will affirm a district court's order if the district court reached the correct result, even if for the wrong reason.").

CONCLUSION

We conclude that NRS 11.190(1)(b) does not apply to nonjudicial foreclosures because nonjudicial foreclosures are not judicial actions and NRS 11.190 applies only to judicial actions. Accordingly, we affirm the district court's order denying summary judgment and granting the countermotion to dismiss.

Douglas, Gibbons, Pickering, Hardesty, Parraguirre, and Stiglich, JJ., concur.

HIGH NOON AT ARLINGTON RANCH HOMEOWNERS ASSOCIATION, a Nevada Nonprofit Corporation, Petitioner, *v*. THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE SUSAN JOHNSON, District Judge, Respondents, and D.R. HORTON, INC., Real Party in Interest.

No. 65456

September 27, 2017 402 P.3d 639

Original petition for writ of mandamus or prohibition challenging a district court order granting partial summary judgment.

Petition granted.

Angius & Terry LLP and *Scott P. Kelsey, Paul P. Terry, Jr.*, and *John J. Stander*, Las Vegas, for Petitioner.

Wolfenzon Rolle and *Bruno Wolfenzon* and *Jonathan P. Rolle*, Las Vegas; *Wood, Smith, Henning & Berman, LLP*, and *Joel D. Odou* and *Victoria L. Hightower*, Las Vegas, for Real Party in Interest.

Before the Court En Banc.[1]

[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter. The Honorable Lidia S. Stiglich, Justice, did not participate in the decision of this matter.

OPINION

By the Court, Hardesty, J.:

In this petition for extraordinary relief, we consider whether a homeowners' association has standing to bring a construction defect suit on behalf of its members if the ownership of some units has changed since the action began. The statute in effect at the commencement of litigation, NRS 116.3102(1)(d) (2007), afforded a homeowners' association representational standing to pursue litigation on behalf of the units' owners. The narrow questions we consider are whether a homeowners' association has such standing to represent (a) unit owners who purchase their units after the litigation commences, and (b) unit owners who sell their units after the litigation commences.

We conclude that homeowners' associations do have representational standing to represent unit owners who purchase their units after the litigation commences as both NRS Chapters 40 and 116 and this court's previous construction defect holdings support the assertion that homeowners' associations represent all unit owners within a community. We further conclude, however, that under NRS 116.3102(1)(d) (2007), homeowners' associations may only represent their members, and thus, a homeowners' association does not have standing under that statute to bring, or continue to pursue, claims for unit owners who sell their units after the litigation commences. Accordingly, we grant the petition.

FACTS AND PROCEDURAL HISTORY

Petitioner High Noon at Arlington Ranch Homeowners Association (High Noon) is a homeowners' association created pursuant to NRS Chapter 116 that operates and manages the High Noon at Arlington Ranch community. This community consists of 342 residential units contained in 114 buildings, with three units per building.

In June 2007, High Noon filed its complaint against real party in interest D.R. Horton, "in its own name on behalf of itself and all of the High Noon . . . unit owners" alleging breach of implied warranties of workmanlike quality and habitability, breach of contract, breach of express warranties, and breach of fiduciary duty. In addition, High Noon obtained written assignment of the claims of 194 individual unit owners. These assigned units involve 107 of the community's 114 buildings.

On January 24, 2014, D.R. Horton filed a motion for partial summary judgment[2] contending that, since only 112 of High Noon's 342 members were unit owners at the time the complaint was filed, High Noon's standing should be reduced to those 112 units. D.R. Horton also argued that a subclass of 192 units for interior claims' purposes should be reduced to 62 units for the same reason.

The district court agreed with D.R. Horton and granted partial summary judgment. In its order, the district court determined that High Noon could not represent "claims on behalf of the now 230 former-owners as [they] are no longer the real parties in interest as required under NRCP 17." Instead, the court found that former owners "retain their claims for damages they personally suffered," but because the units remain "constructively defective, the former owners are no longer the 'real parties in interest' with respect to such claims." The district court also determined, however, that High Noon could represent "the claims of former owners for other damages suffered and specified under NRS 40.655, such as loss of use and market value, repair and temporary housing expenses, attorneys' fees and the like . . . ." Finally, the district court concluded that High Noon could also represent subsequent owners "in the event of an assignment of claims for existing or continuing construction defects by the seller or soon-to-be former owner to the purchaser in conjunction with the property's transfer." This petition followed.

DISCUSSION

High Noon argues the district court erred when it found that the association could only maintain an action for those owners who have owned their units continuously since High Noon first filed its complaint.[3] D.R. Horton responds that the unit owners at the time

[2]Only the relevant procedural history is described in this opinion, as the case has been ongoing for almost eight years and the parties have filed numerous motions and writ petitions.

[3]High Noon also argues that the district court violated NRCP 56 when it granted summary judgment on allegedly independent grounds that were not raised in the motion for summary judgment. High Noon argues that, in providing the parties copies of the order in another district court case, *Balle v. Carina Corp.*, No. A557753 (Order, Dec. 9, 2009), and granting a short recess for the parties to review it, the district court did not provide High Noon an "opportunity to meaningfully respond to this new source of authority." We disagree.

Although the district court's order here resembles the *Balle* order, the conclusions of law align with portions of D.R. Horton's argument. While the district court relied on its previous ruling in cases involving single family homes, it nevertheless agreed with D.R. Horton's argument that subsequent owners need an assignment of the claims. Further, while the *Balle* case was new authority presented to counsel during the hearing, the legal conclusion—that subsequent owners do not have standing absent assignments—is the same as the district court's holding in *Smith v. Central Park, LLC*, No. A-09-605954-D (Findings of Fact, Conclusions of Law and Order, Dec. 5, 2011). D.R. Horton attached the *Smith* order to its reply brief. Therefore, we conclude that the district court did not base its decision on grounds not argued in the briefs or at argument.

High Noon filed the complaint are the real parties in interest, and without a valid assignment, High Noon cannot represent those owners who subsequently purchased units. D.R. Horton further argues that the district court erred when it found that High Noon has standing to pursue the claims of former unit owners. Finally, D.R. Horton argues for the first time in its answer to the petition that subsequent unit owners are barred from bringing specific claims in the complaint, such as breach of express warranties and breach of fiduciary duty.

Writ relief is appropriate

High Noon petitions this court for a writ of mandamus[4] compelling the district court to amend its order granting partial summary judgment in favor of D.R. Horton. "A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Generally, this court "decline[s] to consider writ petitions that challenge interlocutory district court orders," here, an order granting partial summary judgment, because an appeal from a final judgment is an adequate legal remedy. *Int'l Game Tech.*, 124 Nev. at 197, 179 P.3d at 558; *see also Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1344, 950 P.2d 280, 281 (1997). However, even when an adequate and speedy remedy exists, this court may exercise its discretion when an important issue of law needs clarification and sound judicial economy warrants intervention. *Cote H. v. Eighth Judicial Dist. Court*, 124 Nev. 36, 39, 175 P.3d 906, 908 (2008).

This petition merits this court's consideration as it raises an important issue regarding Nevada's construction defect law and NRS 116.3102(1)(d) (2007).[5] Specifically, the petition presents an important question regarding a homeowners' association's ability to represent its members in construction defect litigation under the older version of the statute, and there are a number of similar cases

[4]While High Noon titled its petition as a "Petition for Writ of Prohibition or Mandamus," High Noon only argues for a writ of mandamus. Accordingly, we do not address the request for a writ of prohibition.

[5]NRS 116.3102(1)(d) was amended by the 2015 Legislature's enactment of A.B. 125 and the Governor's subsequent approval on February 24, 2015. The amended statute explicitly provides that a homeowners' association does not have standing to represent individual units in construction defect actions:

> The association may not institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or units' owners with respect to an action for a constructional defect pursuant to NRS 40.600 to 40.695, inclusive, unless the action pertains exclusively to common elements.

NRS 116.3102 (2015). All further references to the NRS are based on the statutes in effect at the commencement of this litigation in 2007.

currently pending. Not only will the court's resolution of the legal questions raised in this petition affect the underlying case, but it will also likely affect other pending construction defect cases. Therefore, we exercise our discretion to entertain the petition.

At issue is whether homeowners' associations have standing to represent unit owners who purchased their units after an association files its initial complaint, and whether homeowners' associations may continue to represent unit owners who sold their units while the litigation was pending. Before addressing these issues, however, we must examine High Noon's complaint and interpret the district court's order to frame our discussion of the standing issues.

High Noon's claims for relief

The district court's order never referred to High Noon's complaint and, ultimately, did not specify how the association's claims on behalf of the various past and present unit owners related to its standing. The district court instead indicated that High Noon could continue to represent those owners who had not sold their property during the litigation, could represent owners who had sold their property during the litigation in their claims for personal damages relating to construction defects, and could represent new unit owners only if the former unit owners assigned their "claims for constructional defects" to the subsequent owners. The problem with this oversight is that the standing analysis varies depending on the type of claim, as some claims do not transfer to a subsequent party.[6] Because the district court did not specify how High Noon's standing related to the unit owners' claims in the complaint, we briefly examine High Noon's complaint.

High Noon's complaint alleged four claims for relief: (1) breach of implied warranties of workmanlike quality and habitability, (2) breach of contract, (3) breach of express warranties, and (4) breach of fiduciary duty. The complaint never alleges that the claims for relief fall under NRS Chapter 40. Rather, the only specific mention of NRS Chapter 40 is in the first claim for relief, which references "monies recoverable for attorney's fees, costs and expenses under NRS 40.600 *et seq.*"

The breach of contract and breach of fiduciary duties claims are not construction defect claims under NRS Chapter 40. Similarly, a

[6]D.R. Horton did not argue that subsequent owners could not pursue specific claims, such as breach of fiduciary duty, until it filed its answer to the writ petition. Because this argument was not made before the district court and is not necessary for us to decide to resolve this writ petition, we decline to consider this argument. *See Smith v. Eighth Judicial Dist. Court*, 107 Nev. 674, 677, 818 P.2d 849, 851 (1991) ("[T]he issuance of a writ of mandamus or prohibition is purely discretionary with this court."); *Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) ("A point not urged in the trial court . . . will not be considered on appeal.").

breach of the implied warranty of habitability is not mentioned in NRS Chapter 40 and was extended to include builders in *Radaker v. Scott*, 109 Nev. 653, 661, 855 P.2d 1037, 1042 (1993). These claims are distinct from construction defect claims, but the district court's order does not indicate how the order was intended to affect them. Therefore, we conclude that the order does not affect these claims, and we decline to address them.

However, in the breach of implied warranty of workmanlike quality and breach of express warranties claims, High Noon sought damages for alleged defects and code violations under NRS 116.4113 and NRS 116.4114. While High Noon did not specifically identify NRS Chapter 40, the implied and express warranty claims sought relief similar to that allowed for a construction defect. Under NRS 40.615, "[c]onstructional defect" is defined as

> a defect in the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance and includes, without limitation, the design, construction, manufacture, repair or landscaping of a new residence, of an alteration of or addition to an existing residence, or of an appurtenance:
>
> 1. Which is done in violation of law, including, without limitation, in violation of local codes or ordinances.

To allege defects in the construction of the units, the complaint also used language similar to the language defining construction defects in NRS 40.615. *See* NRS 40.615(3) (defining a construction defect as a defect "[w]hich is not completed in a good and workmanlike manner in accordance with the generally accepted standard of care in the industry").

Regardless of High Noon stating that the claims for relief arise under NRS Chapter 116, the district court's order analyzed High Noon's standing to assert the unit owner's claims as if the claims were construction defect claims under NRS Chapter 40. *See* NRS 40.635(2) (stating that the provisions of "NRS 40.600 to 40.695, inclusive . . . [p]revail over any conflicting law otherwise applicable to the claim or cause of action"); *see also Gonski v. Second Judicial Dist. Court*, 126 Nev. 551, 562, 245 P.3d 1164, 1172 (2010) ("NRS Chapter 40's provisions apply to 'any' construction defect claims."); *Olson v. Richard*, 120 Nev. 240, 243, 89 P.3d 31, 33 (2004) ("NRS 40.635(2) clarifies that Chapter 40 prevails over any conflicting law otherwise applicable to the claim or cause of action." (internal quotation marks omitted)). Accordingly, as the parties and the district court treated High Noon's claims for relief for breach of implied warranty of workmanlike quality and breach of express warranty as construction defect claims under NRS Chapter 40, we do so as well for purposes of this opinion.

Under the then-existing statute, homeowners' associations have standing to represent unit owners who purchase units after litigation begins

Turning to the merits, High Noon argues that a homeowners' association has standing pursuant to NRS 116.3102(1)(d) and NRCP 17 to represent all unit owners, regardless of ownership status, because a homeowners' association is the claimant and real party in interest for construction defect claims. We agree in part.

Under the version of NRS 116.3102(1)(d) in effect at the time of the complaint, homeowners' associations may act in a representative capacity on behalf of homeowner members in construction defect actions. *Beazer Homes Holding Corp. v. Eighth Judicial Dist. Court*, 128 Nev. 723, 730-31, 291 P.3d 128, 133-34 (2012); *D.R. Horton, Inc. v. Eighth Judicial Dist. Court (First Light II)*, 125 Nev. 449, 457, 215 P.3d 697, 702-03 (2009). However, it is unclear if, in this representative capacity, a homeowners' association may represent homeowners who bought their units during the pendency of the litigation, and thus, this is a matter of first impression for this court.

We review questions of statutory construction de novo, *I. Cox Constr. Co., LLC v. CH2 Invs., LLC*, 129 Nev. 139, 142, 296 P.3d 1202, 1203 (2013), even in the context of a writ petition, *Int'l Game Tech.*, 124 Nev. at 198, 179 P.3d at 559. When a statute is facially clear, we will give effect to the statute's plain meaning. *D.R. Horton, Inc. v. Eighth Judicial Dist. Court (First Light I)*, 123 Nev. 468, 476, 168 P.3d 731, 737 (2007). Where a statute is ambiguous because it is susceptible to more than one reasonable interpretation, this court will consider reason and public policy to determine legislative intent. *Cable v. State ex rel. Emp'rs Ins. Co. of Nev.*, 122 Nev. 120, 124-25, 127 P.3d 528, 531 (2006). When interpreting an ambiguous statute to give effect to the Legislature's intent, we will look to the legislative history of the statute in light of the overall statutory scheme. *See We the People Nev. v. Miller*, 124 Nev. 874, 881, 192 P.3d 1166, 1171 (2008). In addition, "[t]he legislature is presumed to have intended a logical result, rather than an absurd or unreasonable one." *Clark Cty. Sch. Dist. v. Clark Cty. Classroom Teachers Ass'n*, 115 Nev. 98, 103, 977 P.2d 1008, 1011 (1999) (quoting *Angoff v. M & M Mgmt. Corp*., 897 S.W.2d 649, 654 (Mo. Ct. App. 1995)).

This court assumes that when enacting a statute, the Legislature is aware of related statutes. *Cable*, 122 Nev. at 125, 127 P.3d at 531. Moreover, "when a term is defined in NRS Chapter 116, the statutory definition controls and any definition that conflicts will not be enforced." *Boulder Oaks Cmty. Ass'n v. B & J Andrews Enters., LLC*, 125 Nev. 397, 406, 215 P.3d 27, 32 (2009). Finally, NRS 116.003 states that "the words and terms defined in NRS 116.005 to 116.095, inclusive, have the meanings ascribed to them in those sections."

Under Nevada law, an action must be commenced by the real party in interest—"one who possesses the right to enforce the claim and has a significant interest in the litigation." *Szilagyi v. Testa*, 99 Nev. 834, 838, 673 P.2d 495, 498 (1983); *see* NRCP 17(a). Generally, a party has standing to assert only its own rights and cannot raise the claims of a third party not before the court. *Deal v. 999 Lakeshore Ass'n*, 94 Nev. 301, 304, 579 P.2d 775, 777 (1978). However, under NRCP 17(a), "a party authorized by statute may sue in that person's own name without joining the party for whose benefit the action is brought." Thus, a party needs statutory authorization before it can assert a third party's claims.

A homeowners' association's standing rights are statutorily granted. Under NRS 116.3102(1)(d), an association "[m]ay institute, defend or intervene in litigation or in arbitration, mediation or administrative proceedings in its own name on behalf of itself or two or more units' owners on matters affecting the common-interest community." We have held that "so long as a common-interest community association is acting on behalf of two or more units' owners, it can represent its members in actions concerning the community." *Beazer Homes*, 128 Nev. at 731, 291 P.3d at 134. Thus, when homeowners' associations act under these circumstances, they are real parties in interest.

