires clear and convincing evidence," and "[e]ven a deed reciting that [the owner] owned the estate as his separate property would not of itself overcome the presumption." *Id.* The party claiming that the property is separate has the burden of demonstrating that it is not community property. *Id.* Pursuant to NRS 123.250(1), upon the death of a spouse:

> (a) An undivided one-half interest in the community property is the property of the surviving spouse and his or her sole separate property.
>
> (b) The remaining interest:
>
> (1) Is subject to the testamentary disposition of the decedent or, in the absence of such a testamentary disposition, goes to the surviving spouse . . . .

See also McKissick v. McKissick, 93 Nev. 139, 148, 560 P.2d 1366, 1371 (1977).

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[3]The foreclosure proceedings were commenced on or about February 9, 2016. This mediation was therefore governed by the Foreclosure Mediation Rules as amended January 13, 2016. *See In re Adoption of Rules for Foreclosure Mediation*, ADKT 435 (Order Adopting Foreclosure Mediation Rules, June 30, 2009).

[4]NRS 107.086 was amended in 2017. 2017 Nev. Stat., ch. 571, § 2, at 4091-96. Except where otherwise indicated, the references in this opinion to statutes codified in NRS Chapter 107 are to the version of the statutes in effect when the events giving rise to this litigation occurred.

Here, Myrna and Ricardo occupied the property in question as their primary residence, and Ricardo continued to do so after Myrna's death. Under such circumstances, the plain language of the relevant statutes and rules authorizes a special administrator to participate in the FMP, which is a preliminary step "necessary to preserve the estate" and keep "it from damage, waste and injury," i.e., foreclosure. NRS 140.010; NRS 140.040(1)(b). Even if the administrator statutes did not speak to this issue, reason and public policy indicate that the statutory schemes and court rules contemplate a special administrator's participation in the FMP to avoid foreclosure of residential property occupied by the special administrator as the spouse of the deceased owner and to preserve the estate. *Salas*, 116 Nev. at 1168, 14 P.3d at 514. In addition, the property was acquired during Ricardo's marriage to Myrna and is thus presumed to be community property. While the fact that the deed was titled as Myrna's sole and separate property may suggest that it was not meant to constitute community property, we conclude that Bayview Loan failed to demonstrate that the property was not intended to be community property. Thus, the record supports that, upon Myrna's death, Ricardo received, at a minimum, an undivided one-half interest in the property. *See* NRS 123.250(1)(a). Accordingly, Ricardo was empowered to participate in the FMP as a special administrator and because he obtained an ownership interest in the property upon Myrna's death.

III.

As Ricardo obtained an ownership interest in the property upon Myrna's death and the property served as his primary residence, he qualifies as an owner-occupier under Nevada statutes and the FMRs, and because his status as special administrator also authorizes him to take action to preserve Myrna's estate, Ricardo was entitled to participate in the FMP. Thus, the district court erred by denying Ricardo's petition for judicial review.[5] We therefore reverse the district court's order and remand for proceedings consistent with this opinion.

Pickering and Hardesty, JJ., concur.

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[5]Because Ricardo has an ownership interest in the property, and is authorized to participate in the FMP pursuant to NRS 140.040, we further conclude that Ricardo is an aggrieved party within the meaning of NRAP 3A. We thus reject Bayview Loan's contention that Ricardo lacks standing to appeal. *See Valley Bank of Nev. v. Ginsburg*, 110 Nev. 440, 446, 874 P.2d 729, 734 (1994) ("A party is 'aggrieved' within the meaning of NRAP 3A(a) 'when either a personal right or right of property is adversely and substantially affected' by a district court's ruling." (quoting *In re Estate of Hughes v. First Nat'l Bank of Nev.*, 96 Nev. 178, 180, 605 P.2d 1149, 1150 (1980))).

JENNIFER HENRY, Petitioner, *v.* NEVADA COMMISSION ON JUDICIAL DISCIPLINE, Respondent.

No. 75675

February 28, 2019 435 P.3d 659

Original petition for a writ of prohibition challenging the jurisdiction of the Nevada Commission on Judicial Discipline.

Petition denied.

Law Office of Daniel Marks and *Daniel Marks* and *Nicole M. Young*, Las Vegas, for Petitioner.

Sinai, Schroeder, Mooney, Boetsch, Bradley & Pace and *Thomas C. Bradley*, Reno, for Respondent.

Before Gibbons, C.J., Pickering, Hardesty, Parraguirre and Stiglich, JJ.[1]

OPINION

Per Curiam:

This petition for a writ of prohibition challenges the jurisdiction of the Nevada Commission on Judicial Discipline (the Commission). Jennifer Henry challenges the Commission's jurisdiction over her as a hearing master, arguing that NRS 1.428, the statute giving the Commission its purported jurisdiction over her, is unconstitutional. We hold that NRS 1.428 is constitutional and accordingly hearing masters are subject to the Commission's jurisdiction.

FACTS AND PROCEDURAL HISTORY

Henry is a hearing master for the family courts in the Eighth Judicial District Court (EJDC) of Nevada. On October 10, 2016, Henry presided over a hearing in the juvenile court for EJDC, wherein she allegedly acted inappropriately. Four days later, Judge William Voy informed Henry that he had consulted with Presiding Judge Charles Hoskin and Chief Judge David Barker. Judge Voy had listened to the recording of the hearing, and the three determined that Henry's actions were improper. They administered a one-week suspension without pay. On October 10, 2017, the Commission filed a formal statement of charges for Henry's conduct. Henry is challenging the Commission's jurisdiction.