NRS 116.3102(1)(d), however, does not expressly indicate what happens if a unit owner sells his unit and another person purchases the unit during the time the homeowners' association is litigating on behalf of its members. The statute merely stated that an association can represent two or more units' owners. The Nevada Revised Statutes did not define the plural noun "units' owners," but NRS 116.095 defined "[u]nit's owner" as "a declarant or other person who owns a unit." Because "owns" is a present tense verb, NRS 116.3102(1)(d) indicated that homeowners' associations are representatives for only the current owners of units. Furthermore, the statute did not restrict a homeowners' association from representing subsequent unit owners if ownership changed, and no Nevada statute limited the application of NRS 116.3102(1)(d) in 2007. Thus, we conclude that NRS 116.3102(1)(d) permitted homeowners' associations to represent current unit owners, even if a unit's owner changed during the litigation.

D.R. Horton argues to the contrary, however, that the real party in interest in a construction defect action is only the owner of a unit at the time the suit was filed, because the subsequent purchaser of the damaged property received a reduction in the purchase price as a result of the damaged property, and it is the seller who continues to be damaged. D.R. Horton contends that an association only has standing to bring suit on behalf of its members to the extent those

members would have standing to sue on their own behalf, and subsequent purchasers would have such a right only if they received an assignment from the previous owner. Thus, D.R. Horton argues that because a homeowners' association brings an action pursuant to NRS 116.3102(1)(d) on behalf of its members and not its units, the plain language of NRS 116.3012(1)(d) limits the association's standing to the owners of the units at the time the suit was filed.

However, the reasoning and public policy underlying the Legislature's intent when enacting NRS 116.3012(1)(d) refute D.R. Horton's argument. *See Barney v. Mt. Rose Heating & Air Conditioning*, 124 Nev. 821, 826, 192 P.3d 730, 734 (2008). Interpreting the statute to mean a homeowners' association's representative standing decreases each time a unit's ownership changes during the pendency of litigation would lead to unreasonable results. *See Clark Cty. Sch. Dist.*, 115 Nev. at 103, 977 P.2d at 1011 (noting that the interpretation of a statute's language should not produce unreasonable or absurd results). Such a result would undermine a homeowners' association's ability to represent the entire community and would undermine the Legislature's intent for NRS 116.3102(1)(d)—to provide a mechanism for associations to represent all of its members.

Interpreting NRS 116.3102 to allow the association to represent all present unit owners, including subsequent owners, is also in "harmony" with NRS Chapter 40. *See Barney*, 124 Nev. at 827, 192 P.3d at 734. Several sections of NRS Chapter 40 recognize homeowners' associations' representative standing. For example, a "claimant" for NRS Chapter 40 purposes can be "[a] representative of a homeowner's association that is responsible for a residence or appurtenance and is acting within the scope of the representative's duties pursuant to chapter 116."[7] NRS 40.610(2). In addition, this claimant is granted other duties such as allowing inspections and providing a reasonable opportunity to repair defects. *See* NRS 40.647. Moreover, NRS 40.645(5) allows a homeowners' association to provide an NRS Chapter 40 notice. Thus, NRS Chapter 40 recognizes homeowners' association's rights and duties as a community representative of construction defect claims, and it has no limiting language or statutes that prevent a homeowners' association from representing subsequent owners.

Similarly, NRS 40.6452 is consistent with the concept of representation regardless of ownership identity. This statute concerns common construction defects within a single development and providing notice of construction defects common to the community on behalf

[7]In 1997, the Legislature amended this statute to include homeowners' associations as claimants "acting within the scope of the representative's duties pursuant to chapter 116," however there is no record of any legislative discussion of this addition. NRS 40.610. The only comment in the minutes was that this addition was a technical change. *See* Hearing on S.B. 480 Before the Senate Judiciary Comm., 69th Leg. (Nev., July 3, 1997).

of an "unnamed owner." NRS 40.6452. "Unnamed owner" appears several times throughout the statute.[8] *See* NRS 40.6452(2)-(6). For example, in NRS 40.6452(2), "[t]he contractor may provide a disclosure of the notice of the alleged constructional defects to each unnamed owner of a residence." Accordingly, because NRS 40.6452 does not require specific identity of unit owners within a community, the Legislature recognized ownership within a community could change.

If a homeowners' association could not represent all of its members, the association's ability to be a claimant pursuant to NRS 40.610 would be undermined. Therefore, reading NRS Chapters 40 and 116 together permits homeowners' associations to represent all members so that common defects throughout a community may be addressed in the most efficient method possible.[9] Accordingly, we reject D.R. Horton's argument and conclude that the Legislature's intent in adopting NRS Chapter 40 and NRS Chapter 116 was to afford homeowners' associations the ability to represent members in an efficient way to expedite remedies for homeowners, which includes subsequent unit owners if ownership changes during litigation.

This conclusion is also in harmony with our recent holdings in construction defect cases. In *ANSE, Inc. v. Eighth Judicial District Court*, we held that subsequent owners of homes could seek remedies under construction defect statutes. 124 Nev. 862, 864-65 192 P.3d 738, 740 (2008). In *First Light II*, we concluded that homeowners' associations have standing to represent claims affecting individual units, but claims may be subject to NRCP 23 class-action principles if challenged. 125 Nev. at 457-58, 215 P.3d at 702-03. However, failing to meet NRCP 23 demands does not strip a homeowners' association of its ability to represent its members. *Beazer Homes*, 128 Nev. at 731, 291 P.3d at 134.

Caselaw from other jurisdictions also supports our conclusion. When the Legislature codified NRS Chapter 116, it modeled the chapter on the Uniform Common Interest Ownership Act (UCIOA). *See, e.g.*, Hearing on A.B. 221 Before the Assembly Judiciary Comm., 66th Leg. (Nev., March 20, 1991); Hearing on A.B. 221 Before the Senate Judiciary Comm., 66th Leg. (Nev., May 23, 1991).

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[8]NRS Chapter 40 does not provide a definition of "unnamed owner."

[9]D.R. Horton argues that for a homeowners' association to "represent ever changing homeowners . . . would . . . frustrate the legislative intent of Chapter 40." D.R. Horton further argues that subsequent purchasers would not have "complied with the mandates of Chapter 40" because if a subsequent purchaser were to pursue an NRS Chapter 40 claim, the purchaser would have to serve D.R. Horton with a new NRS 40.645 notice for that particular unit. We disagree.

Under NRS Chapter 40, a homeowners' association is a claimant and can issue notices. The redundancy of a new NRS Chapter 40 notice from a subsequent owner is not necessary—the homeowners' association has already provided notice to the developer of the construction defect issue within the unit.

NRS 116.3102 mirrors section 3-102 of the UCIOA. *See* Unif. Common Interest Ownership Act § 3-102(a)(4), 7 U.L.A. 96-97 (2009). While several states have adopted a version of the UCIOA and have a similar standing statute,[10] no state court has addressed this specific issue. However, in *Candlewood Landing Condominium Ass'n, Inc. v. Town of New Milford*, the Appellate Court of Connecticut concluded that, under Connecticut's Common Interest Ownership Act, modeled after the UCIOA, a condominium association had standing to act on behalf of its unit owners, including the right to bring tax appeals regarding common areas fractionally owned by the unit owners. 686 A.2d 1007, 1009-10 (Conn. App. Ct. 1997). Like NRS 116.3102, the Connecticut Common Interest Ownership Act permits an association to "'[i]nstitute, defend or intervene in litigation or administrative proceedings in its own name on behalf of itself or two or more unit owners on matters affecting the common interest community.'" *Id.* at 1009 (alteration in original) (quoting Conn. Gen. Stat. § 47-244(a)(4) (2010)). After determining the language of the statute was plain and unambiguous, the court noted that the statute contained "no exceptions or limitations on a condominium association's authority to act on behalf of the unit owners as long as at least two unit owners agree." *Id.* The court indicated that if it applied this exception, it would have "burdened the court system and the municipalities with hundreds of cases where a single action by the association could have accomplished the same result more speedily and efficiently." *Id.* at 1010.

Accordingly, under NRS 116.3102(1)(d), homeowners' associations have standing to pursue construction defect claims regardless of ownership changes[11] during the pendency of litigation.

Homeowners' associations do not have standing to continue to represent unit owners who sell units after litigation begins

D.R. Horton further argues that the district court erred when it found High Noon has standing to pursue claims of former unit owners, and requests that this court issue a writ of mandamus directing the district court to vacate this portion of its order. D.R. Horton, however, requests this relief in its answer, not in an original writ

[10]*See* Alaska Stat. Ann. § 34.08.320(a)(4) (West 2014); Colo. Rev. Stat. Ann. § 38-33.3-302(1)(d) (West 2013); Conn. Gen. Stat. Ann. § 47-244(a)(4) (West 2010); Del. Code. Ann. tit. 25, § 81-302(a)(4) (West 2009); Minn. Stat. Ann. § 515B.3-102(a)(4) (West 2011); Vt. Stat. Ann. tit. 27A, § 3-102(a)(4) (West 2014); W. Va. Code Ann. § 36B-3-102(a)(4) (West 2011).

[11]D.R. Horton also argues that subsequent purchasers cannot recover for construction defects under NRS 40.640(5) if the owner disclosed the defect. We disagree. While the statute presumably begins to limit contractor liability, sections 1-4 describe situations of neglect or "normal" occurrences; the only mention of a construction defect is in section 5. Importantly, however, this statute concerns contractors and does not mention disclosures by *homeowners* to future buyers.

petition, and D.R. Horton did not meet other procedural requirements for seeking a writ. While we would generally decline to consider this issue, if an "error is apparent on the record, . . . we may 'take cognizance of plain error *sua sponte*'" to consider and correct that error. *Mainor v. Nault*, 120 Nev. 750, 774, 101 P.3d 308, 324 (2004), *as corrected on denial of reh'g* (Apr. 13, 2005) (quoting *Crow-Spieker #23 v. Robert L. Helms Constr. & Dev. Co.*, 103 Nev. 1, 3 n.2, 731 P.2d 348, 350 n.2 (1987)).

We concluded above that a homeowners' association's representational standing allows it to represent only current unit owners. The corollary is that representational standing does not permit a homeowners' association to represent former unit owners because those owners are no longer members of the association. This statutory conclusion is echoed in High Noon's own "Covenants, Conditions & Restrictions." Therein, High Noon's "Duties, Powers and Rights" reflect that the association may act in any manner "necessary or proper, in operating for the peace, health, comfort, safety and general welfare of its [m]embers, including any applicable powers set forth in NRS § 116.3102." This includes High Noon litigating on behalf of its unit owners. Therefore, the benefit of the association's representative litigation under NRS 116.3102(1)(d) is contingent upon membership in the association. However, membership within High Noon is automatically terminated upon sale of the unit and transferred to the new unit owner; this membership is not assignable. Thus, because the membership is transferred to the new unit owner upon sale, High Noon cannot represent prior unit owners via its representational standing.[12]

CONCLUSION

This court chooses to exercise its discretion and entertain High Noon's writ petition. Under the prior version of NRS 116.3102(1)(d), we conclude that homeowners' associations have standing in construction defect actions to represent unit owners who purchased property at High Noon after the initiation of the underlying litigation. We also conclude, however, that when a unit owner sells his or her home in the association, then he or she is no longer a member of the association and the association can no longer represent him or her through the association's representational standing under the former NRS 116.3102(1)(d). Therefore, we grant this petition and

[12]The district court's order references assignments of rights from then current, now former, unit owners to High Noon purporting to permit High Noon to pursue their interests in the underlying litigation. The parties' arguments in this proceeding, however, focused on High Noon's representational standing. Accordingly, we have addressed the arguments concerning High Noon's representational standing, but we decline to consider whether High Noon may pursue the interests of former unit owners who have assigned their rights to High Noon.

direct the clerk of this court to issue a writ of mandamus directing the district court to vacate its partial summary judgment order and reconsider the partial summary judgment in light of this order.

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

SHELDON G. ADELSON, Appellant, *v.* DAVID A. HARRIS; MARC R. STANLEY; and NATIONAL JEWISH DEMOCRATIC COUNCIL, Respondents.

No. 67120

September 27, 2017 402 P.3d 665

Certified questions pursuant to NRAP 5 regarding whether Nevada's fair report privilege or anti-SLAPP statute immunize an online petition sponsor from civil liability. United States Court of Appeals for the Second Circuit; Guido Calabresi, Reena Raggi, Denny Chin, Second Circuit Judges.

Questions answered.

Lewis Roca Rothgerber Christie LLP and *Daniel F. Polsenberg*, Las Vegas; *Morris Law Group* and *Steve L. Morris* and *Rosa Solis-Rainey*, Las Vegas, for Appellant.

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McDonald Carano Wilson LLP and *Kristen T. Gallagher* and *Pat Lundvall*, Las Vegas; *Davis Wright Tremaine LLP* and *Laura R. Handman*, Washington, D.C., for Amici Curiae The Association of American Publishers, Inc.; Bloomberg L.P., d/b/a Bloomberg News; CBS Broadcasting, Inc.; CBS Corporation; The Daily Beast Company LLC; E.W. Scripps Company; First Look Media, Inc.; IAC/InterActiveCorp; The Media Law Resource Center; Nash Holdings LLC; National Public Radio, Inc.; NBCUniversal Media, LLC; The Nevada Press Association; The Reporters Committee for Freedom of the Press; TDB Holdings, Inc.; Reuters America LLC; WP Company LLC, d/b/a The Washington Post.

Before the Court En Banc.[1]

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[1]Chief Justice Michael Cherry and Justice Kristina Pickering are disqualified from this case.

OPINION

By the Court, Hardesty, J.:

The United States Court of Appeals for the Second Circuit certified to this court, and we accepted, two questions of law pursuant to NRAP 5:

> Does a hyperlink to source material about judicial proceedings in an online petition suffice to qualify as a report for purposes of applying the common law fair report privilege?
>
> Did Nevada's anti-strategic litigation against public participation ("anti-SLAPP") statute, NRS 41.635-.670, as that statute was in effect prior to the most recent amendments in 2013, cover speech that seeks to influence an election but that is not addressed to a government agency?

Adelson v. Harris, Docket No. 67120 (Order Accepting Certified Questions, Directing Briefing, and Directing Submission of Filing Fee, March 19, 2015). As to the first question, we conclude that a hyperlink to source material about a judicial proceeding may suffice as a report within the common law fair report privilege.

As to the second question, we refer the circuit court to our recently published opinion in *Delucchi v. Songer*, 133 Nev. 290, 294, 396 P.3d 826, 830 (2017), which explains that application of Nevada's anti-SLAPP statute, prior to the 2013 amendment, is not limited to communication addressed to a government agency, but includes speech "aimed at procuring any governmental or electoral action."

FACTS AND PROCEDURAL HISTORY

During the 2012 presidential election cycle, respondents the National Jewish Defense Counsel, its chair Marc Stanley, and its CEO Davis Harris (collectively, NJDC) posted an online petition to pressure presidential candidate Mitt Romney to reject appellant Sheldon Adelson's campaign contributions. The petition indicated that Adelson had "reportedly approved of prostitution" at his Macau casinos and included a hyperlink to an Associated Press (AP) article discussing ongoing litigation from Nevada that involved Adelson and Steven Jacobs, the former CEO of Adelson's casinos in Macau. The AP article provided a summary of a sworn declaration Jacobs filed in the litigation alleging that Adelson had approved of prostitution in his Macau casino resorts. Specifically, the article quotes a portion of the declaration in which Jacobs states that a "prostitution strategy had been personally approved by Adelson."

The petition was approximately one page long. The top half of the petition was composed of a large graphic stating: "IF ONE OF YOUR

BIGGEST DONORS WAS ACCUSED OF PUTTING 'FOREIGN MONEY' FROM CHINA IN OUR ELECTIONS & REPORTEDLY APPROVED OF PROSTITUTION, WOULD YOU TAKE HIS MONEY?" Below this graphic were four paragraphs of regular text. The AP article's hyperlink was in the petition's second paragraph. The hyperlink was approximately three-fourths of the way down the page, and was placed on the words "personally approved." There were at least three other working hyperlinks in the petition, which were connected to partisan news articles. The sentence that included the operative hyperlink read as follows: "But this week, reports surfaced that in addition to his anti-union and allegedly corrupt business practices, **Adelson 'personally approved' of prostitution in his Macau casinos**." (Underlines represent active hyperlinks at the time the petition was published.)

Based on the petition, Adelson filed a defamation action against the NJDC. In his complaint, Adelson alleged that "[t]he gist of the . . . [petition] is that the political contributions made by Adelson were 'tainted,' 'dirty' money obtained from Mr. Adelson's having 'personally approved of prostitution in his Macau casinos.'" Thus, Adelson argued that "[t]he gist of the [petition] . . . [was] false and defamatory."

The United States District Court for the Southern District of New York determined that Nevada law governed the controversy and dismissed Adelson's complaint, concluding that the prostitution comment constituted a privileged report of judicial proceedings and that the state's anti-SLAPP statutes applied. *Adelson v. Harris*, 973 F. Supp. 2d 467, 471 (S.D.N.Y. 2013). Adelson appealed to the Second Circuit, which certified the two questions of law stated above.

DISCUSSION

The Second Circuit's first certified question focuses on whether a hyperlink to a news article discussing litigation, itself covered by the common law fair report privilege, suffices to render the petition a privileged fair report. *Adelson v. Harris*, 774 F.3d 803, 808 (2d Cir. 2014). The question requires this court to determine when the fair report privilege can protect an Internet communication that draws information from an underlying report of judicial proceedings available to the public.

Nevada "has long recognized a special privilege of absolute immunity from defamation given to the news media and the general public to report newsworthy events in judicial proceedings." *Sahara Gaming Corp. v. Culinary Workers Union Local 226*, 115 Nev. 212, 214, 984 P.2d 164, 166 (1999); *see also Circus Circus Hotels, Inc. v. Witherspoon*, 99 Nev. 56, 60, 657 P.2d 101, 104 (1983) ("[There] is [a] long-standing common law rule that communications uttered or published in the course of judicial proceedings are absolutely

privileged so long as they are in some way pertinent to the subject of controversy." (citation omitted)). "[T]he 'fair, accurate, and impartial' reporting of judicial proceedings is privileged and nonactionable . . . affirming the policy that Nevada citizens have a right to know what transpires in public and official legal proceedings." *Lubin v. Kunin*, 117 Nev. 107, 114, 17 P.3d 422, 427 (2001) (quoting *Sahara Gaming*, 115 Nev. at 215, 984 P.2d at 166).

Although the fair report privilege is most commonly asserted by media defendants, it "extends to any person who makes a republication of a judicial proceeding from material that is available to the general public." *Sahara Gaming*, 115 Nev. at 215, 984 P.2d at 166. In Nevada, if the privilege applies, it is "absolute," meaning it "precludes liability even where the defamatory statements are published with knowledge of their falsity and personal ill will toward the plaintiff." *Circus Circus Hotels*, 99 Nev. at 60, 657 P.2d at 104; *see also Sahara Gaming*, 115 Nev. at 213, 984 P.2d at 165.

Determining when a document, which draws upon a source summarizing judicial proceedings, falls within the fair report privilege

The primary test to resolve whether a report qualifies for the fair report privilege was articulated by the United States Court of Appeals for the Federal Circuit in a case interpreting the District of Columbia's fair report privilege. *See Dameron v. Wash. Magazine, Inc.*, 779 F.2d 736, 739 (D.C. Cir. 1985); *see also* David Elder, *Defamation: A Lawyer's Guide* § 3:3 (2015) (stating that *Dameron* "has become the leading case" on what constitutes a report). In *Dameron*, the court considered whether an allegedly defamatory statement in a magazine article should be immunized under the fair report privilege. 779 F.2d at 737. The allegedly defamatory statement was based on the conclusion reached in a National Transportation Safety Board (NTSB) report. *Id*. at 740. However, nothing in the vicinity of the article's statement mentioned the NTSB report. *Id*. The court explained the fair report privilege's purpose and articulated the following rule:

> The privilege's underlying purpose—encouraging the dissemination of fair and accurate reports—also suggests a natural limit to its application. . . . The privilege is . . . unavailable where the report is written in such a manner that the average reader would be unlikely to understand the article (or the pertinent section thereof) to be a report on or summary of an official document or proceeding. It must be apparent either from specific attribution or from the overall context that the article is quoting, paraphrasing, or otherwise drawing upon official documents or proceedings.

Id. at 739. The court concluded that neither the overall context nor specific attributions allowed an average reader to determine the publication's statement was based on the NTSB report. *Id*. at 740.

The *Dameron* test reflects Nevada's policy that citizens have a right to a fair account of what occurs during official proceedings. *See, e.g.*, *Lubin*, 117 Nev. at 114, 17 P.3d at 427. By focusing on the average reader and specific attributions or overall context, the test also properly asks whether an average Nevada citizen can understand that the report is summarizing an official document or proceedings. For these reasons, we adopt the *Dameron* test and consider the petition's specific attributions to determine whether the AP hyperlink is sufficient to bring the petition within the fair report privilege as a matter of law on the record before us.

The hyperlink provides sufficient attribution to turn the petition into a privileged fair report

At the outset of our discussion, we note that Adelson has conceded that the underlying AP article quoting Jacobs' declaration itself is protected by the fair report privilege. Thus, we must consider, as an issue of first impression, whether a hyperlink in an Internet publication that provides specific attribution to a document protected by the fair report privilege qualifies as a protected report for purposes of that privilege.

Under *Dameron*, specific attributions may sufficiently reference underlying sources to bring a document within the fair report privilege, even if the overall context fails to do so.[2] 779 F.2d at 739. When a specific attribution makes it apparent to an average reader that a document draws from judicial proceedings, it will be immune from civil liability. *Id*.

"A hyperlink, or a link, is a 'cross-reference . . . appearing on one [W]eb page that, when activated by the point-and-click of a mouse, brings onto the computer screen another [W]eb page.'" Anjali Dalal, *Protecting Hyperlinks and Preserving First Amendment Values on the Internet*, 13 U. Pa. J. Const. L. 1017, 1018 (2011) (alterations in original) (quoting *Universal City Studios, Inc. v. Corley*, 273 F.3d 429, 455 (2d Cir. 2001)). Hyperlinks "are the signature characteristic of the World Wide Web . . . [and] [b]oth creation and use of hyperlinks are relatively simple tasks." Mark Sableman, *Link Law Revisited: Internet Linking Law at Five Years*, 16 Berkeley Tech. L.J. 1273, 1276 (2001). "On an individual level, hyperlinks can help readers understand an issue in depth; can provide an element of interactivity for the reader[;] and can also increase the user's ability to control the information-seeking process." Porismita

[2]In light of our decision that the petition's specific attributions bring the petition within the fair report privilege, we need not address the overall context of the petition.

Borah, *The Hyperlinked World: A Look at How the Interactions of New Frames and Hyperlinks Influence News Credibility and Willingness to Seek Information*, 19 J. of Computer-Mediated Comm. 576, 579 (2014) (citations and internal quotation marks omitted). Hyperlinks provide strong attribution because they allow direct access to underlying materials, are intuitively easy to use, and are extremely prevalent online. A reader can click on a hyperlink and immediately determine whether official proceedings are implicated.

Here, the AP article, which connected with the hyperlink at issue, discussed the sworn declaration submitted by Jacobs' and Adelson's lawyer's response. No party argues that the AP article misquoted or otherwise inaccurately characterized Jacobs' declaration. When the AP hyperlink is opened, an average reader would immediately realize that the petition draws upon a summary of judicial proceedings. Furthermore, as the district court noted, "[t]he hyperlink is the twenty-first century equivalent of the footnote for purposes of attribution in defamation law, because it has become a well-recognized means for an author or the Internet to attribute a source" and "the hyperlink instantaneously permits the reader to verify an electronic article's claims." *Adelson*, 973 F. Supp. 2d at 484. However, there is a drawback to hyperlinks as attributions—an average reader must identify a hyperlink, understand its importance, and ultimately open the link.[3] When a hyperlink is not found, understood, or opened by a reader, it has failed as a source of attribution.

It is clear that we must consider more than the underlying source material connecting to a hyperlink to determine whether the fair report privilege applies. Although courts have not addressed hyperlinks in the context of the fair report privilege, *Adelson*, 774 F.3d at 808, courts have extensively discussed hyperlinks in the context of whether they impart notice for the purposes of contract formation. In *Specht v. Netscape Communications Corp.*, the Second Circuit held that a terms and conditions hyperlink provided insufficient notice for users to assent to contractual formation. 306 F.3d 17, 31-32 (2d Cir. 2002). The court reasoned that the hyperlink was concealed by being placed a whole page below the download button, so users lacked constructive notice of the purported terms. *Id.*

Likewise, in *Nguyen v. Barnes & Noble Inc.*, the United States Court of Appeals for the Ninth Circuit held that a terms and condi-

[3]An additional drawback to hyperlinks is the concept of "link rot" where hyperlinks stop working because source URLs have been moved or removed. Jonathan Zittrain et al., *Perma: Scoping and Addressing the Problem of Link and Reference Rot in Legal Citations*, 127 Harv. L. Rev. F. 176, 177 (2014). If a hyperlink fails to connect a user to its underlying source, it will not bring a document within the fair report privilege under *Dameron*'s specific attribution test. However, here, the link was active and led to the AP article it referenced when the petition was online, so "link rot" or inability to access the hyperlink in this case are not material considerations.

tions hyperlink at the very bottom of checkout webpages was insufficient to impart notice upon purchasers. 763 F.3d 1171, 1178 (9th Cir. 2014). The court reasoned that online purchasers have a wide range of computer skills, and that "consumers cannot be expected to ferret out hyperlinks to terms and conditions" when no information on the checkout pages directed the purchaser to the hyperlink. *Id*. at 1178-79; *see also In re Zappos.com, Inc., Customer Data Sec. Breach Litig.*, 893 F. Supp. 2d 1058, 1062-63, 1066 (D. Nev. 2012) (applying Nevada law and finding that "[a] party cannot assent to terms of which it has no knowledge or constructive notice, and a highly inconspicuous hyperlink buried among a sea of links does not provide such notice"); *but see Fteja v. Facebook, Inc.*, 841 F. Supp. 2d 829, 841 (S.D.N.Y. 2012) (holding that a terms and conditions hyperlink was sufficient for constructive notice where the hyperlink was directly next to the signup button). Broadly, these cases look to "the conspicuousness . . . of the . . . hyperlink[and] other notices given to users of the [hyperlink]" in determining whether sufficient notice has been provided. *Nguyen*, 763 F.3d at 1177.

These cases are analogous to the certified question because both standards ask whether an average person can identify and understand a hyperlink's importance. We adopt a similar approach in answering this certified question.

Conspicuousness and textual explanation

Although the AP hyperlink was in the second of four textual paragraphs in the petition, it is important to note that the hyperlink was placed in the same sentence as the content it purported to support. That is to say, the AP news article supported the proposition that a report existed stating that "Adelson 'personally approved' of prostitution." Thus, although the hyperlink was not conspicuous in a general sense, when reading the specific sentence the hyperlink functioned like a footnote. For this reason, we conclude that the hyperlink was conspicuous in the context of supporting a specific claim.

Furthermore, the textual explanation accompanying the hyperlink notifies readers that the petition draws upon other sources. The sentence in which the hyperlink appears states: "But this week, reports surfaced that . . . **Adelson 'personally approved' of prostitution in his Macau casinos**." The sentence includes the qualifier "reports" and provides the operative hyperlink over the text "personally approved," which is quoted. The hyperlink also provides support for the text it covers (i.e., the AP report supports the proposition that Adelson personally approved of prostitution). Although there were other hyperlinks in the sentence, we conclude that the textual references help make apparent to an average reader that the petition draws information from another source. Also, because the AP hyperlink is contained within the same sentence, an average reader

interested in what the "reports" stated would simply click on the AP hyperlink to learn more.

The AP hyperlink, as a specific, active, and accurate attribution, provides average readers notice that the petition draws from a summary of judicial proceedings because the petition's text indicates it is based on "reports" and the hyperlink's placement and function allows for it to operate like a footnote. Therefore, we conclude that the online petition, as it existed when Adelson's complaint was filed, fell within the purview of Nevada's fair report privilege.[4]

Nevada's anti-SLAPP protections include speech that seeks to influence an election but is not addressed to a government agency

Although no decisions addressing this matter existed when we accepted this question, we recently issued *Delucchi v. Songer*, 133 Nev. 290, 295, 396 P.3d 826, 830 (2017), in which we determined that in 2013 the Legislature amended portions of Nevada's anti-SLAPP statutes in order to "clarif[y] that, under NRS 41.637, the scope of the anti-SLAPP protections is not limited to a communication made directly to a governmental agency." Thus, Nevada's anti-SLAPP statutes, prior to the 2013 amendment as now, covered "[c]ommunication that is aimed at procuring any governmental or electoral action, result or outcome . . . which is truthful or is made without knowledge of its falsehood," NRS 41.637(1) (1997), even if that communication was not addressed to a government agency. *Delucchi*, 133 Nev. at 294-95, 396 P.3d at 830-31. We therefore refer the Second Circuit to our *Delucchi* decision to answer the second question.[5]

CONCLUSION

Based on the record before us, the fair report privilege immunizes the petition drafters from civil liability because the AP hyperlink provided sufficient source attribution to put an average reader on

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[4]The Second Circuit Court of Appeals also invited this court to weigh in on the "accuracy, fairness, and impartiality . . . requirements of the fair report privilege as [we] deem relevant to this case." *Adelson v. Harris*, 774 F.3d 803, 808 n.3 (2014). We agree with the United States District Court for the Southern District of New York's analysis as to the fairness, accuracy, and neutrality of the petition. *Adelson v. Harris*, 973 F. Supp. 2d 467, 486 (2013) (explaining that the petition accurately quotes Jacobs' declaration and that Adelson "had not yet filed the[ ] response to the Jacobs Declaration, so it cannot be seriously maintained that the Petition unfairly presented a one-sided view of the action").

[5]This determination, however, is not necessarily dispositive in the federal case. Even if the communication in this case was "aimed at procuring a[ ] governmental or electoral action, result or outcome," that communication is not protected unless it is "truthful or is made without knowledge of its falsehood." NRS 41.637(1) (1997); *see Delucchi*, 133 Nev. at 294, 396 P.3d at 829-30. However, the Second Circuit court did not address this issue and we decline to address it further.

notice that the petition drew from an underlying summary of judicial proceedings. Furthermore, communications with either the government or the public that are intended to influence an electoral result potentially fall under NRS 41.637(1) (1997).

Douglas, Gibbons, Parraguirre, and Stiglich, JJ., concur.

FORD MOTOR COMPANY, Appellant, *v.* TERESA GARCIA TREJO, as the Successor-in-Interest and Surviving Spouse of RAFAEL TREJO, Deceased, Respondent.

No. 67843

September 27, 2017 402 P.3d 649

Appeal from a final judgment on a jury verdict in a strict liability design defect action and post-judgment order denying a motion for judgment as a matter of law or a new trial and awarding costs. Eighth Judicial District Court, Clark County; Valerie Adair, Judge.

Affirmed.

Pickering, J., dissented.

Snell & Wilmer, L.L.P., and *Jay J. Schuttert, Vaughn A. Crawford*, and *Morgan T. Petrelli*, Las Vegas; *Horvitz & Levy, LLP*, and *Emily V. Cuatto* and *Lisa Perrochet*, Encino, California; *Thompson Coe Cousins & Irons, L.L.P.*, and *Michael W. Eady*, Austin, Texas, for Appellant.

David N. Frederick, Las Vegas; *Naylor & Braster* and *A. William Maupin, John M. Naylor*, and *Jennifer L. Braster*, Las Vegas; *Nettles Law Firm* and *Brian D. Nettles* and *William R. Killip, Jr.*, Henderson; *Garcia Ochoa Mask* and *Ricardo A. Garcia* and *Jody R. Mask*, McAllen, Texas; *Lawrence Law Firm* and *Larry Wayne Lawrence*, Austin, Texas, for Respondent.

Bailey Kennedy and *Dennis L. Kennedy* and *Sarah E. Harmon*, Las Vegas; *Shook Hardy & Bacon, L.L.P.*, and *Victor E. Schwartz*, Washington, D.C., for Amici Curiae National Association of Manufacturers and the Alliance of Automobile Manufacturers.

Matthew L. Sharp, Ltd., and *Matthew L. Sharp*, Reno; *Eglet & Prince* and *Robert T. Eglet* and *Erica D. Entsminger*, Las Vegas, for Amicus Curiae Nevada Justice Association.