[1]The Honorable Elissa F. Cadish and The Honorable Abbi Silver did not participate in the decision of this matter.

DISCUSSION

The Nevada Constitution creates the Commission and provides a list of positions that the Commission covers. Nev. Const. art. 6, § 21(1). Henry's argument that the Commission does not have jurisdiction over her rests on the assertion that the Legislature improperly expanded the jurisdiction of the Commission by including hearing masters under the definition of a "judge" in NRS 1.428. The Nevada Constitution provides:

> [a] justice of the Supreme Court, a judge of the court of appeals, a district judge, a justice of the peace or a municipal judge may . . . be censured, retired, removed or otherwise disciplined by the Commission on Judicial Discipline.

Nev. Const. art. 6, § 21(1). The Nevada Legislature has enacted additional statutes related to the authority and jurisdiction of the Commission. *See* NRS 1.425-1.4695. NRS 1.440 gives the Commission jurisdiction over "judges." NRS 1.428 defines "judge" as including "[a]ny other officer [besides those specifically enumerated] of the Judicial Branch of this State, whether or not the officer is an attorney, who presides over judicial proceedings, including . . . a . . . special master or referee." Henry argues that this broad definition of judges improperly expanded the jurisdiction of whom the Commission has authority over beyond what is proscribed in the Nevada Constitution. Thus, she argues, NRS 1.428 is unconstitutional.

Henry admits that hearing masters and referees serve the same purpose, and accordingly, that she would be included in the definition of "judge" under NRS 1.428. However, she cites her original proposition—that referees would have needed to be included in the Constitution—to support her argument against the Commission's jurisdiction over her. The Commission, however, contends that there is authority in the Constitution for the Legislature to enact NRS 1.428. The Commission is correct.

The Nevada Constitution provides an enumerated list of positions that may be disciplined by the Commission. Nev. Const. art. 6, § 21(1). It further provides, in the district court section, that "[t]he legislature may provide by law for . . . Referees in district courts." *Id.* at § 6(2). We have previously held that multiple sections of the Nevada Constitution may be read in tandem to support the Legislature's authority to expand the jurisdiction of the Commission. *See In re Davis*, 113 Nev. 1204, 1213, 946 P.2d 1033, 1039 (1997). Before the Constitution was amended to include municipal court judges, a municipal court judge challenged the statute that gave the Commission its jurisdiction to discipline him in *Davis*. *Id.* at 1207-10, 946 P.2d at 1036-38. Specifically, the statute he challenged read,

at the time, "[t]he Commission on judicial discipline has exclusive jurisdiction over the censure, removal and involuntary retirement of . . . judges of municipal courts." *Id.* at 1211, 946 P.2d at 1038 (emphasis omitted) (quoting NRS 1.440(1) (1977)). Although municipal court judges were not enumerated in the Constitution as subject to the Commission's jurisdiction, the Constitution provided that the Commission may "[e]xercise such further powers as the legislature may from time to time confer upon it." *Id.* at 1212, 946 P.2d at 1038 (quoting Nev. Const. art. 6, § 21(9)(d) (1993)). Thus, we held the statute did not unconstitutionally expand the Commission's jurisdiction because "it [was] apparent that the legislature was free to utilize the Commission as a medium for [removing a municipal court judge]." *Id.* at 1213, 946 P.2d at 1039.

We hold that NRS 1.428 is constitutional for similar reasons. Although hearing masters are not specifically enumerated in the Nevada Constitution, the Nevada Constitution still gives the Legislature authority to enact laws regarding referees in district courts. Since NRS 1.428 concerns referees in district courts, we conclude its enactment was constitutional. Furthermore, the Nevada Constitution still provides, as it did when we analyzed *Davis*, that the Commission may "[e]xercise such further powers as the Legislature may from time to time confer upon it." Nev. Const. art. 6, § 21(11)(d). The Legislature conferred powers over judicial officers outside of those named in Article 6, Section 21 when enacting NRS 1.428. Thus, we conclude NRS 1.428 is constitutional and Henry falls under the purview of the Commission's jurisdiction.

Henry also argues that the Commission does not have jurisdiction over hearing masters because the Nevada Constitution intentionally limits the positions that are subject to the Commission's discipline. She asserts that the Commission's creation was intended to hold elected judges accountable to the public and that hearing masters are special in that they are held accountable in other ways. Specifically, she argues hearing masters are appointed and supervised by judges who are subject to judicial discipline by the Commission and that she is an at-will employee that may be disciplined by her employer. However, the only authority Henry cites to support her argument are statutes stating that hearing masters are supervised by justices/judges and caselaw providing that the Commission was created "to provide for a standardized system of judicial governance." *Ramsey v. City of N. Las Vegas*, 133 Nev. 96, 96, 392 P.3d 614, 616 (2017). We conclude these authorities support our conclusion because the Commission having jurisdiction over a multitude of judicial officers, including hearing masters under NRS 1.428, is consistent with having a standardized system of judicial governance. Therefore,

Henry's argument is unpersuasive because the authorities cited are inapposite to her proposition that the Commission was not created with the intent to have jurisdiction over hearing masters.

CONCLUSION

Henry makes a similar argument, regarding NRS 1.428, as the municipal court judge in *Davis*. However, we reject her argument and hold that NRS 1.428 is constitutional. Accordingly, the Commission is not acting outside of its jurisdiction here because it has the authority, by way of statute, to discipline Henry. Thus, we deny Henry's petition for a writ of prohibition.[2]

[2]In light of this opinion, we vacate the stay of proceedings entered on May 24, 2018.