Before the Court En Banc.[1]

[1]The Honorable Ron Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

OPINION

By the Court, Stiglich, J.:

In Nevada, claims of design defect are historically governed by the consumer-expectation test. Under this test, a product is defectively designed if it "fail[s] to perform in the manner reasonably to be expected in light of its nature and intended function and [is] more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970).

In this case, the court is asked to consider adopting the risk-utility analysis for determining whether a defendant is liable for a design defect under a strict product liability theory, as set forth in the Restatement (Third) of Torts: Products Liability (Third Restatement). Risk-utility analysis differs from the consumer-expectation test in that it analyzes the reasonableness of a manufacturer's actions, rather than the product itself, in determining whether a product is unreasonably dangerous. The risk-utility test also requires plaintiffs to present affirmative proof of a reasonable alternative design.

As discussed below, the risk-utility analysis represents a substantial departure from the underlying tenets of our strict products liability jurisprudence, which does not rest on traditional concepts of fault. Further, this court strongly disagrees with the notion that a plaintiff in a strict product liability design defect action must present proof of an alternative design. Such a requirement unfairly raises a plaintiff's burden of proof, and in some cases, poses an insurmountable barrier to bringing a claim. Therefore, this court declines to adopt the risk-utility test for strict product liability design defect claims. Claims of design defect grounded on strict product liability in Nevada will continue to be governed by the consumer-expectation test.

BACKGROUND

The Ford Excursion

In 1999, appellant Ford Motor Company introduced the Ford Excursion, the largest and heaviest SUV ever produced and sold in North America. Ford based its design of the Excursion on Ford's line of Super Duty pickup trucks, such as the F250, F350, and F450.

At trial, Ford conceded that it did not perform any physical roof-crush tests on the Excursion. In 2002, Ford ran computer-simulated testing on the Excursion, using modeling that had been developed during the development of the Super Duty pickup trucks. Ford's internal guidelines required that a vehicle weighing less than 8,500 pounds have a roof strength-to-weight ratio of 1.725 pounds. The strength-to-weight ratio of the Excursion was only 1.25. If the win-

dows were not available to act as added support (e.g., if the windows broke), the strength-to-weight ratio dropped to 0.79.

Though the Excursion's actual weight was 7,730 pounds, its gross vehicle weight rating was 8,600 pounds. Ford did not have internal guidelines for strength-to-weight ratios for vehicles weighing over 8,500 pounds. Therefore, Ford did not issue any recalls on the Excursion, or otherwise advise dealerships or the public that early versions of the Excursion did not meet Ford's internal guidelines for roof strength.

The Trejos' accident

On December 16, 2009, respondent Teresa Trejo, a resident of Las Vegas, was driving a 2000 Ford Excursion, with a trailer attached, through New Mexico. Her husband Rafael Trejo was seated in the passenger seat. While driving on the highway, Trejo attempted to change lanes to make room for merging traffic. The trailer attached to the Excursion started to fishtail. Trejo swerved, and though the Excursion slowed, it began to roll, somewhere between 1.5 and 2.5 times.

After the rollover sequence, the Excursion came to rest upside down. Trejo managed to remove her seatbelt and exit the Excursion through the driver's side window. She went to the passenger side of the vehicle, but the roof was so crushed that Trejo was unable to see Rafael. She returned to look through the driver's side window. Trejo saw Rafael, who could not move but was looking back at her. Trejo later testified that Rafael's eyes were moving at this time. A couple driving by assisted Trejo in removing Rafael from the vehicle. Emergency services arrived shortly thereafter and confirmed that Rafael had died.

Trejo's suit against Ford

Trejo subsequently filed a complaint against Ford, alleging a design defect in the roof of the Excursion and seeking damages based on twin theories of strict products liability and common law negligence. The case proceeded to trial solely on the strict products liability theory. During trial, Trejo presented expert testimony to support her theory of "hyperflexion"—that the roof of the Excursion crushed, breaking and pinning Rafael's neck, and causing him to suffocate. Trejo also presented evidence that Ford could have reinforced the roof of the Excursion for an additional $70 in production costs, adding an additional 70 pounds of weight to the Excursion.

Ford presented evidence supporting its theory of "torso augmentation"—that Rafael died during the first rollover, because the moment the Excursion turned upside down, the weight of Rafael's body "diving" into the roof caused his neck to break, killing him instantly.

Ford also disputed the feasibility of Trejo's proposed reinforcement to the roof design of the Excursion.

While settling jury instructions, Ford requested the district court to give design defect instructions based on the "risk-utility" test set forth in the Third Restatement.[2] To this end, Ford requested Instruction nos. 21, 22, and 23. The parties also provided the district court with agreed upon alternatives to these instructions, nos. 21A, 22A, and 23A, in the event the court declined to adopt the Third Restatement. Noting that Nevada has not adopted the Third Restatement approach to claims of design defect, the district court declined to give Ford's requested instructions. The district court instead gave the parties their *agreed-upon* alternatives, which were stock instructions and reflected the current state of the law.

Ultimately, the jury returned a special verdict in favor of Trejo, answering in the affirmative the following two questions: (1) whether the 2000 Ford Excursion's roof was defective in design, and, if so, (2) whether the 2000 Ford Excursion's roof design defect was a proximate cause of Rafael Trejo's death. The district court entered judgment on the jury's $4.5 million damages award and granted in part and denied in part Ford's subsequent motion to retax costs. Ford filed a motion for judgment as a matter of law or for a new trial, which the district court denied. Ford now appeals.

DISCUSSION

To determine whether a product is defective in its design under strict tort liability, Nevada has long used the consumer-expectation test. *Ginnis*, 86 Nev. at 413, 470 P.2d at 138. Under the consumer expectation test, a plaintiff must demonstrate that a product "failed to perform in the manner reasonably to be expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Id*.

In 1998, the drafters of the Third Restatement proposed the risk-utility test for strict product liability design defect claims. Under this test, a product "is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design . . . and the omission of the alternative design renders the product not reasonably safe." Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am.

[2]The dissent conflates Ford's requested instructions, which change the standard under which a plaintiff must prove a design defect, with instructions that may assist a jury on how to use relevant information. Ford only proffered instructions on the former, and once denied by the district court, agreed to the instructions given and sought no further clarifications to assist the jury with the latter.

Law Inst. 1998). Thus, under the risk-utility test, in addition to proving elements of negligence, plaintiffs also bear the new burden of proving a "reasonable alternative design." *Id.*

On appeal, Ford urges this court to adopt the risk-utility test for claims of strict product liability design defect and argues that the district court erred in failing to instruct the jury regarding risk-utility analysis. Regardless of the analysis used, Ford argues that Trejo failed to prove that Rafael's death was proximately caused by a defect in the Excursion's roof design. For the reasons stated below, this court declines to adopt the risk-utility test. The risk-utility test, especially its requirement of proof of a reasonable alternative design, would prove fundamentally unfair to Nevada plaintiffs. Instead of being allowed to bolster their case with evidence of an alternative design after the discovery process, a plaintiff would face the barrier of establishing a reasonable alternative design from the outset, even in those cases where no reasonable design may exist, or where the defendant is in complete control of the necessary information related to product design. Because we further conclude that Trejo presented sufficient evidence of design defect under the consumer-expectation test and causation, we affirm the judgment of the district court. *Allstate Ins. Co. v. Miller*, 125 Nev. 300, 308, 212 P.3d 318, 324 (2009) (recognizing that a jury verdict will be upheld if supported by substantial evidence).

Products liability in Nevada

In 1966, this court examined a case in which Leo Dolinski purchased a bottle of Squirt soda from a vending machine, took a drink, and discovered the remains of a decomposing mouse. *Shoshone Coca-Cola Bottling Co. v. Dolinski*, 82 Nev. 439, 441, 420 P.2d 855, 857 (1966). Dolinski presented his case to the jury solely on the theory of strict product liability, and the jury awarded Dolinski $2,500 in damages. *Id*.

In affirming the jury's verdict, this court determined that when a manufacturer has placed a dangerous or defective product into the stream of commerce, sound public policy requires the imposition of strict liability, even in those situations where "the seller has exercised all reasonable care, and the user has not entered into a contractual relation with him." *Id*. The court noted that

> [b]y placing their goods upon the market, the suppliers represent to the public that they are suitable and safe for use; and by packaging, advertising and otherwise, they do everything they can to induce that belief. . . . The supplier has invited and solicited the use; and when it leads to disaster, he should not be permitted to avoid the responsibility by saying that he made no contract with the consumer, or that he used all reasonable care.

Id. at 442, 420 P.2d at 857 (quoting William L. Prosser, *The Fall of the Citadel (Strict Liability to the Consumer)*, 50 Minn. L. Rev. 791, 799 (1966)).

Nonetheless, this court cautioned that while a manufacturer and distributor of a bottled beverage may be strictly liable without a showing of negligence or privity, the adoption of strict tort liability as a theory of recovery "does not mean that the plaintiff is relieved of the burden of proving a case." *Id*. at 443, 420 P.2d at 857-58. Rather, this court noted that a plaintiff was required to demonstrate that (1) the product at issue was defective, (2) the defect existed at the time the product left the manufacturer, and (3) the defect caused the plaintiff's injury. *Id*. at 443, 420 P.2d at 858.

Four years later in *Ginnis*, this court extended the doctrine of strict tort liability "to the design and manufacture of all types of products." 86 Nev. at 413, 470 P.2d at 138. With respect to proving whether a product is defective, this court also adopted the consumer-expectation test, which is set forth in Section 402A of the Restatement (Second) of Torts (Am. Law Inst. 1965). *Id.* at 414, 470 P.2d at 138. In adopting the consumer-expectation test in *Ginnis*, this court explained that

> [a]lthough the definitions of the term "defect" in the context of products liability law use varying language, all of them rest upon the common premise that those products are defective which are dangerous because they fail to perform in the manner reasonably to be expected in light of their nature and intended function.

Id. at 413, 470 P.2d at 138 (quoting *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401, 403 (Ill. 1969)). Further, defective products are "more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Id*.

This court has subsequently recognized three categories of strict tort liability claims: manufacturing defects, design defects, and the failure to warn. *See, e.g.*, *Rivera v. Philip Morris, Inc*., 125 Nev. 185, 190-91, 209 P.3d 271, 274 (2009) (failure to warn); *Krause Inc. v. Little*, 117 Nev. 929, 937-38, 34 P.3d 566, 571-72 (2001) (manufacturing defects); *Robinson v. G.G.C., Inc.*, 107 Nev. 135, 138-39, 808 P.2d 522, 524 (1991) (design defects). In the realm of manufacturing and design defects, this court has consistently applied the consumer-expectation test to determine liability. *See Krause*, 117 Nev. at 937-38, 34 P.3d at 571-72; *Robinson*, 107 Nev. at 138-39, 808 P.2d at 524.

In the context of proving that a product was defective under the consumer-expectation test, this court has concluded that "[a]lternative design is one factor for the jury to consider when evaluating

whether a product is unreasonably dangerous." *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 104, 734 P.2d 696, 698 (1987). Therefore, a plaintiff may choose to support their case with evidence "that a safer alternative design was feasible at the time of manufacture." *Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 572 (1992). However, any alternative design presented must be commercially feasible. *Id*. "[W]hen commercial feasibility is in dispute, the court must permit the plaintiff to impeach the defense expert with evidence of alternative design." *Robinson*, 107 Nev. at 141, 808 P.2d at 525. In addition to evidence of alternative designs, evidence of other accidents involving analogous products, post-manufacture design changes, and post-manufacture industry standards will support a strict product liability claim. *Id*. at 140-43, 808 P.2d at 525-27.

The Restatement (Third) of Torts risk-utility analysis

Ford urges this court to depart from this well-settled line of jurisprudence and adopt the risk-utility test for design defects set forth in the Third Restatement. Under the risk-utility test, a product

> is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe.

Restatement (Third) of Torts: Prods. Liab. § 2(b) (Am. Law Inst. 1998). The drafters of the Third Restatement provide a number of factors relevant to analyzing whether there was a reasonable alternative design and whether the omission of the alternative design renders a product not reasonably safe. Some of the factors for consideration include the magnitude and probability of foreseeable risks of harm; the instructions and warnings included with the product; the nature and strength of consumer expectations regarding the product, including expectations arising from product advertising and marketing; the advantages and disadvantages of product function arising from the alternative design, as well as the effects of the alternative design on production costs; and the effects of the alternative design on product longevity, maintenance, repair, and esthetics. *Id*. § 2 cmt. f.

Some analysts of the risk-utility approach have posited that the test is better suited to analyzing cases involving complicated or technical design. These proponents of the risk-utility approach also contend that the average consumer does not have ascertainable "expectations" about the performance of a complex product, such as a car, in unfamiliar circumstances. *See* Douglas A. Kysar, *The Expectations of Consumers*, 103 Colum. L. Rev. 1700, 1716 (2003).

Accordingly, adopting courts have observed that when faced with a complicated or technical design, the risk-utility analysis "provides objective factors for a trier of fact to analyze when presented with a challenge to a manufacturer's design." *Branham v. Ford Motor Co.*, 701 S.E.2d 5, 15 (S.C. 2010).

Based on these perceived advantages, a number of jurisdictions have exclusively adopted the risk-utility analysis in design defect cases through either caselaw or statute. *See, e.g.*, *Gen. Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003); *Banks v. ICI Americas, Inc*., 450 S.E.2d 671, 674 (Ga. 1994); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 169 (Iowa 2002); *Toyota Motor Corp. v. Gregory*, 136 S.W.3d 35, 42 (Ky. 2004); *Jenkins v. Int'l Paper Co*., 945 So. 2d 144, 150-51 (La. Ct. App. 2006); *Williams v. Bennett*, 921 So. 2d 1269, 1273 (Miss. 2006); *Rix v. Gen. Motors Corp*., 723 P.2d 195, 201 (Mont. 1986); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335 (Tex. 1998). Still others have adopted a hybrid approach, utilizing the risk-utility approach only in complex design situations. *See, e.g.*, *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 305 (Cal. 1994); *Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 347 (Ill. 2008).

Nevada will continue to follow the consumer-expectation test

Ford urges this court to join those jurisdictions that have concluded that the risk-utility test better allows a jury to analyze complex cases in which consumer expectations are less clear. Ford also argues that the risk-utility test provides a lay jury with a concrete framework in which to analyze complex or technical products. Despite Ford's arguments, we find that the proposed advantages of the risk-utility test over the consumer-expectations test are largely overstated. Further, as discussed below, the adoption of negligence standards into strict products liability, as well as the affirmative requirement that plaintiffs provide proof of a reasonable alternative design, stands contrary to the public policy supporting Nevada's long-standing use of the consumer-expectation test.

The consumer-expectation test provides sufficient framework to analyze complex or technical products

With respect to the clarity of consumer expectations, we conclude that even in cases of complex or technical products, a lay jury is sufficiently equipped to determine whether a product performs in a manner to be reasonably expected under certain circumstances, pursuant to the consumer-expectation test. The Wisconsin Supreme Court noted:

> A determination of "unreasonable danger," like a determination that a product is in a condition not contemplated by the ordinary consumer, does not inevitably require any degree

> of scientific understanding about the product itself. Rather, it requires understanding of how safely the ordinary consumer would expect the product to serve its intended purpose.

Green v. Smith & Nephew AHP, Inc., 629 N.W.2d 727, 742 (Wis. 2001). With respect to the instant case, Ford argues that it is extremely unlikely that the Trejos bought their Excursion with any specific expectation regarding the strength-to-weight ratio of the vehicle roof. Nonetheless, Trejo presented sufficient evidence for the jury to conclude that the level of protection actually provided by the roof in a rollover accident was less than would be expected by a reasonable consumer, indicating that in this case, the distinction between the risk-utility and consumer expectation tests is without practical difference.

Further, to the extent scientific or technical evidence is presented, we note that juries are often requested to digest unfamiliar technical material. The Wisconsin Supreme Court explained that "juries are always called upon to make decisions based upon complex facts in many different kinds of litigation. . . . The problems presented in products liability jury trials would appear no more insurmountable than similar problems in other areas of the law." *Id*. at 743 (quoting *Arbet v. Gussarson*, 225 N.W.2d 431, 438 (Wis. 1975), *overruled in part on other grounds by Greiten v. LaDow*, 235 N.W.2d 677 (Wis. 1975)). Ford presents no evidence that the jury was incapable of digesting the expert testimony and evidence admitted in this case.

The consumer-expectation test also provides a sufficient framework to analyze complex designs. In this, we note that while proof of an alternative design is not required, in most cases, evidence of an alternative design is the most expedient method for a plaintiff to prove that the product at issue was unreasonably dangerous. *See Aubin v. Union Carbide Corp.*, 177 So. 3d 489, 511-12 (Fla. 2015) (citing *Tincher v. Omega Flex, Inc.*, 104 A.3d 328, 397 (Pa. 2014)). When evidence of an alternative design is presented, a defendant remains free to argue that a design is not commercially feasible. Therefore, evidence related to the majority of factors in the risk-utility test remains admissible, including evidence related to the advantages and disadvantages of product function arising from the alternative design; the effect of the alternative design on production costs; and the effect of the alternative design on product longevity, maintenance, repair, and esthetics.[3] *See* Restatement (Third) of

[3]Contrary to the suggestion of our dissenting colleague, our holding does nothing "to place limits on the use of risk-utility evidence in products liability cases." Our holding in no way limits the presentation of relevant evidence, including evidence regarding a reasonable alternative design. Indeed, we note that Trejo chose to present evidence of an alternative design, arguing that Ford could have reinforced the roof of the Excursion for an additional $70 in production costs, adding an additional 70 pounds of weight to the vehicle. Ford presented

Torts: Prods. Liab. § 2 cmt. f (Am. Law Inst. 1998). Similarly, evidence related to other factors identified by the drafters of the Third Restatement, including evidence related to instructions and warnings included with the product, as well as product advertising and marketing, remains relevant to prove a reasonable consumer's expectations with respect to the product.

The risk-utility approach presents tangible disadvantages

In addition to our determination that the proposed benefits of the risk-utility test are overstated, the risk-utility approach also presents several tangible disadvantages. When we first adopted the theory of strict liability in *Shoshone*, this court reasoned that when a seller has advertised a product, and invited and solicited its use, the seller should not be permitted to avoid the consequences of a "disaster" by arguing that he used all reasonable care. 82 Nev. at 442, 420 P.2d at 857. Accordingly, the consumer-expectation test focuses on the reasonable expectations of a consumer regarding the use and performance of a product. Rather than focus on the product itself, the risk-utility test subverts this analysis, focusing on the "foreseeable risks of harm" apparent to a manufacturer when adopting a design. This inserts a negligence standard into an area of law where this court has intentionally departed from traditional negligence analysis. *See Aubin*, 177 So. 3d at 506; *Green*, 629 N.W.2d at 751 (noting that the risk-utility test unnecessarily "blurs the distinction between strict products liability claims and negligence claims"). By focusing on the conduct of the manufacturer in designing and developing, rather than the product itself, the risk-utility test is in direct conflict with the reasoning of this court in *Shoshone* and its progeny.

Further, as noted by the Kansas Supreme Court, the risk-utility test

> is impoverished especially insofar as the [drafters of the Third Restatement] ruled out consumer expectations as an independent test. They thereby ignored the centrality of what we all know as people . . . : the centrality of product portrayals and images and their role in creating consumer motives to purchase or encounter products.

Delaney v. Deere & Co., 999 P.2d 930, 945 (Kan. 2000) (quoting Marshall S. Shapo, *Defective Restatement Design*, 8 Kan. J.L. & Pub. Pol'y 59, 60 (1998)). Given the unique position of manufacturers, we agree that by advocating for the negligence-based risk-utility approach, "the Third Restatement fails to consider the crucial link

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evidence demonstrating that this design was not commercially feasible. Both parties argued these respective positions to the jury. Thus, the only practical effect of Ford's request would have been to instruct the jury regarding the shifted burden of proof for reasonable alternative design.

between a manufacturer establishing the reasonable expectations of a product that in turn cause consumers to demand that product." *Aubin*, 177 So. 3d at 507.

In addition to this departure from the policy supporting consumer-expectations analysis, we note that by requiring plaintiffs to demonstrate proof of a reasonable alternative design, the risk-utility approach actually imposes a higher bar for recovery than that in a case involving standard negligence claims—"the antithesis of adopting strict products liability in the first place." *Id.* at 506. In addition to the inherent inequity in imposing an additional element of proof beyond negligence, this requirement presents several practical dilemmas.

First, the requirement that plaintiffs present evidence of a reasonable alternative design presents a prohibitive barrier to entry for many plaintiffs. As noted by the Connecticut Supreme Court, this "would require plaintiffs to retain an expert witness even in cases in which lay jurors can infer a design defect from circumstantial evidence." *Potter v. Chi. Pneumatic Tool Co*., 694 A.2d 1319, 1332 (Conn. 1997). The court in *Aubin* similarly observed "that the reasonable alternative design requirement is not supported by public policy or economic analysis because the cost of processing a case will make it economically impossible to produce a reasonable alternative design in a small products liability case." 177 So. 3d at 508. Further, while evidence of an alternative design is often the most expedient way for a plaintiff to demonstrate that the product at issue was not reasonably safe, affirmatively requiring such evidence actively shifts the focus of a case away from the defective product that is the subject of the litigation. *See Delaney*, 999 P.2d at 946.

As a second practical concern, multiple courts have observed that "in some instances, a product may be in a defective condition unreasonably dangerous to the user even though no feasible alternative design is available." *Potter*, 694 A.2d at 1332; *see also Aubin*, 177 So. 3d at 507. While the comments to the Third Restatement appear to contemplate an exception to the alternative design requirements for those products, a plaintiff in these cases is required to demonstrate a "manifestly unreasonable design." Restatement (Third) of Torts: Prods. Liab. § 2 cmt. e (Am. Law Inst. 1998). As observed by the *Aubin* court, this heightened standard "imposes an undue burden on plaintiffs that might preclude otherwise valid claims from jury consideration." 177 So. 3d at 507 (quoting *Potter*, 694 A.2d at 1332).

Public policy favors retention of the consumer-expectation test

This court is not persuaded that the Third Restatement's risk-utility analysis provides a superior framework for analyzing claims of design defect. Rather, the risk-utility analysis inserts negligence standards into claims of design defect, contrary to the public policy

supporting the adoption of strict liability in Nevada. The requirement that plaintiffs must provide proof of a reasonable alternative design is not supported by Nevada law and poses an unfair burden to many prospective plaintiffs. Therefore, claims of design defect in Nevada will continue to be governed by the consumer-expectation test. Accordingly, we conclude that the district court did not err in declining to give Ford's proposed jury instruction on the risk-utility test. *See Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004) (noting that the "decision to give or decline a proposed jury instruction is reviewed for an abuse of discretion or judicial error").

The verdict is supported by sufficient evidence

Ford also contends that the testimony of Trejo's biomechanical expert lacked factual foundation and that the district court wrongfully allowed the coroner who performed the autopsy on Rafael to testify as a nonretained expert. Therefore, viewed as a whole, Ford argues that the jury's verdict is not supported by sufficient evidence, indicating that the district court abused its discretion in denying Ford's motion for a new trial or motion for judgment as a matter of law. We disagree.

While there was some potential conflict between the testimony of Trejo's biomechanical expert and mechanical engineering expert regarding when the roof was crushed during the rollover sequence, "[i]t is a well settled rule in this state that whenever conflicting testimony is presented, it is for the jury to determine what weight and credibility to give to that testimony." *Allen v. State*, 99 Nev. 485, 487, 665 P.2d 238, 240 (1983); *see also Houston Expl. Inc. v. Meredith*, 102 Nev. 510, 513, 728 P.2d 437, 439 (1986) (noting that the jury, not the court, must determine the weight given to conflicting expert testimony). Accordingly, the district court did not abuse its discretion in admitting this testimony. *Rish v. Simao*, 132 Nev. 189, 195, 368 P.3d 1203, 1208 (2016).

We further conclude that coroner Ross Zumwalt did not rely on any sources outside of his statutorily mandated examination of Rafael Trejo in forming his opinions and appropriately testified as a nonretained expert. *See* NRS 259.050(1) (requiring a coroner to perform an investigation when a "death has been occasioned by unnatural means"); *FCH1, LLC v. Rodriguez*, 130 Nev. 425, 433, 335 P.3d 183, 189 (2014).

Given our conclusion that biomechanical engineer Joseph Peles' and Zumwalt's testimony was appropriately admitted, we conclude, "after viewing all inferences in favor of the prevailing party, substantial evidence supports the jury's verdict." *J.J. Indus., LLC v. Bennett*, 119 Nev. 269, 273, 71 P.3d 1264, 1267 (2003). Trejo presented multiple witnesses to support her theory that the roof of

the Excursion crushed, pinning Rafael in a hyperflexion position, causing him to suffocate, including testimony by mechanical engineer Brian Herbst, Peles, Zumwalt, and her own testimony. While Ford presented evidence to dispute this testimony, well-settled law dictates that it is the role of the jury, not this court, to weigh conflicting evidence. *Id*. Therefore, we will not disturb the district court's denial of Ford's motion for judgment as a matter of law or motion for a new trial. *See Nelson v. Heer*, 123 Nev. 217, 222-23, 163 P.3d 420, 424 (2007) (noting that we will uphold denial of a motion for judgment as a matter of law if sufficient evidence exists to support a verdict for the nonmoving party, and will not disturb the denial of a motion for a new trial "absent palpable abuse" of discretion (internal quotation omitted)).

CONCLUSION

The risk-utility test for strict product liability design defect claims represents a significant departure from current Nevada law. Notably, the risk-utility test inserts a negligence analysis into traditional claims of strict product liability and imposes an unfair additional requirement on plaintiffs to present evidence of a reasonable alternative design. Accordingly, this court declines to adopt the risk-utility test. Claims of design defect in Nevada will continue to be governed by the consumer-expectation test, which we believe best supports the policy reasons allowing recovery under the theory of strict products liability.

The jury in this case was properly instructed on the consumer-expectation test. Further, the record demonstrates that Trejo presented sufficient evidence to demonstrate that the roof of the Ford Excursion failed to perform in a manner reasonably expected in light of its nature and intended function and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community. Trejo also presented evidence sufficient to demonstrate that Rafael Trejo's death was caused by this defect. Therefore, we affirm the judgment on the jury verdict, as well as the post-judgment order awarding costs.

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

Pickering, J., dissenting:

The jury instructions the district court gave and the majority affirms were inadequate. They told the jury to decide this case based solely on "consumer expectations," that is, on how the jurors thought an "ordinary user having the ordinary knowledge available in the community" would have expected the Excursion's roof to function in a highway-speed rollover. The district court refused Ford's request that the court also instruct the jury on whether, based on the expert testimony they heard, a feasible alternative design existed

for the roof that would have protected Trejo, who was in the front passenger seat, from being crushed in the rollover.

Neither Nevada law, nor the law nationally, supports deciding a design defect case such as this based solely on consumer expectations. The failure to instruct the jury on alternative design left the jurors with no specific guidance on the law by which to decide the case. While I would not pursue an alternative design or "risk-utility" analysis to the exclusion of consumer expectations—a position the majority erroneously attributes to the Restatement (Third) of Torts: Products Liability (Am. Law Inst. 1998)—the jury can and should be instructed on alternative design in addition to consumer expectations where, as here, evidence has been presented to support it. As this instructional error clouds the verdict's reliability, I would reverse and remand for a new trial. I therefore dissent.

I.

Nevada imposes strict liability on manufacturers and distributors who place in the hands of users a product that is "unreasonably dangerous." *Ward v. Ford Motor Co.*, 99 Nev. 47, 49, 657 P.2d 95, 96 (1983). As the majority notes, there are three principal types of products liability claims: manufacturing defect; design defect; and inadequate warnings. In *Ginnis v. Mapes Hotel Corp.*, 86 Nev. 408, 413, 470 P.2d 135, 138 (1970), we endorsed what has come to be known as the consumer expectation test as an appropriate means of assessing "unreasonable dangerousness." Under this test, the plaintiff must demonstrate that the product "fail[ed] to perform in the manner reasonably to be expected in light of [its] nature and intended function" and "was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community." *Id.* (quoting *Dunham v. Vaughan & Bushnell Mfg. Co.*, 247 N.E.2d 401, 403 (Ill. 1969)). The *Ginnis* formulation has been applied to all three types of product liability claims. *See Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 105, 65 P.3d 245, 248 (2003) (inadequate warnings); *Ward*, 99 Nev. at 48, 657 P.2d at 96 (design and manufacturing defects).

As part of, or in addition to, the consumer expectation test, Nevada has endorsed using the existence of a safer alternative design to prove that a design defect or lack of warnings made a product unreasonably dangerous. *McCourt v. J.C. Penney Co.*, 103 Nev. 101, 102, 104, 734 P.2d 696, 697, 698 (1987) (citing *Ginnis* and reversing because the district court erred in refusing, in a design defect case, to admit evidence of feasible alternative design: "Alternative design is one factor for the jury to consider when evaluating whether a product is unreasonably dangerous"); *see also Fyssakis v. Knight Equip. Corp.*, 108 Nev. 212, 214, 826 P.2d 570, 572 (1992) ("Under Nevada law, evidence . . . that a safer alternative design was feasible

at the time of manufacture will support a strict liabilities claim."); *Robinson v. G.G.C.*, 107 Nev. 135, 138, 808 P.2d 522, 525 (1991) ("a manufacturer may be liable for the failure to provide a safety device if the inclusion of the device is commercially feasible, will not affect product efficiency, and is within the state of the art at the time the product was placed in the stream of commerce"); *Michaels v. Pentair Water Pool & Spa, Inc.*, 131 Nev. 804, 818, 357 P.3d 387, 397 (Ct. App. 2015) (under Nevada law a design defect "may be determined with reference to such things as whether a safer design was possible or feasible, whether safer alternatives are commercially available, and other factors") (citing *McCourt*, 103 Nev. at 104, 734 P.2d at 698). Though not denominated as such by our case law, this balancing of a possible safer alternative design against its commercial feasibility is known as the "risk-utility" approach to determining product defect. *See* 1 David G. Owen & Mary J. Davis, *Owen & Davis on Products Liability* § 8:7 (4th ed. 2014). A risk-utility analysis determines "[w]hether a particular design danger is 'unreasonable' (that is, 'defective')" by balancing "'the probability and seriousness of harm against the costs of taking precautions. Relevant factors to be considered include the availability of alternative designs, the cost and feasibility of adopting alternative designs, and the frequency or infrequency of injury resulting from the design.'" *Id.* (quoting *Raney v. Honeywell, Inc.*, 540 F.2d 932, 935 (8th Cir. 1976)).

At trial, both sides presented evidence regarding alternative roof designs and their commercial feasibility, as *McCourt* and its progeny allow. Trejo affirmatively alleged that a safer alternative design was available and presented expert testimony that the design was commercially reasonable. Ford presented contradictory evidence, to the effect that Trejo's expert's proposed design was not, in fact, safer and, further, created issues of commercial unreasonableness.

Based on this admitted evidence, Ford sought to have the jury instructed on alternative design by adding the italicized language to the stock product-defect jury instruction:

> [Proposed] Instruction No. 21
>
> In order to establish a claim of strict liability for a defendant product, the plaintiff must prove the following elements by a preponderance of the evidence:
>
> 1. That Ford Motor Company was the manufacturer of the 2000 Ford Excursion;
> 2. That the 2000 Ford Excursion's roof structure was defectively designed;
> 3. That the defect existed when the 2000 Ford Excursion left Ford Motor Company's possession;

4. That the 2000 Ford Excursion was used in a manner which was reasonably foreseeable by Ford Motor Company;
5. *There existed a reasonable alternative design*; and
6. That the defect was a proximate cause of the injury to Rafael Trejo.

(emphasis added to show proposed addition to *Nevada Jury Instructions—Civil* § 7PL.4 (2011)). Ford also offered [Proposed] Instruction No. 22, as follows:

> A product is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design and the omission of the alternative design renders the product not reasonably safe.

Although these requested instructions accurately stated Nevada law under *McCourt*, the district court rejected them. It also rejected every other jury instruction Ford proposed that touched on reasonable alternate design.[1] As a result, the jury received no instructions on how to apply the evidence regarding a safer alternative design and its commercial feasibility to determine whether the Excursion was unreasonably dangerous due to a design defect.

The court gave only stock product liability instructions to the jury. Thus, the district court gave as Instruction No. 19 what Ford had tendered as [Proposed] Instruction No. 21, *minus* the italicized language about reasonable alternative design, *reprinted supra* at 15-16. It also gave, as the only other guidance on how the jury should decide design defect, the following stock instructions:

> Instruction No. 20
>
> A product is defective in its design if, as a result of its design, the product is unreasonably dangerous.

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[1]In addition to the instructions reprinted in the text, Ford proposed a "state of the art defense" instruction and, citing *Robinson v. G.G.C.*, 107 Nev. at 139-40, 808 P.2d at 526, an instruction that would have told the jury as a minimal alternative that "[a] manufacturer is not required to produce the safest design possible." Both were refused, as was Ford's additional proposed instruction based on the Restatement (Third) section 2(b) that would have told the jury that, in assessing risk-utility, to consider "(a) the likelihood that the product will cause injury considering the product as sold with any instructions or warnings regarding its use; (b) the ability of the plaintiff to have avoided injury; (c) the plaintiff's awareness of the product's dangers; (d) the usefulness of the product as designed as compared to a safe design; (e) the functional and monetary cost of using the alternative design; and (f) the likely effect of liability for failure to adopt the alternative design on the range of consumer choice among products."

> Instruction No. 21
>
> A product is unreasonably dangerous if it failed to perform in the manner reasonably to be expected in light of its nature and intended function, and was more dangerous than would be contemplated by the ordinary user having the ordinary knowledge available in the community.

See Nevada Jury Instructions—Civil § 7PL.7 (2011). While these instructions are accurate, they are incomplete and misleading as a result. "[C]onsumers comprehend that automobiles are not completely crashproof, but they have no meaningful expectations as to the extent to which a vehicle may be compromised in the event of a collision or rollover at substantial speeds." 1 Owen & Davis, *supra*, at § 8:5. The jury should have been instructed on all of the law pertinent to the evidence presented, including alternative design.

The instructions the jury received failed to give them any guidance on how to utilize the ample expert evidence presented over the course of the two-week trial regarding Trejo's proffered alternative design and Ford's arguments that the alternative design was proven neither to be safer nor commercially feasible. *See Woosley v. State Farm Ins. Co.*, 117 Nev. 182, 188, 18 P.3d 317, 321 (2001) (providing that it is error for the court to refuse to give a jury "instruction when the law applies to the facts of the case"). Indeed, with the instructions given to the jury, such evidence would not even factor into their decision as to whether the Excursion was unreasonably dangerous as designed.

The refusal to give an instruction regarding the evidence presented contravenes this court's long-held tenet that "a party is entitled to have the jury instructed on all of [its] case theories that are supported by the evidence." *Atkinson v. MGM Grand Hotel, Inc.*, 120 Nev. 639, 642, 98 P.3d 678, 680 (2004) (quoting *Silver State Disposal Co. v. Shelley*, 105 Nev. 309, 311, 774 P.2d 1044, 1045 (1989)). While the majority recognizes that Nevada's jurisprudence allows for the presentation of risk-utility evidence in products liability cases (albeit as part of the consumer-expectation test), it disconcertingly concludes that there was no error in the district court's failure to instruct the jury regarding alternative design or risk-utility in this case.[2] With this holding, it is unclear whether the majority intends to

[2]The majority characterizes Ford's proposed jury instructions as asking the district court to overrule or change existing Nevada law, something a district court cannot do. But this misreads the record and the law. Nevada has never rejected feasible alternative design as an appropriate consideration in a design defect case. *See McCourt*, 103 Nev. at 102, 734 P.2d at 697-98, and Nevada cases cited, *supra*, at 533-34. And, even in its proposed risk-utility instructions, Ford included consumer expectations as a factor to be considered.

Also unavailing is the majority's suggestion that Ford somehow waived its right to have the jury instructed on alternative feasible design. It requested the instructions; it objected to the failure to give them; and it moved for a new trial based on instructional error. The law does not require more. *See Johnson v.*

place limits on the use of risk-utility evidence in products liability cases[3] or intends to relax the requirement that district courts must instruct juries based on the evidence presented at trial, but what is clear is that this holding diverges from current Nevada law. The failure to give the jury instructions that are supported by both this court's prior jurisprudence and the evidence and pleadings presented by the parties constitutes reversible error because, had the jury been instructed on the risk-utility test, the outcome of the case may have been different. *Id.*; *see also Cook v. Sunrise Hosp. & Med. Ctr., LLC*, 124 Nev. 997, 1005-06, 194 P.3d 1214, 1219 (2008) (holding that an error in jury instructions warrants reversal when a different result might have been reached had the court given the proper instructions).

This court encountered a similar jury instruction issue in *Lewis v. Sea Ray Boats, Inc.*, 119 Nev. 100, 65 P.3d 245 (2003). In that case involving an allegation of an inadequate warning on a boat's generator, a party requested an instruction that would define "adequate warning" for the jury. *Id.* at 104-05, 65 P.3d at 248. The court refused to give the instruction and instead gave more generalized instructions.[4] *Id.* at 105, 65 P.3d at 248. On appeal, this court held that the general instructions were insufficient to guide the jury both because jurors had "to search their imaginations to test the adequacy of the warnings" and because, due to the expert witness testimony given, the jurors were "entitled to more specific guidance" on the law governing the case. *Id.* at 108, 65 P.3d at 250.

The same reasoning should be applied here: the more specific instructions provided greater guidance to the jury and the district court's failure to give those more specific instructions warrants a reversal of the jury verdict and a remand for a new trial. *See id.* (reversing and remanding for a new trial based on the failure to give more specific instructions to the jury). A district court cannot abdicate its duty to instruct the jury on the relevant law as it is informed

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Egtedar, 112 Nev. 428, 434-35, 915 P.2d 271, 275 (1996) (recognizing that if a court is "adequately apprised of the issue of law involved and was given an opportunity to correct the error," then a party has adequately reserved a jury instruction issue for appellate review).

[3]If this is the majority's intent, such a holding would place Nevada in the extreme minority of jurisdictions that do not allow any evidence of risk-utility in design defect cases as is discussed more in depth in the next section. *See* Aaron D. Twerski & James A. Henderson, Jr., *Manufacturers' Liability for Defective Product Designs: The Triumph of Risk-Utility*, 74 Brook. L. Rev. 1061, 1104-05 (2009).

[4]The proposed instruction provided that a warning must be designed to catch the attention of the consumer, give a fair indication of the specific risks attributable to the product, and that the intensity of the warning match the danger being warned against. *Lewis*, 119 Nev. at 105, 65 P.3d at 248. In comparison, the given instruction merely provided that whether a warning was legally sufficient depended upon the language used and its impression on the consumer. *Id.*

by the evidence presented at trial. *See Am. Cas. Co. v. Propane Sales & Serv., Inc.*, 89 Nev. 398, 400-01, 513 P.2d 1226, 1228 (1973) (reversing and remanding where the instructions given to the jury were so general that it gave "the jury a roving commission as to the facts and permit[ted] them to pass upon a question of law according to any theory they could construct or evolve in their own minds" and because it abdicated the court's duty to explain the law of the case "and to bring into view the relations of the particular evidence adduced to the particular issues involved" (internal quotation marks omitted)); *Beck v. Haley*, 239 A.2d 699, 702 (Del. 1968) (relied upon in *American Casualty* and holding that jury instructions should be based on the evidence presented at trial).

Based on the foregoing, I would reverse and remand this matter for a new trial.

II.

The majority's approval of jury instructions that focus on consumer expectations to the exclusion of risk-utility considerations not only contravenes preexisting Nevada law, it also makes Nevada an outlier, as only a small minority of jurisdictions rely solely on consumer expectations in design defect cases. *See* Twerski & Henderson, *Manufacturers' Liability for Defective Product Designs*, 74 Brook. L. Rev. at 1104-05 (stating that only Kansas, Nebraska, Oklahoma, Wisconsin, and possibly Maryland solely apply a consumer-expectation test to design defect claims); *but see* Wis. Stat. Ann. § 895.047(1)(a) (West 2015) (by statute adopted in 2011, Wisconsin follows a risk-utility approach in design defect cases). En route to this holding, the majority also mischaracterizes the risk-utility test as presented by the Restatement (Third) and how it is applied.

A.

Like Nevada (at least until today), most jurisdictions recognize that both consumer expectations and feasible alternative design or risk-utility evidence have legitimate roles to play in design defect cases. Feasible alternative design evidence plays a predominant role in design defect, as opposed to manufacturing defect, cases because of the difference in the two types of claims: "Whereas a manufacturing defect consists of a product unit's failure to meet the manufacturer's design specifications, a product asserted to have a defective design meets the manufacturer's design specifications but raises the question whether the specifications themselves create unreasonable risk." Restatement (Third) of Torts: Products Liability § 2 cmt. d.

Analyzing the manufacturer's design choice cannot be done in a void, leading courts to strike a balance between the consumer-expectation test and risk-utility test. California has created a test

wherein consumer expectations are reserved for those cases where "*everyday experience* of the product's users permits a conclusion that the product's design violated *minimum* safety assumptions, and is thus defective *regardless of expert opinion about the merits of the design*." *Soule v. Gen. Motors Corp.*, 882 P.2d 298, 308 (Cal. 1994); *see also* Twerski & Henderson, *Manufacturers' Liability for Defective Product Designs*, 74 Brook. L. Rev. at 1098-1101 (listing ten other jurisdictions that use the same approach as California). Thus, the jury is exclusively instructed on risk-utility only when the evidence presented would not support a jury verdict based on consumer expectations. *Soule*, 882 P.2d at 309. Illinois' approach is to include consumer expectations as a factor to consider under the risk-utility test when the evidence presented at trial implicates both tests, with the alternative design criteria controlling in design defect cases. *See Mikolajczyk v. Ford Motor Co.*, 901 N.E.2d 329, 350-52 (Ill. 2008).

Even those jurisdictions that appear to exclusively adopt a risk-utility test for design defect cases nevertheless recognize consumer expectations as a factor for consideration. *Compare Gen. Motors Corp. v. Jernigan*, 883 So. 2d 646, 662 (Ala. 2003) (holding that a safer alternative design is required in design defect cases raised under Alabama's Extended Manufacturer's Liability Doctrine and cited by the majority for the proposition that Alabama exclusively uses the risk-utility test), *with Horn v. Fadal Machining Ctrs., LLC*, 972 So. 2d 63, 70 (Ala. 2007) (providing that a claim under the same doctrine can be won by showing the product failed to meet consumer expectations). *See also Banks v. ICI Americas, Inc.*, 450 S.E.2d 671, 675 n.6 (Ga. 1994) (listing factors relevant to a risk-utility analysis, which include "the user's knowledge of the product . . . as well as common knowledge and the expectation of danger"); *Wright v. Brooke Grp. Ltd.*, 652 N.W.2d 159, 170 (Iowa 2002) ("Although consumer expectations are not the sole focus in evaluating the defectiveness of a product under the [Third] Products Restatement, consumer expectations remain relevant in design defect cases."); *Nichols v. Union Underwear Co.*, 602 S.W.2d 429, 432-33 (Ky. 1980) (holding that consumer expectations is a factor to be considered in a design defect case, along with other risk-utility factors); *Williams v. Bennett*, 921 So. 2d 1269, 1275 (Miss. 2006) (quoting *Clark v. Brass Eagle, Inc.*, 866 So. 2d 456, 460 (Miss. 2004), with approval and *Clark* notes that Mississippi's products liability law is a hybrid of the consumer-expectation test and the risk-utility test); *Uniroyal Goodrich Tire Co. v. Martinez*, 977 S.W.2d 328, 335-37 (Tex. 1998) (refusing to adopt a new rule of law regarding design defect and recognizing that the risk-utility test includes consideration of the consumer's expectations of the product). The Restatement (Third) also provides a comprehensive analysis of this issue, concluding that the risk-utility analysis should predominate in design defect cases but

still include consideration of consumers' expectations. Restatement (Third) of Torts: Products Liability § 2 & cmt. f.

The varied foregoing approaches to incorporating both the consumer-expectations test and the risk-utility test into design defect cases demonstrate the difficulty presented by this issue. The fact that the task is difficult or that there may be more than one possible solution, however, does not justify the majority's decision to exclude all references to risk-utility evidence in the instructions given to the jury.

B.

The majority gives a series of reasons for rejecting the risk-utility approach offered by the Restatement (Third). On the surface, the concerns seem legitimate but, at their core, they rest on a fundamental misunderstanding of what the Restatement (Third) actually proposes in design defect cases.

First, the majority asserts that by requiring evidence of a feasible alternative design prior to the discovery process, the risk-utility test places a "prohibitive barrier" to a plaintiff bringing a case, especially since the defendant controls the information related to product design. *See* majority opinion, *ante*, at 530. But the Restatement's feasible alternative design provision relates to proof *at trial*, after discovery, and specifically "assume[s] that the plaintiff will have the opportunity to conduct reasonable discovery so as to ascertain whether an alternative design is practical." Restatement (Third) of Torts: Products Liability § 2 cmt. f. Thus, the feasible alternative design requirement is not a mandatory prerequisite to filing a design defect claim under the Restatement (Third).

Second, the majority criticizes the Restatement (Third) as failing to recognize that proof of a feasible alternative design should not be required in every design defect case, especially those where no feasible alternative design exists. *See* majority opinion, *ante* at 530. But again, the Restatement (Third) does not propose the rule the majority criticizes. On the contrary, the Restatement makes specific provision for design defect claims that do not require feasible alternative design evidence. For example, if the product is manifestly unreasonable, or it has little social use and a high degree of danger, a court may declare it to be defective in design without evidence of a feasible alternative design. *See* Restatement (Third) of Torts: Products Liability § 2 cmt. e (using the example of a child's pellet gun that uses pellets hard enough to cause injury).

Going beyond the comments to section 2, section 3 of the Restatement (Third) provides for imposition of strict liability without regard to alternative design in cases involving inexplicable product malfunction. Restatement (Third) of Torts: Products Liability § 3

("It may be inferred that the harm sustained by the plaintiff was caused by a product defect existing at the time of sale or distribution, without proof of a specific defect, when the incident that harmed the plaintiff: (a) was of a kind that ordinarily occurs as a result of product defect; and (b) was not, in the particular case, solely the result of causes other than product defect existing at the time of sale or distribution."); *id.* at cmt. b (acknowledging that product malfunction can implicate design as well as manufacturing defects). This section comports with Nevada product liability law. Indeed, the Reporter's Note to section 3, cmt. b, of the Restatement (Third) quotes with approval this court's holding in *Stackiewicz v. Nissan Motor Corp. in U.S.A.*, 100 Nev. 443, 448, 686 P.2d 925, 928 (1984), "that proof of an unexpected, dangerous malfunction may suffice to establish a prima facie case for the plaintiff of the existence of a product defect." And in section 4, the Restatement (Third) provides for design and other product defect claims premised on a manufacturer's failure to meet applicable safety statutes or administrative regulations without proof of a feasible alternative design. *See* Restatement (Third) of Torts: Products Liability § 4; *see also id.* at § 2 Reporters' Note cmt. b (stating that § 4 of the Restatement provides an alternative ground for proving design defect that does not require proof of a feasible alternative design).

In sum, the majority's suggestion that the Restatement (Third) requires proof of alternative design in all design defect cases is simply incorrect. There are numerous instances wherein a plaintiff could succeed on a design defect claim without providing evidence of a feasible alternative design.

C.

Also problematic is the majority's failure to acknowledge the shortcomings of the consumer expectation test, especially in design defect cases. First, and most important, the consumer expectation test does not fairly allow design defect claims when the design dangers are obvious. "Because consumers acquire their safety and danger expectations most directly from a product's appearance, obvious dangers—such as the risk to human limbs from an unguarded power mower or industrial machine—are virtually always contemplated or expected by the user or consumer, who thereby is necessarily unprotected by the consumer expectations test, no matter how probable and severe the likely danger nor how easy and cheap the means of avoiding it." 1 Owen & Davis, *supra*, at § 8:5.

"Another significant limitation on the usefulness of consumer expectations as a liability standard in design cases concerns the vagueness of a consumer's expectations concerning most complex designs." *Id.* As the disconnect between the jury instructions and the

expert evidence presented over the course of the ten-day trial in this case illustrates, assessing design defect requires more of a measure than simply consumer expectations. Instructing the jury to consider alternative design, in addition to consumer expectations, allows the jury to determine not just malfunction but design defect.

III.

The error in the instructions requires reversal and remand for a new trial. By affirming the instructions the jury was given, the majority has moved Nevada from the mainstream—where courts and commentators alike are striving to strike the proper balance between risk-utility and consumer-expectations analyses in design defect cases—to a minority of three or four jurisdictions that rely solely on consumer expectations. While I do not necessarily advocate for the Restatement (Third) over the approaches variously taken by California or Illinois, Nevada should at a minimum adhere to its prior case law recognizing that feasible alternative design has a legitimate and important role to play in design defect cases. As the complete elimination of feasible alternative design from the design-defect calculus is unsound, I respectfully dissent.

JENNIFER ELISE GORDON, Appellant, *v.*
MATTHEW ROBERT GEIGER, Respondent.

No. 67955

September 27, 2017 402 P.3d 671

Appeal from a post-divorce decree district court order modifying a child custody matter. Eighth Judicial District Court, Family Court Division, Clark County; Department T.[1]

Reversed and remanded.

Greenberg Traurig, LLP, and *Tami D. Cowden* and *Moorea L. Katz*, Las Vegas, for Appellant.

Kemp Jones & Coulthard, LLP, and *Eric M. Pepperman*, Las Vegas, for Respondent.

Before the Court En Banc.[2]

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[1]The Honorable Gayle Nathan, District Judge, presided over the hearing where custody was modified, and The Honorable Lisa Brown, District Judge, entered the written order and denied reconsideration.

[2]The Honorable Ron D. Parraguirre, Justice, did not participate in the decision of this matter.

OPINION

By the Court, Douglas, J.:

In this case, we examine a district court's sua sponte order permanently increasing respondent's visitation with the parties' minor children. The district court based its order on unrecorded interviews the judge conducted independently with the children and an unsubstantiated Child Protective Services (CPS) report that was not admitted into evidence.

We conclude that appellant's due process rights were violated when the district court changed the terms of custody without sufficient notice to appellant. Accordingly, we reverse the district court's order modifying child custody and remand this matter for further proceedings.

We further take this opportunity to provide necessary guidance for when the district court wants to interview a child witness. We clarify that such interviews must be recorded and must comply with the Uniform Child Witness Testimony by Alternative Methods Act, set forth in NRS 50.500 *et seq.*

FACTS AND PROCEDURAL HISTORY

Appellant Jennifer Gordon and respondent Matthew Geiger divorced in 2011. Pursuant to their divorce decree, both were awarded joint legal custody of their two minor children; Gordon was awarded primary physical custody, and Geiger received limited visitation.

In 2011, before the district court entered the decree of divorce, the judge interviewed the parties' children with the children's guardian ad litem present. A return hearing immediately followed. Pursuant to the court minutes from the return hearing, the court ordered that Gordon's boyfriend was to not physically discipline the children in any way. The district court never entered a written order on this issue.

In early 2014, the district court entered a written order modifying Geiger's visitation to every other weekend. Subsequently in July, Geiger was arrested and incarcerated for 23 days due to an outstanding warrant for parole violations. Gordon then filed a motion for an order to show cause, alleging that Geiger violated court orders concerning custody and child support. Based on Geiger's parole violation, among other reasons, Gordon also filed a separate motion to modify custody, which requested sole legal and physical custody, and removal of Geiger's visitation.

At the following hearing on August 28, 2014, the district court stated it was inclined to interview the parties' children, to which Geiger and pro se Gordon agreed. The district court then set an evidentiary hearing for October 9, 2014, to address Gordon's request

for an order to show cause and to particularly discern the reason for the issuance of Geiger's warrant.

In September, the district court judge interviewed the minor children individually and off the record, with only the court clerk and court marshal present during the interviews.

At the October evidentiary hearing, the district court clarified that it set this hearing to hear from Geiger's probation officer in order to understand why a warrant was issued for his arrest. Accordingly, Geiger's probation officer took the stand and testified to the probation conditions Geiger allegedly violated and indicated that Gordon was not responsible for the issuance of Geiger's warrant. On cross-examination, the probation officer testified that he did not have any proof that Geiger was aware of the changes to the terms of his probation.

Following the probation officer's testimony, Gordon took the stand. The district court recognized Gordon's pending motion to modify custody, but clarified that she could testify in a limited capacity as to her interaction with Geiger's probation officer, which she did. Geiger's counsel further acknowledged that Gordon was testifying to this limited issue. The district court then addressed Geiger's child support arrears, and Geiger took the stand to testify about financial matters.

Following Geiger's testimony concerning child support, the court made its ruling and denied Gordon's motion for sole legal custody, finding that Geiger did not know that he violated the terms of his probation and lacked notice of his warrant. Although the district court had already announced its decision, it allowed closing arguments. After arguments by the parties, the court made additional rulings concerning the parties' failure to communicate and the minor child's participation in a traveling band.

The judge then addressed the unrecorded interview she conducted with the parties' children. According to the judge, the youngest child was not as forthcoming in his interview. However, the eldest child revealed that he liked the current custody schedule, and thus, the court found that he was not distressed by the arrangement. Then the judge informed the parties that the eldest child also told her that Gordon's boyfriend would punch him as a form of discipline. Despite Gordon's denial of this allegation, the judge stated that she believed the child's testimony due to his detailed narrative. The court also based its ruling on an unsubstantiated CPS report, which was not authenticated by a CPS agent, admitted into evidence, or provided to the parties. In response, Geiger's counsel asked the court to consider issuing an order to protect the children from Gordon's boyfriend. The court granted the request and also ordered the parties to take classes concerning appropriate child discipline.

As the evidentiary hearing came to a conclusion, Geiger's counsel orally requested expansion of Geiger's visitation, despite the fact

that he never previously requested custody modification in writing or otherwise. Geiger's counsel also stated that even a temporary time-share change until the parties completed the discipline classes would suffice. The court declined counsel's request and instead sua sponte ordered a permanent change in the parties' visitation schedule. Although Gordon retained physical custody during the week, the court expanded Geiger's visitation schedule to the first four weekends of each month and awarded Gordon every fifth weekend of the month where applicable. The court further ruled that Gordon could plan a maximum of four weekend trips a year with the children if she gave Geiger sufficient notice. Thus, the district court ultimately decreased Gordon's weekend custodial time with the children to a maximum of eight weekends per year and increased Geiger's visitation to the remaining weekends. The district court based its order on the unrecorded child interviews and the unsubstantiated CPS report. The evidentiary hearing concluded immediately following the court's sua sponte order. The district court subsequently entered a written order reflecting the new visitation schedule.

In response to the district court's order, Gordon filed a motion for reconsideration, a new trial, or to amend or set aside a judgment, which the district court denied. This appeal followed.

DISCUSSION

Gordon argues that the district court erred when it sua sponte ordered a permanent increase in Geiger's visitation and a reduction of her custodial time. In particular, Gordon argues that this sua sponte order violated not only her due process rights, but also violated statutory law.[3] We agree.

This court will not disturb the district court's determination of child custody, including visitation schedules, absent an abuse of discretion. *Rivero v. Rivero*, 125 Nev. 410, 428, 216 P.3d 213, 226 (2009). However, the district court's findings must be supported with substantial evidence. *Id.* "Substantial evidence is evidence that a reasonable person may accept as adequate to sustain a judgment." *Id.* (internal quotation marks omitted).

Due process

"[D]ue process of law [is] guaranteed by the Fourteenth Amendment of the United States Constitution and Article 1, Section 8(5) . . . of the Nevada Constitution." *Rico v. Rodriguez*, 121 Nev. 695, 702-03, 120 P.3d 812, 817 (2005). Due process protects certain

[3]We recognize Geiger's argument that Gordon waived the challenges she now asserts on appeal by stipulating to the children's interviews and by failing to object to the district court's review of the CPS records. However, this court may address constitutional issues sua sponte. *In re Guardianship of L.S. & H.S.*, 120 Nev. 157, 166 n.24, 87 P.3d 521, 526 n.24 (2004).

substantial and fundamental rights, including the interest parents have in the custody of their children. *Id.* at 704, 120 P.3d at 818. Further, due process demands notice before such a right is affected. *Wiese v. Granata*, 110 Nev. 1410, 1412, 887 P.2d 744, 745 (1994). Accordingly, a "party threatened with loss of parental rights must be given opportunity to disprove evidence presented." *Wallace v. Wallace*, 112 Nev. 1015, 1020, 922 P.2d 541, 544 (1996) (citing *Wiese*, 110 Nev. at 1413, 887 P.2d at 746).

Here, a permanent change to Geiger's visitation affects Gordon's fundamental right concerning the custody of their children. Gordon never received notice that Geiger would be requesting increased visitation at the evidentiary hearing, and she was not afforded the opportunity to be heard and rebut the evidence upon which the district court relied.[4] Therefore, the district court's sua sponte order, which in effect granted Geiger's oral request for a change in visitation at the evidentiary hearing, violated due process.[5]

Moreover, the district court's findings are not supported by substantial evidence due to the fact that the court relied upon the unrecorded child interviews and the unsubstantiated CPS report, neither of which were admitted into evidence. Therefore, without this evidence in the record, which was the basis for the district court's sua sponte order, we must reverse.

On remand, the district court must allow the parties the opportunity to demonstrate whether a modification to the existing custodial and visitation schedule is warranted. When modifying primary physical custody, the court must determine whether there is a sufficient showing of a substantial change in circumstances that affects the children's welfare, such that it is in the children's best interests to modify the existing visitation arrangement. *See Ellis v. Carucci*, 123 Nev. 145, 150, 161 P.3d 239, 242 (2007) (establishing this two-pronged test for modifications of primary physical custody).

Uniform Child Witness Testimony by Alternative Methods Act

Statutory interpretation is a question of law which this court reviews de novo. *Irving v. Irving*, 122 Nev. 494, 496, 134 P.3d 718, 720 (2006). Further, this court first looks to the statute's plain meaning before looking to the Legislature's intent. *Id.*

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[4]Gordon only offered limited evidence at the evidentiary hearing, which addressed Geiger's arrest and child support arrearages. Geiger did not offer any exhibits as evidence.

[5]We note that any violation of the 2011 minute order prohibiting Gordon's boyfriend from physically disciplining the children could not justify the district court's decision to increase Geiger's visitation at the evidentiary hearing. *See Div. of Child & Family Servs. v. Eighth Judicial Dist. Court*, 120 Nev. 445, 451, 92 P.3d 1239, 1243 (2004) (stating that "a [c]ourt's oral pronouncement from the bench, the clerk's minute order, and even an unfiled written order are ineffective for *any purpose*") (internal quotation marks omitted).

In 2003, Nevada adopted the Uniform Child Witness Testimony by Alternative Methods Act (the Act), set forth in NRS 50.500 to 50.620. NRS 50.500; 2003 Nev. Stat., ch. 198 §§ 1-14, at 988-90. Instead of requiring a child witness to testify in open court, the Act provides an alternative method for the child witness. *See* NRS 50.520. In addition to criminal proceedings, the Act also applies in noncriminal proceedings, which includes family law proceedings. NRS 50.560(1); Hearing on S.B. 43 Before the Senate Comm. on the Judiciary, 72d Leg. (Nev., February 11, 2003).

Although the Act sets forth standards and procedures for determining when to allow a child to testify by alternative methods, it does not preclude an applicable state rule or law that permits another procedure for the district court to take testimony of a child by an alternative method. *See* NRS 50.560(2)(a). Indeed, at the time the district court interviewed the children in this case, an Eighth Judicial District Court Rule addressed judicially conducted child interviews. EDCR 5.06 provided in pertinent part: "In exceptional cases, the judge, master or commissioner may interview minor children in chambers outside the presence of counsel and the parties."[6] But the record on appeal is void of any findings stating that this case was exceptional. Rather, the district court judge stated that she was inclined to interview the children for a second time and that she would "talk to the children and see what's going on with them." Therefore, EDCR 5.06 did not apply to the case at hand and, thus, did not supersede the Act.

We now take this opportunity to clarify that child interviews must be recorded and must abide by the Act.[7] Further, we provide family law judges with guidance in interviewing child witnesses in the noncriminal proceedings over which they preside.

Under the Act, a judge *may* sua sponte order a hearing in determining whether a child witness should be allowed to testify by an alternative method. NRS 50.570(1)(a); *see also* NRS 1.428 (defining "judge"). However, a court *must* order a hearing if a party makes a motion and shows good cause. NRS 50.570(1)(b). Regardless of whether a hearing is ordered sua sponte or after a party shows good cause, the parties *must* be reasonably notified of the hearing, and the hearing *must* be recorded. NRS 50.570(2).

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[6]EDCR 5.06 was in effect at the time of the parties' hearings and at the time the district court judge interviewed the children. However, the rule was repealed effective January 27, 2017. *In re Proposed Amendments to Part V of the Rules of Practice for the Eighth Judicial District Court*, ADKT 0512 (Order Amending the Rules of Practice for the Eighth Judicial District Court Part V, Dec. 28, 2016).

[7]Child witnesses must be sworn before testifying. *See* NRS 50.035. We note that the interview must be recorded in some fashion to preserve the questions asked and the answers given. *See* NRCP 16.215(f). This will prevent the judge from becoming a witness, as was the case here. *See* NRS 50.055(1).

Furthermore, the family court judge *may* allow a child witness to testify by an alternative method upon finding by a preponderance of the evidence that such allowance "is necessary to serve the best interests of the child or enable the child to communicate with the finder of fact." NRS 50.580(2). In making this necessary finding, the judge *must* make relevant considerations as statutorily proscribed. *See* NRS 50.580(2)(a)-(e). If the judge makes a satisfactory finding, he or she *must* consider additional statutory factors to determine whether a child should be allowed to testify by an alternative method. *See* NRS 50.590(1)-(7). The judge must then support his or her determination by stating the findings of fact and conclusions of law in an order. NRS 50.600(1). The order also must specify certain conditions under which the testimony by an alternative method is to be presented. *See* NRS 50.600(2)(a)-(e). Notably, the judge's order "may be no more restrictive of the rights of the parties than is necessary under the circumstances to serve the purposes of the order." NRS 50.600(3).

The Act also sets forth constitutional safeguards. In conducting the alternative method of obtaining child witness testimony, the district court must afford each party with a full and fair opportunity to examine or cross-examine the child witness. NRS 50.610.[8]

Here, the district court erred by disregarding NRS 50.500 *et seq.* when it decided to interview the children off the record. We hold that a court is required to follow the Act's provisions set forth in NRS 50.500 *et seq.* Although Gordon's acquiescence to the court's interviews of the children may have waived the requirement for a hearing under NRS 50.570, it did not constitute a complete waiver of the Act's provisions, including the court's obligation to set forth the parameters of the alternative method in an order pursuant to NRS 50.600 or the parties' rights for a full and fair opportunity to examine or cross-examine the child witnesses under NRS 50.610.[9]

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[8]NRCP 16.215, which became effective after the district court decided this case, provides additional guidance on implementing the Act. *In re Adoption of NRCP 16.215*, ADKT 0502 (Order Adopting Nevada Rule of Civil Procedure 16.215, May 22, 2015).

[9]We note that since the parties' hearing, the Nevada Rules of Civil Procedure have addressed stipulation by stating:

> The court may deviate from any of the provisions of this rule upon stipulation of the parties. The district courts of this state shall promulgate a uniform canvass to be provided to litigants to ensure that they are aware of their rights to a full and fair opportunity for examination or cross-examination of a child witness prior to entering into any stipulation that would permit the interview or examination of a minor child by an alternative method and/or third-party outsourced provider.

NRCP 16.215(h). Based on the plain language of this rule, the district court may only deviate from NRCP 16.215 upon the parties' stipulation, not NRS 50.500 *et seq.*

We also note that after the district court records the child interviews, as required, the court must retain the original recordings. *See* NRCP 16.215(i).

We therefore reverse and remand this matter to the district court for further proceedings consistent with this opinion.

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

THE STATE OF NEVADA DEPARTMENT OF TRANSPORTATION, Petitioner, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, in and for THE COUNTY OF CLARK; and THE HONORABLE GLORIA STURMAN, District Judge, Respondents, and FRED NASSIRI, Individually and as Trustee of the NASSIRI LIVING TRUST, a Trust Formed Under Nevada Law, Real Party in Interest.

No. 70098

September 27, 2017 402 P.3d 677

Original petition for a writ of mandamus challenging district court orders denying summary judgment and a motion to exclude an expert witness report.

Petition granted.

[Rehearing denied November 29, 2017]

Adam Paul Laxalt, Attorney General, *Dennis Vincent Gallagher*, Chief Deputy Attorney General, *Joe Vadala*, Special Counsel, and *Janet L. Merrill*, Senior Deputy Attorney General, Carson City; *Kemp, Jones & Coulthard, LLP*, and *William L. Coulthard* and *Eric M. Pepperman*, Las Vegas, for Petitioner.

Garman Turner Gordon LLP and *Eric R. Olsen* and *Dylan T. Ciciliano*, Las Vegas, for Real Party in Interest.

Before the Court En Banc.[1]

OPINION

By the Court, Cherry, C.J.:

In this petition for a writ of mandamus, we address whether the district court inappropriately denied petitioner Nevada Department of Transportation's (NDOT) motions for summary judgment on a landowner's contract claims concerning a settlement agreement in

[1]The Honorable Ron D. Parraguirre, Justice, voluntarily recused himself from participation in the decision of this matter.

a condemnation action. These questions involve whether NDOT breached the settlement agreement or its implied duty of good faith and fair dealing by building an overpass (a "flyover") adjacent to the landowner's property and whether the property owner may seek rescission based on a claim of unilateral mistake regarding whether NDOT would construct the flyover. We conclude that the district court erred in declining to grant summary judgment by interpreting the contract to include a duty imposed outside the express terms of the contract, and allowing a claim for unilateral mistake to proceed even though the landowner's claim was barred by the statute of limitations. Accordingly, we grant the petition.

FACTS AND PROCEDURAL HISTORY

Factual background

Beginning in 1999, NDOT initiated a freeway project to realign the Blue Diamond Interchange with Interstate 15 in Clark County (the Blue Diamond Project). NDOT sought federal funding for the Blue Diamond Project from the Federal Highway Administration (FHWA). The FHWA, under the National Environmental Policy Act (NEPA), required NDOT to complete an environmental impact study and hold several public informational meetings regarding the Blue Diamond Project, memorialized in an "Environmental Assessment" for final approval. The Environmental Assessment, which was publicly available at libraries and NDOT's office, noted that the Blue Diamond Project could include a flyover when traffic demands warranted its construction and funding became available. The FHWA approved the Environmental Assessment and federal funding for the Blue Diamond Project in 2004.

The Blue Diamond Project required approximately 4.21 acres of adjacent land owned by real party in interest Fred Nassiri. NDOT filed a condemnation action against Nassiri to acquire the property. During negotiations of a potential settlement, NDOT allegedly never disclosed that the Blue Diamond Interchange could contain a flyover.

In 2005, NDOT and Nassiri entered into a settlement agreement.[2] As part of the settlement, Nassiri transferred NDOT's required 4.21 acres to NDOT, acquired 24.42 acres of NDOT property (the "Exchange Property") adjoining the 4.21 acres, and paid NDOT approximately $23 million dollars. The purchase price was based on a property appraisal by NDOT, which Nassiri accepted after being provided an exclusive review period of several weeks.

[2]The parties subsequently amended the settlement agreement in order to correct an acreage error in the Exchange Property and adjust the sales price commensurate with the change.

The settlement agreement contained several notable terms. First, the settlement agreement required NDOT to transfer the property to Nassiri via quitclaim deed. Second, the agreement contained an integration clause. Third, the agreement specified that the negotiated price was "not an admission by any party as to the fair market value of the Subject Property." However, the settlement agreement did not contain any restriction on NDOT's future construction efforts at the Blue Diamond Interchange. Finally, the agreement stated that "[t]he Exchange Property shall be the . . . property set forth in the legal description and diagram attached." According to Nassiri, the diagram featured the Blue Diamond Interchange without a flyover.

Later that year, NDOT began a new project at the Blue Diamond Interchange. NDOT ultimately adopted the Blue Diamond Project's flyover design. In 2010, construction began on the flyover. Soon thereafter, Nassiri filed an administrative claim with the State Board of Examiners due to concerns that the flyover would obstruct his property's visibility. The Board rejected his claim.

Procedural history

Complaint and motions for summary judgment

In 2012, Nassiri filed suit against NDOT, alleging, among other things, breach of the settlement agreement and breach of the settlement agreement's implied covenant of good faith and fair dealing. Nassiri also sought equitable rescission of the settlement agreement. Nassiri's claims pertained to NDOT's allegedly undisclosed plans to construct a flyover, which Nassiri claimed destroyed the visibility of his adjacent property.

NDOT filed three unsuccessful motions for summary judgment relevant to this petition. The first motion pertained to Nassiri's claims for breach of contract and good faith and fair dealing. There, NDOT argued that it had no contractual or legal obligation under the settlement agreement to restrict construction of the flyover or preserve the visibility of the Exchange Property after conveying it to Nassiri via quitclaim deed. The district court denied the motion.

In the second motion for summary judgment, NDOT argued that Nassiri's unilateral mistake claim could not substantiate a rescission remedy, and even if it could, Nassiri's unilateral mistake claim was barred by the statute of limitations. The district court denied NDOT's motion.

The third motion for summary judgment arose after the district court held a limited bench trial regarding the unilateral mistake claim's statute of limitations and found that Nassiri's claim was not barred. In that motion, NDOT again argued that equitable rescission was not appropriate. The district court refused to grant summary judgment.

DISCUSSION

NDOT's petition merits our consideration

NDOT filed this writ petition challenging the district court's denials of its summary judgment motions. NDOT asserts that this court should consider its petition because it raises important legal issues and matters of public policy. We agree.

"A writ of mandamus is available to compel the performance of an act that the law requires . . . or to control an arbitrary or capricious exercise of discretion." *Int'l Game Tech., Inc. v. Second Judicial Dist. Court*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008); *see* NRS 34.160. Generally, a writ will not issue if a petitioner has a plain, speedy, and adequate remedy in the ordinary course of the law, NRS 34.170, and "an appeal from the final judgment typically constitutes an adequate and speedy legal remedy," *Int'l Game Tech., Inc.*, 124 Nev. at 197, 179 P.3d at 558. In particular as to orders denying summary judgment, we usually decline to consider writ petitions challenging such orders, except that we may choose to exercise our discretion to hear a petition "where no disputed factual issues exist and, pursuant to clear authority under a statute or rule, the district court is obligated to dismiss an action." *Smith v. Eighth Judicial Dist. Court*, 113 Nev. 1343, 1345, 950 P.2d 280, 281 (1997). We may also exercise our discretion to hear a petition when "an important issue of law needs clarification and considerations of sound judicial economy and administration militate in favor of granting the petition." *NDOT v. Eighth Judicial Dist. Court (Ad America)*, 131 Nev. 411, 417, 351 P.3d 736, 740 (2015) (internal quotation marks omitted); *see also Smith*, 113 Nev. at 1344, 950 P.2d at 281.

In *Ad America*, we recently considered a similar petition by NDOT in the context of condemnation proceedings. *See* 131 Nev. at 417, 351 P.3d at 740. There, NDOT petitioned this court after the district court granted partial summary judgment to the plaintiff on an inverse condemnation claim, even though the record indicated that NDOT "had not physically occupied [the] property, passed any regulation or rule affecting [the] property, or taken any formal steps to commence eminent domain proceedings against [the] property." *Id.* This court entertained the petition because it (1) raised an important issue regarding Nevada's takings laws, (2) presented an important question of policy about NDOT's "ability to engage in efficient, long-term planning dependent on federal funding" for highway improvements, and (3) served judicial economy because NDOT "requir[ed] multiple acquisitions of private property and the inevitability of other similar long-term projects in the future." *Id.*

In this case, as in *Ad America*, NDOT's petition raises an important issue of law and an important policy question, and our consideration of it serves judicial economy. First, the extent to which a court may impose upon NDOT legal obligations not expressly agreed to

under a settlement agreement presents an important issue of law. Second, Nassiri's claims raise an important question of policy about NDOT's ability to engage in long-term planning and further improve Nevada's highways. Finally, judicial economy is served by entertaining NDOT's petition because NDOT frequently engages in condemnation settlements and, inevitably, will face similar issues in the future. Moreover, pursuant to clear authority, the district court is obligated to dismiss the claims against NDOT. Accordingly, we exercise our discretion to address NDOT's petition.

The district court erred as a matter of law by denying summary judgment on Nassiri's claims

Standard of review

Even in a writ petition, this court reviews de novo issues of law, such as contract and statutory interpretation. *Int'l Game Tech., Inc.*, 124 Nev. at 198, 179 P.3d at 559; *see Redrock Valley Ranch, LLC v. Washoe Cty.*, 127 Nev. 451, 460, 254 P.3d 641, 647-48 (2011) ("Contract interpretation is a question of law and, as long as no facts are in dispute, this court reviews contract issues de novo."); *see also Benchmark Ins. Co. v. Sparks*, 127 Nev. 407, 411, 254 P.3d 617, 620 (2011) (reviewing a district court's order denying summary judgment de novo). When reviewing an order granting or denying summary judgment in the context of a writ petition, we must also be cognizant of the summary judgment standard, that "[s]ummary judgment is appropriate when the pleadings and other evidence demonstrate that no genuine issue as to any material fact remains and that the moving party is entitled to a judgment as a matter of law." *Id.* (internal quotation marks omitted).

NDOT did not breach the settlement agreement by building the flyover

NDOT argues that the district court should have granted its motion for summary judgment on Nassiri's breach of contract claim because NDOT could not have breached the settlement agreement, as it had no contractual duty to refrain from building the flyover. Nassiri responds that NDOT breached the settlement agreement by building the flyover, which interfered with the view from the Exchange Property that he acquired. We agree with NDOT.

A settlement agreement is a contract governed by general principles of contract law.[3] *May v. Anderson*, 121 Nev. 668, 672, 119

[3]NDOT also argues that the quitclaim deed is the governing contract because the settlement agreement merged into the deed. "The general rule concerning a contract made to convey . . . property is that once a deed has been executed and delivered, the contract becomes merged into the deed." *Hanneman v. Downer*, 110 Nev. 167, 177, 871 P.2d 279, 285 (1994) (internal quotation marks omitted). However, "[w]hether merger is applicable depends upon the intention of the

P.3d 1254, 1257 (2005). Breach of contract is the material failure to perform "a duty arising under or imposed by agreement." *Bernard v. Rockhill Dev. Co.*, 103 Nev. 132, 135, 734 P.2d 1238, 1240 (1987) (internal quotation marks omitted). "[C]ontracts will be construed from their written language and enforced as written." *The Power Co. v. Henry*, 130 Nev. 182, 189, 321 P.3d 858, 863 (2014). "[N]either a court of law nor a court of equity can interpolate in a contract what the contract does not contain." *Traffic Control Servs., Inc. v. United Rentals Nw., Inc.*, 120 Nev. 168, 175-76, 87 P.3d 1054, 1059 (2004).

Here, NDOT was not contractually obligated to refrain from constructing the flyover. The settlement agreement neither contains any mention of a flyover, nor restricts NDOT's future development plans at the Blue Diamond Interchange, nor contemplates the preservation of view or visibility of Nassiri's property. Although the settlement agreement references a diagram of the Blue Diamond Interchange allegedly without a flyover, neither the diagram nor the agreement established that the diagram represented the perpetual configuration of the Blue Diamond Interchange.

Further, because the settlement agreement does not restrict the flyover's construction or reference the view from the Exchange Property, Nassiri's argument that visibility was a component of the agreement and the district court's determination that questions of fact existed with regard to visibility effectively revived the possibility that an implied duty to avoid infringing upon Nassiri's view over a public highway might be inserted into the settlement agreement. This determination is particularly concerning given that, almost 50 years ago, this court expressly repudiated the implied negative easement of visibility, holding that "[t]he infringement upon an abutting owner's light, air and view over a public highway" is not actionable "unless such owner has acquired a right to light, air and view by express covenant." *See Probasco v. City of Reno*, 85 Nev. 563, 565-66, 459 P.2d 772, 774 (1969). Nassiri did not acquire an express covenant for the property's view, therefore, his claim fails.

Nothing in the four corners of the settlement agreement prohibited the construction of a flyover, and holding otherwise would effectively allow Nassiri to enforce a nonexistent implied negative easement of visibility. Therefore, we conclude that no genuine issues of fact exist and that, pursuant to clear authority, NDOT is entitled to summary judgment on Nassiri's breach of contract claim. Therefore, the district court erred in not granting NDOT summary judgment.

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parties." *Id.* (internal quotation marks omitted). Here, the parties explicitly agreed in the settlement agreement that the deed would not merge into the agreement. As such, the settlement agreement applies to Nassiri's contract claims.

NDOT did not breach the implied covenant of good faith and fair dealing

Nassiri argues that even if NDOT did not breach express terms of the settlement agreement, NDOT breached the implied covenant of good faith and fair dealing by (1) not constructing the Blue Diamond Interchange as represented to Nassiri, and (2) destroying the visibility of the Exchange Property, which formed the basis of the Exchange Property's appraisal and sales value. We disagree.

Even if a defendant does not breach the express terms of a contract, a plaintiff "may still be able to recover damages for breach of the implied covenant of good faith and fair dealing." *Hilton Hotels Corp. v. Butch Lewis Prods., Inc.*, 107 Nev. 226, 232, 808 P.2d 919, 922 (1991). "[A]ll contracts impose upon the parties an implied covenant of good faith and fair dealing, which prohibits arbitrary or unfair acts by one party that work to the disadvantage of the other." *Nelson v. Heer*, 123 Nev. 217, 226, 163 P.3d 420, 427 (2007).

Here, NDOT did not breach the covenant of good faith and fair dealing. First, as discussed above, the settlement agreement did not restrict NDOT's construction of a flyover. If Nassiri was concerned about NDOT's future construction on the Blue Diamond Interchange, Nassiri could have addressed these concerns in the settlement agreement. Further, plans for a potential flyover were available to the public at libraries and NDOT's office at the time of the settlement agreement, and Nassiri could have readily uncovered NDOT's potential plans for a flyover. Finally, regardless of the relationship of the Exchange Property's visibility to its market value, the settlement agreement explicitly states that the agreed-upon sales price was "not an admission by any party as to the fair market value of the [Exchange] Property." Therefore, NDOT did not violate the spirit and intent of the settlement agreement, and we conclude that no genuine issues of fact exist and that, pursuant to clear authority, NDOT is entitled to summary judgment on Nassiri's claim for breach of good faith and fair dealing. The district court erred in not granting NDOT summary judgment.[4]

Nassiri's unilateral mistake claim is barred by the statute of limitations

NDOT also argues that Nassiri's unilateral mistake claim is time-barred because he did not file the action until four years after the execution of the settlement agreement, when he knew or should have known of his alleged mistake regarding the flyover. We agree.

[4]NDOT also argues that if Nassiri's contract claims are allowed to proceed to trial, this court should preclude Nassiri's planned damages evidence because it is irrelevant and was not properly disclosed. Because we hold that Nassiri's contract claims fail as a matter of law, we need not address this issue.

An action for relief on the grounds of mistake is subject to a three-year limitations period, which "shall be deemed to accrue upon the discovery by the aggrieved party of the facts constituting the . . . mistake." NRS 11.190(3)(d). "In a discovery based cause of action, a plaintiff must use due diligence in determining the existence of a cause of action." *Bemis v. Estate of Bemis*, 114 Nev. 1021, 1025, 967 P.2d 437, 440 (1998). "Dismissal on statute of limitations grounds is only appropriate when uncontroverted evidence irrefutably demonstrates plaintiff discovered or should have discovered the facts giving rise to the cause of action." *Id.* (internal quotation marks omitted).

Here, NDOT publicly disclosed its proposed plans for the Blue Diamond Project, including the potential flyover, in its 2004 Environmental Assessment. *See Ad America*, 131 Nev. at 423, 351 P.3d at 744 (finding that there was public knowledge of NDOT's plans, given that "NEPA required disclosure of the plans and the opportunity for public comment"). While the Environmental Assessment was available to Nassiri the year before he signed the settlement agreement, Nassiri failed to discover the plan for a potential flyover. Because Nassiri should have discovered the plans for a flyover more than three years prior to filing his complaint, we conclude that his unilateral mistake claim is time-barred, and the district court erred in declining to grant NDOT summary judgment on this ground.[5]

CONCLUSION

We conclude that the undisputed material facts demonstrate that NDOT was entitled to summary judgment on each of Nassiri's claims as a matter of law. Therefore, we grant NDOT's petition. The clerk of this court shall issue a writ of mandamus instructing the district court to vacate its previous orders denying summary judgment and enter a new order granting summary judgment in favor of NDOT on each of Nassiri's claims.

Douglas, Gibbons, Pickering, Hardesty, and Stiglich, JJ., concur.

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[5]Because we hold that Nassiri's claim for unilateral mistake was barred by the statute of limitations, we need not address the parties' other arguments in this regard.